

[About this Title](#)

Halsbury's Laws of Australia

[Halsbury's Laws of Australia](#) > **80 — Civil and Political Rights**

80 — CIVIL AND POLITICAL RIGHTS

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AMBIT OF TITLE — CIVIL AND POLITICAL RIGHTS

The CIVIL AND POLITICAL RIGHTS title provides an account of enforceable civil and political rights in Australia. In the absence of an Australian bill of rights, this title has been structured on the basis of the International Covenant on Civil and Political Rights 1966, which provides a primary source of substantive civil and political rights for Australian law. Civil rights include the right to equality, protected by legislation prohibiting discrimination on a number of grounds and in relation to a number of areas or pursuits, although subject to certain exceptions. Harassment, incitement and vilification are also discussed in this context. The concept of civil rights also extends to the right to life, liberty and security of person, freedom of movement and residence, privacy, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom of thought, conscience and religion and the right to a fair trial. Political rights encompass freedom of expression, freedom of association, assembly and procession and the right to

About this Title

participate in public life. The title also discusses the roles and procedures of the Australian Human Rights Commission and related State and Territory tribunals.

Related Titles

<i>aboriginals and torres strait islanders</i>	aboriginal and torres strait islander customary law
<i>administrative law</i>	administrative law
<i>defence</i>	armed forces
<i>police and emergency services</i>	arrest powers
<i>charities; religion; voluntary associations</i>	associations
<i>media and communications</i>	broadcasting regulation
<i>entertainment, sport and tourism</i>	censorship
<i>family law</i>	children's rights
<i>practice and procedure</i>	civil procedure
<i>constitutional law</i>	constitutional law
<i>criminal law</i>	criminal law
<i>criminal law</i>	criminal trial procedure
<i>citizenship and migration</i>	deportation
<i>defamation</i>	defamation
<i>constitutional law; public administration</i>	elections, electoral system
<i>employment</i>	employment law
<i>medicine</i>	euthanasia
<i>constitutional law</i>	external affairs power
<i>administrative law</i>	freedom of information
<i>citizenship and migration</i>	immigration law
<i>foreign relations</i>	international treaty law
<i>aboriginals and torres strait islanders</i>	international conventions affecting aboriginals
<i>local government</i>	local government elections
<i>mental health and intellectual disability</i>	mental health
<i>family law</i>	minors
<i>citizenship and migration</i>	passports
<i>foreign relations</i>	public international law
<i>religion</i>	religion
<i>family law; mental health and intellectual disability; practice and procedure</i>	represented persons

[foreign relations](#)

treaties

[defence](#)

war crimes

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Despite all this the author remains responsible for any shortcomings the reader may detect.

Statement of Currency

The sections listed below are based on information available at the date in bold.

I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS [\[80-1\]-\[80-120\]](#): **19 February 2023**

II CIVIL RIGHTS [\[80-175\]-\[80-1695\]](#): **7 March 2018**

III POLITICAL RIGHTS [\[80-1740\]-\[80-2271\]](#): **7 March 2018**

IV DEROGATION OF POWERS [\[80-2295\]-\[130-2325\]](#): **7 March 2018.**

To undertake further research, consult the *Australian Current Law Reporter* and *Legislation*.

End of Document

(0) RECENT UPDATES

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > **0 RECENT UPDATES**

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[80-0] Recent updates

The paragraph below is current to **07 March 2018**

Information on recent updates to Halsbury's Laws of Australia may be found online at [PRODUCT INFORMATION \[0-10\]](#).

End of Document

(A) Definition of Civil and Political Rights

Halsbury's Laws of Australia

Last updated: 19 February 2023

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS > (1) INTRODUCTION TO CIVIL AND POLITICAL RIGHTS

I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS

(1) INTRODUCTION TO CIVIL AND POLITICAL RIGHTS

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(A) DEFINITION OF CIVIL AND POLITICAL RIGHTS

[80-1] General

The paragraph below is current to **19 February 2023**

There is no agreed statement of the subject matter of the rights contained within the term 'civil and political rights'.¹ However, for the purposes of this title, the listing and definition of rights contained in the International Covenant on Civil and Political Rights (the 'ICCPR') are taken as the standard and are used as the point of reference.²

Civil rights can be distinguished from political rights in that civil rights deal primarily with the rights and liberties of all individuals,³ while political rights are concerned primarily with rights relating to citizenship.⁴ Therefore, civil rights guarantee to all persons a range of freedoms and rights including freedom of expression,⁵ freedom of conscience,⁶ the right to liberty and security of the person.⁷ Political rights relate centrally to the right of citizens to participate in public life, for example, to vote, to employment in the public service of the state and to be elected to public office.⁸ Economic and social rights can fall within the definition of civil rights but are not discussed in this title.⁹ Some rights cut across both the civil and political spheres, notably the right to equality and non-discrimination.¹⁰

(A) Definition of Civil and Political Rights

Notes

- 1 For useful discussions in the American context see *American Jurisprudence*, Vol 15, 2nd ed, Lawyers Co-operative Publishing Co, 1976; Civil Rights Entry and Corpus Jurisdictions Secundum, *Civil Rights Supplement*, Vol 14, West Publishing Co, St Paul Minnesota, 1974.
- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR'). As to Australia's ratification of the covenant see FOREIGN RELATIONS [\[215-635\]](#). See also [\[80-15\]](#).
- 3 Civil rights covered in this title include the right to life (see [\[80-885\]-\[80-915\]](#)), the right to liberty and security of a person (see [\[80-1010\]-\[80-1125\]](#)), the right of freedom of movement (see [\[80-1135\]-\[80-1175\]](#)), the right to privacy (see [\[80-1230\]-\[80-1290\]](#)), protection of families and children (see [\[80-1291\]](#)), protection of property (see [\[80-1311\]](#)), the right to freedom from torture (see [\[80-1345\]-\[80-1390\]](#)), freedom from slavery (see [\[80-1391\]](#), [\[80-1393\]](#)), the right to freedom of thought, conscience and religion (see [\[80-1445\]-\[80-1535\]](#)), and the right to a fair trial (see [\[80-1575\]-\[80-1695\]](#)).
- 4 Political rights include the right to participation in public life (see note 9 below) and the right to freedom of association, assembly and procession (see [\[80-2135\]-\[80-2240\]](#)). For the rights of aliens who may not always enjoy the same civil rights as citizens see [\[80-200\]](#). As to citizenship see CITIZENSHIP AND MIGRATION [\[77-1\]-\[77-150\]](#).
- 5 See [\[80-1945\]-\[80-2080\]](#).
- 6 See [\[80-1445\]-\[80-1535\]](#).
- 7 See [\[80-1010\]-\[80-1125\]](#).
- 8 See [\[80-1740\]-\[80-1890\]](#).
- 9 As to the (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) see FOREIGN RELATIONS [\[215-640\]](#). For the relevance within a civil and political rights context, the consideration of the right to freedom of association and of *ibid* art 8 see [\[80-2140\]](#).
- 10 See [\[80-175\]-\[80-830\]](#).

End of Document

(B) Australian Use of International Covenant on Civil and Political Rights

Halsbury's Laws of Australia

Last updated: 19 February 2023

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#) > [\(1\) INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#)

(B) AUSTRALIAN USE OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

[80-15] Bill of Rights

The paragraph below is current to **19 February 2023**

The Australian Capital Territory, Queensland and Victoria are the only jurisdictions to have enacted human rights charters, although these are statutory and not entrenched.¹ Since ratification of the International Covenant on Civil and Political Rights (the 'ICCPR')² in 1980, Australia has been under an obligation in international law 'to take the necessary steps, in accordance with its constitutional processes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant'.³ Accordingly, the list of rights in the ICCPR has been adopted to provide the framework for this title.⁴ In addition, the (CTH) Human Rights Commission [Act 1981](#) (repealed) and its successor the (CTH) [Australian Human Rights Commission Act 1986](#) (the '[Act](#)') provide that the ICCPR is to form the basis of the work of the Australian Human Rights Commission (the 'Commission') that the [Act](#) establishes.⁵ The Commission is responsible for promoting and protecting human rights in Australia and has the power to investigate complaints of discrimination and breaches of human rights, investigating and reporting upon alleged breaches of the provisions of the ICCPR.⁶ The annexation of the ICCPR to these [Acts](#), however, has little if any other effect upon domestic law.⁷

The Australian government has reporting obligations under several international human rights instruments, and by becoming party to the second optional protocol to the ICCPR, it recognises the capacity of individuals to petition the Human Rights Committee established under the ICCPR to ensure states parties comply with their obligations. In recent years, Australia has come under criticism from international human rights bodies, notably for the 1998 amendments to the (CTH) [Native Title Act 1993](#) (which were considered to be racially discriminatory) and for the policy of mandatory detention of asylum-seekers (which has been found to be in breach of Australia's obligations concerning arbitrary detention).⁸ Even though rights and obligations contained in a treaty do not form part of Australian domestic law,⁹ treaties are not without significance,¹⁰ including their effect on statutory intention.¹¹

Notes

1 ([ACT](#)) [Human Rights Act 2004](#)

([QLD](#)) [Human Rights Act 2019](#)

(B) Australian Use of International Covenant on Civil and Political Rights

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#).

Attempts to introduce a Bill of Rights for Australia failed with the rejection and rewithdrawal respectively of the (CTH) Human Rights Bill 1973 and the (CTH) Australian Bill of Rights Bill 1985. The Parliamentary Charter of Rights and Freedoms Bill 2001, introduced by the Democrats in April 2001, did not proceed to a second reading. See further the Australian Human Rights Commission's website www.hreoc.gov.au.

As to the (ACT) [Human Rights Act 2004](#) see [80-27]. As to the International Bills of Rights see [\[80-30\]](#). See also *National Human Rights Consultation Report*, Attorney-General's Department (Cth), 30 September 2009, Ch 10.

- 2 (INT) International Covenant on Civil and Political Rights 1966 (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') adopted and opened for signature ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966 Resolutions of the United Nations GA Res 2200 A (XXI); scheduled in (CTH) [Australian Human Rights Commission Act 1986 Sch 2](#). The ICCPR, together with the Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) and the (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) approved on the same date as the ICCPR, and two Protocols to the ICCPR, constitute the International Bill of Rights. See further FOREIGN RELATIONS [\[215-635\]](#), [\[215-640\]](#).
- 3 The ICCPR art 2(2). The ICCPR became operative 23 March 1976. Australia ratified the ICCPR on 13 August 1980.
- 4 The text of the relevant article of the ICCPR is given in a footnote to each appropriate section below.
- 5 As to the Australian Human Rights Commission see [\[80-50\]](#), [\[80-55\]](#).
- 6 As to the human rights inquiry functions of the Australian Human Rights Commission see [\[80-60\]](#).
- 7 The High Court of Australia (the 'High Court') has not recognised any particular declaratory status for the ICCPR, but in some cases, it has made reference to it in its judgments to help inform its understanding of the rights protected under the Australian Constitution and the common law. Two justices considered the Minister was entitled, though not obliged, to take the relevant human rights provisions into account: *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550  at 570 per Barwick CJ, at 630 per Brennan J; [9 ALN N28](#); [62 ALR 321](#); [BC8501054](#). In *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ; [39 ALD 206](#); [128 ALR 353](#); [BC9506417](#), the High Court strengthened the declaratory status of ratified but not legislatively implemented treaties by holding that ratification gives rise to a legitimate expectation that government action will, in the absence of legislation or clear executive indication, be in conformity with the provisions of the treaties. (Note, however, that an infringement of an Article in an International Convention referred to in the Schedules to the (CTH) [Racial Discrimination Act 1975](#); (CTH) [Sex Discrimination Act 1984](#) and Australian Human Rights Commission [Act](#) does not give rise to a breach of the [Act](#): *Obieta v Human Rights and Equal Opportunity Commission* (2007) 94 ALD 117 ; [\[2007\] FCA 85](#); [BC200700397](#) at [\[35\]](#) per Cowdroy J (following *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ; [39 ALD 206](#); [128 ALR 353](#); [BC9506417](#)). See also Bailey P H, *Human Rights: Australia in an International Context*, LexisNexis, Sydney, 1990, pp 113-117. Several members of the High Court of Australia threw doubt upon the *Teoh* doctrine in *Re Minister for Immigration and Multicultural Affairs; Ex parte Hieu Trung Lam (Applicant)* (2003) 214 CLR 1 ; [72 ALD 613](#); [\[2003\] HCA 6](#); [BC200300198](#); *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [79 ALD 233](#); [\[2004\] HCA 37](#); [BC200404861](#); *Cornwell v R* (2007) 231 CLR 260 ; [234 ALR 51](#); [\[2007\] HCA 12](#); [BC200701731](#) at [\[175\]](#) per Kirby J.
- 8 In *A v Australia* Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April (1997) at [9.4], [9.5], the Committee found that the detention of the author was arbitrary within the meaning of article 9(1) of the ICCPR and was also in breach of article 9(4) of the ICCPR for the reasons that the detention authorised by the [Act](#) was indefinite, prolonged, not open to review and not proportionate to the end being sought. Violations were also found in *Bakhtiyari v Australia* Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October (2003) at [9.3]; *Fardon v Australia* CCPR/C/15/D/104/1981, (6 April 1983) available at <http://www.unhchr.ch>. The Committee on the Elimination of Racial Discrimination considered in 1999 and 2000 the (CTH) [Native Title Act 1993](#) (amended in 1998) to be inconsistent with Australia's obligations under the (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195). See Office of the High Commissioner for Human Rights, Decision 2(54) on Australia: Australia, 18/03/99, A/54/18, at [21.2] available at <http://www.unhchr.ch>; Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia 19/04/2000, CERD/C/304/Add 101 available at <http://www.unhchr.ch>. The Human Rights Committee has also commented on violations by Australia of the ICCPR in its periodic reports on the country: in 2014 and 2016, the Committee found that Australia had violated arts 7 (prohibition of *torture*), 9 (liberty and security of person), 10 (humane treatment in detention), and 13 (freedom of movement) of the ICCPR in relation to the treatment of asylum seekers and refugees Communication No 104/1981 in offshore detention centers: United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 1 December 2017, CCPR/C/AUS/CO/6.

(B) Australian Use of International Covenant on Civil and Political Rights

- 9 *Minogue v Williams* (2000) 60 ALD 366; [2000] FCA 125; BC200000306 at [21]-[25] per Ryan, Merkel and Goldberg JJ; *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385; 67 ALJR 176; BC9202663 at [305], [306] per Mason CJ and McHugh J, at [321] per Brennan J, at [348], [349] per Dawson J, at [359], [360] per Toohey J; *Cornwell v R* (2007) 231 CLR 260; 234 ALR 51; [2007] HCA 12; BC200701731 at [175] per Kirby J; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; 143 ALD 443; [2015] HCA 1; BC201500135 at [384]-[393] per Gageler J.
- 10 On the relevance of international treaties see [80-225] (constitutional validity: Commonwealth legislation).
- 11 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230, 231 per Brennan CJ, at 239, 240 per Dawson J, at 251-253 per McHugh J, at 272, 273 per Gummow, at 294 per Kirby J; 142 ALR 331; 71 ALJR 381; BC9700274; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303-305; 112 ALR 529 at 533; 29 ALD 119 at 123; BC9203830 per Gummow J; *Chiropedic Bedding Pty Ltd v Radburg Pty Ltd* (2008) 170 FCR 560; 251 ALR 410; [2008] FCAFC 142; BC200807217 at [33]-[36] per French, Rares and Besanko JJ; *DQU16 v Minister for Home Affairs* (2021) 273 CLR 1; 388 ALR 363; [2021] HCA 10; BC202102464 at [1] per Kiefel CJ (Keane, Gordon, Edelman and Steward JJ agreeing).

[80-25] Rule of law

The paragraph below is current to **19 February 2023**

Underlying all civil and political rights is the concept of the rule of law.¹ In Albert Venn Dicey's classic formulation of the 'rule of law', its essential features consist of:

- (1) the absolute supremacy of regular law as opposed to the influence of arbitrary power. This excludes the existence of arbitrariness and means that 'a man may with us be punished for a breach of law, but he can be punished for nothing else';
- (2) there is equality before the law, meaning that there is no special law for agents of the State;² and
- (3) that rights inhere in individuals and are not conferred by the Constitution.³

To the extent that the common law confers rights on individuals, the rights are largely derived from the doctrine of the rule of law.⁴

These principles, while technically non-justiciable, have considerable political and legal influence, with Justice Dixon famously stating that the Constitution was framed in accordance with an assumption of the rule of law.⁵ Other judges have similarly found the 'rule of law' implemented in specific Constitutional provisions, such as the Court's inherent power to judicially review the legality of executive actions under section 75(v) of the Commonwealth Constitution.⁶ The common law has similarly been held to contain principles incorporating elements of the rule of law, including the rule of statutory construction that courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language — also known as the 'principle of legality'.⁷

Notes

- 1 See Dicey A V, *The Law of the Constitution*, Macmillan, 1885 and many later editions and reprints. As to the Diceyan analysis see [80-180]. An Australian exposition is in Walker G de Q, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, Carlton, 1988. A more critical account is found in Jowell J and Oliver D, *The*

(B) Australian Use of International Covenant on Civil and Political Rights

Changing Constitution, 2nd ed, Clarendon Press, Oxford, 1989. For a modern theoretical exposition see Allan T, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press, New York, 2001.

- 2 See [\[80-200\]](#).
- 3 See [\[80-210\]](#).
- 4 As to the rights or liberties recognised in the common law treated in this title see [\[80-1\]](#).
- 5 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1  at 193; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#) per Dixon J (approved *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[233\]](#) per Hayne J, Crennan, at [423] per Bell JJ). As to what the rule of law requires see *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[61\]](#) and forward per Gleeson CJ. See also *APLA Ltd v Legal Services Cmr (NSW)* (2005) 224 CLR 322 ; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[30\]](#) per Gleeson CJ and Heydon J; *MZAPC v Minister for Immigration & Border Protection* (2021) 390 ALR 590 ; [\[2021\] HCA 17](#); [BC202103997](#) at [\[91\]-\[104\]](#) per Gordon and Stewart JJ; *Palmer v Western Australia* (2021) 394 ALR 1 ; [\[2021\] HCA 31](#); [BC202109687](#) at [\[8\]](#) per Kiefel CJ (Gageler, Keane, Gordon, Stewart and Gleeson JJ agreeing).
- 6 See, for example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  at 482; [72 ALD 1](#); [\[2003\] HCA 2](#); [BC200300103](#) per Gleeson CJ. On the rule of law and the Federal Court of Australia exercising the same jurisdiction as that of the High Court of Australia under (CC) Commonwealth Constitution s 75(v) see *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 ; [96 ALD 368](#); [\[2007\] FCA 1273](#); [BC200706740](#) at [\[5\]-\[68\]](#) per Spender J. See also *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 ; [247 ALR 605](#); [\[2008\] HCA 32](#); [BC200806862](#) at [\[86\]](#), [\[87\]](#) per Kirby J (citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  at 513, 514; [72 ALD 1](#); [\[2003\] HCA 2](#); [BC200300103](#) on judicial review and *ibid* s 75(v)); *Bodruddaza v Minister for Immigration and Multicultural & Indigenous Affairs* (2007) 228 CLR 651 ; [95 ALD 1](#); [\[2007\] HCA 14](#); [BC200702595](#) (application of *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ; [72 ALD 1](#); [\[2003\] HCA 2](#); [BC200300103](#) to time limits under (CTH) *Migration Act 1958* s 486A and (CC) Commonwealth Constitution s 75(v) remedies); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 ; [388 ALR 1](#); [\[2021\] HCA 4](#); [BC202100580](#); *MZAPC v Minister for Immigration & Border Protection* (2021) 390 ALR 590 ; [\[2021\] HCA 17](#); [BC202103997](#) at [\[91\]-\[104\]](#) per Gordon and Stewart JJ; *Garlett v Western Australia* (2022) 404 ALR 182 ; [\[2022\] HCA 30](#); [BC202208774](#).
- 7 See *Coco v R* (1994) 179 CLR 427 ; [120 ALR 415](#); 68 ALJR 401; [BC9404609](#) (applied *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 ; [115 ALD 493](#); [\[2010\] HCA 23](#); [BC201004220](#) at [\[56\]-\[59\]](#) per French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Daniels Corp International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543  at 562, 563; [192 ALR 561](#); [\[2002\] HCA 49](#); [BC200206568](#) per McHugh J; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  at 492; [72 ALD 1](#); [\[2003\] HCA 2](#); [BC200300103](#) per Gleeson CJ (applied in *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ; [\[2010\] SASR 56](#); [BC201001454](#) at [\[223\]](#) per Doyle CJ, Duggan and White JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562  at 577; [79 ALD 233](#); [\[2004\] HCA 37](#); [BC200404861](#) per Gleeson CJ; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 ; [256 ALR 32](#); [\[2009\] FCA 528](#); [BC200904335](#) at [\[12\]-\[15\]](#) per Rares J (rights altered retrospectively); *Minister for Immigration and Citizenship v Haneef* (2007) 161 FCR 40 ; [96 ALD 368](#); [\[2007\] FCA 1273](#); [BC200706740](#) at [\[105\]-\[113\]](#) per Black CJ, French and Weinberg JJ; *X7 v Australian Crime Commission* (2013) 248 CLR 92 ; [298 ALR 570](#); [\[2013\] HCA 29](#); [BC201303126](#) at [\[142\]](#) per Hayne and Bell JJ (the implication must be necessary, not just available or somehow thought to be desirable); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 ; [160 ALD 385](#); [\[2018\] HCA 4](#); [BC201800630](#) at [\[87\]](#) per Edelman J; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 ; [373 ALR 1](#); [\[2019\] HCA 32](#); [BC201908940](#) at [\[159\]](#) per Nettle, Gordon and Edelman JJ; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 ; [374 ALR 627](#); [\[2019\] HCA 45](#); [BC201911310](#) at [\[212\]](#) per Edelman J.

[80-27] Australian Capital Territory

The paragraph below is current to **19 February 2023**

The Australian Capital Territory has implemented a human rights charter in the form of the (**ACT**) **Human Rights Act 2004** (the '**Act**'), which asserts in its preamble that human rights are necessary for individuals to live lives of dignity and value, that their protection improves the welfare of the whole community, and that setting them out in legislation ensures that people know what their rights are, and makes it easier for them to be taken into consideration in the development and interpretation of legislation.¹ The preamble also recognises the impact of a human rights charter on Aboriginal and Torres Strait Islander Peoples, acknowledging that the issue of rights protection has 'great and continuing importance' for the 'first owners of the land, members of its most enduring cultures, and individuals.'²

'Human rights' are defined in the **Act** as including civil, political, economic, social and cultural rights.³ The **Act** gives express recognition to the following civil and political rights enshrined in international human rights law which are generally expressed in the same terms as the International Covenant on Civil and Political Rights⁴ (the 'ICCPR'):⁵

- (1) recognition and equality before the law;
- (2) right to life;
- (3) protection from **torture** and cruel, inhuman or degrading treatment;
- (4) protection of the family;
- (5) protection of children;
- (6) privacy and reputation;
- (7) freedom of movement;
- (8) freedom of thought, conscience and religion;
- (9) peaceful assembly
- (10) freedom of association;
- (11) freedom of expression;
- (12) taking part in public life;
- (13) right to liberty and security of person;
- (14) humane treatment when deprived of liberty;
- (15) children in the criminal process;
- (16) fair trial;
- (17) rights in criminal proceedings;
- (18) compensation for wrongful conviction;
- (19) right not to be tried or punished more than once;
- (20) retrospective criminal laws;
- (21) freedom from forced work; and

(22)cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities.

Under the **Act**, human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.⁶ The rights are implemented via four main mechanisms. First, the **Act** requires interpretation of a Territory law in a way that is compatible with human rights (so far as possible consistent with the purpose of the law).⁷ Furthermore, international law, and the judgments of foreign and international courts and tribunals relevant to a human right, may be considered in interpreting the human right.⁸

Second, the **Act** provides the Supreme Court with the power to issue a declaration of incompatibility if satisfied that a Territory law is not consistent with a human right.⁹ The declaration does not affect the validity, operation or enforcement of the law, or the rights or obligations of anyone.¹⁰ However, the Attorney-General must present a copy of the declaration in the Legislative Assembly and prepare a written response within 6 months of the presentation.¹¹ According to the Explanatory Statement, 'this is an essential element in the interpretive and dialogue model upon which the Bill is based'.¹² The **Act** also creates a statutory requirement that the Attorney-General form an opinion on the compatibility of Government Bills with the rights set out in Part 3 of the **Act**.¹³

Third, the **Act** imposes obligations on public authorities (which includes entities whose functions are of a public nature) rendering it unlawful for them to **act** in a way incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.¹⁴ Other entities may choose to be subject to obligations of public authorities.¹⁵ The **Act** does not create legally enforceable rights except against public authorities.¹⁶

Fourth, the **Act** gives the Human Rights Commissioner the function of reviewing the effect of Territory laws, including the common law, on human rights, and reporting to the Minister on the results of the review.¹⁷

Notice of a Supreme Court proceeding must be given to the Attorney-General and the Commission where a question arises that involves the application of the **Act** or the Court is considering making a declaration of incompatibility.¹⁸ The Attorney-General or the **ACT** Human Rights Commissioner may also intervene in a proceeding before a court that involves the application of this **Act** with the leave of the court.¹⁹ There is no complaints mechanism under the **Act**.

Notes

- 1 (ACT) [Human Rights Act 2004](#) Preamble.
- 2 Ibid Preamble.
- 3 Ibid s 5.
- 4 Ibid Sch 1 provides a cross reference of ibid Pt 3 rights to the relevant article of the ICCPR. Certain rights are omitted, such as the right to self-determination, on the basis that it is not an individual human right and is not 'justiciable' before the UN Human Rights Committee: (ACT) Human Rights Bill 2003, Explanatory Statement, pp 3, 4.
- 5 (ACT) [Human Rights Act 2004](#) ss 8-27.
- 6 Ibid s 28; (ACT) Human Rights Bill 2003, Explanatory Statement, p 4 indicates that reasonable is taken to mean 'proportional'.
- 7 (ACT) [Human Rights Act 2004](#) s 30 which was amended by the (ACT) Human Rights Amendment Act 2008 (repealed). For pre-amendment interpretation see *R v Fearnside* (2009) 228 FLR 77; 193 A Crim R 128; [2009] ACTCA 3; [BC200900871](#); *Casey v Alcock* (2009) 3 ACTLR 1; 226 FLR 437; [2009] ACTCA 1; [BC200900125](#). For a

(B) Australian Use of International Covenant on Civil and Political Rights

detailed account of the processes by which compatible interpretation is now to be approached under (ACT) [Human Rights Act 2004](#) s 30: see *Re Application for Bail by Islam* (2010) 4 ACTLR 235 ; 244 FLR 158; [\[2010\] ACTSC 147](#); [BC201008719](#) at [\[236\]-\[239\]](#) per Penfold J; *Momcilovic v R* [\(2011\) 280 ALR 221](#) ; [\[2011\] HCA 34](#); [BC201106881](#) (in relation to the validity of the Victorian charter, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts). See also *Re Application for Bail by Massey (No 2)* [\[2009\] ACTSC 70](#) ; [BC200905514](#) (the (ACT) [Human Rights Act 2004](#) will not necessarily require a new and different interpretation); *Priestley v Godwin (No 2)* (2008) 171 FCR 493 ; [\[2008\] FCA 1453](#); [BC200808432](#) ((ACT) [Human Rights Act 2004](#) does not apply to Federal Court of Australia proceedings in relation to the constitutionality of a law of the Commonwealth).

- 8 Ibid s 31.
- 9 Ibid s 32(2). The power is only exercisable if the issue is raised for consideration during a proceeding being heard by the court: *ibid* s 32(1). See also *Momcilovic v R* [\(2011\) 280 ALR 221](#) ; [\[2011\] HCA 34](#); [BC201106881](#). As to confirmation of the application of *Momcilovic* in the (ACT) see *Andrews v Thomson* (2018) 340 FLR 439 ; [\[2018\] ACTCA 53](#); [BC201811356](#) at [\[42\]](#), [\[45\]](#) per Elkaim, Loukas-karlsson JJ and Robinson AJ.
- 10 Ibid s 32(3).
- 11 Ibid s 33(2), 33(3).
- 12 (ACT) Human Rights Bill 2003, Explanatory Statement, p 6.
- 13 (ACT) [Human Rights Act 2004](#) Pt 5 (Scrutiny of Proposed Territory Laws). Ibid s 37 requires the Attorney-General to prepare a written statement of his opinion. Ibid s 38 provides that a standing committee is to report to the Legislative Assembly about human rights issues raised by Bills presented to the Assembly.
- 14 Ibid s 40B. For the meaning of 'public authority' see *ibid* s 40. For the meaning of 'function of a public nature' see *ibid* s 40A. The public authority provisions are now broadly comparable to those found in the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [38\(1\)](#), [38\(2\)](#).
- 15 Ibid s 40D.
- 16 See, for example, *R v Fearnside* (2009) 228 FLR 77 ; 193 A Crim R 128; [\[2009\] ACTCA 3](#); [BC200900871](#) at [\[77\]](#), [\[80\]-\[82\]](#) per Besanko J.
- 17 (ACT) [Human Rights Act 2004](#) s 41. Note that the (ACT) [Human Rights Commission Act 2005](#) established a new structure for statutory oversight in the Australian Capital Territory, amending the (ACT) [Human Rights Act 2004](#) and establishing the Human Rights Commission, with the functions of dealing with complaints about discrimination, health services, disability services and services for older people, as well as facilitating service improvement and developing awareness in government and the community of human rights. Further, the (ACT) [Human Rights Commission Act 2005](#) s 12(1)(b) establishes the role of the Children and Young People Commissioner within the Human Rights Commission, and is intended to align with the (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/725; Aust TS 1991 No 4; 1977 UNTS 3; 28 ILM 1448 (1989); 29 ILM 1340 (1990)) art 12, which provides the right for a child or young person to express their views.
- 18 (ACT) [Human Rights Act 2004](#) s 34.
- 19 Ibid ss 35, 36(1). See also *R v QX (No 2)* [\[2021\] ACTSC 244](#) ; [BC202015391](#); *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1 ; [\[2022\] ACTSC 83](#); [BC202114719](#).

[80-28] Victoria

The paragraph below is current to **19 February 2023**

The (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) (the 'Charter') establishes a framework for the protection and promotion of civil and political rights derived from the International Covenant on Civil and Political Rights 1966 (the 'ICCPR').¹

Both the (ACT) [Human Rights Act 2004](#) (the 'Act') and the Charter contain limitation provisions in omnibus form rather than article-specific limitations under the ICCPR.² The Charter recognises that only

persons have human rights.³ The Charter requires all Bills introduced into Parliament to be accompanied by a statement of compatibility prepared by the relevant member of Parliament.⁴ The statement must provide whether the Bill is compatible with the rights protected by Part 2 of the Charter. If, in the member's opinion, a Bill is compatible, the statement must state how it is compatible; if considered incompatible, the statement must state the nature and extent of the incompatibility.⁵ In this sense, the Charter is more stringent than the requirements of the **Act**, which does not require reasoned statements.⁶ Similarly, proposed statutory rules must be accompanied by 'human rights certificates' to certify whether a proposed rule limits any human right set out in the Charter and, if so, the purpose, nature and extent of the limitation, the relationship between the limitation and its purpose, and 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.'⁷ The Scrutiny of **Acts** and Regulations Committee is also given a role in the process of examining the compatibility of Bills and statutory rules with the Charter.⁸

Like the **Act**, the Charter makes it unlawful for a public authority to **act** in a way that is incompatible with a human right or, in the making of a decision, to fail to give proper consideration of a relevant human rights protected by the Charter.⁹ 'Public authority' is defined broadly to include an entity established by a statutory provision that has functions of a public nature, or whose functions include functions of a public nature when exercised on behalf of the State, whether under contract or otherwise.¹⁰ If a person has a right to seek relief or a remedy founded on the unlawfulness of some conduct by a public authority otherwise than because of the Charter, then unlawfulness generated by the Charter may be a further ground in the cause of action.¹¹ The non-charter ground of seeking relief need not be successfully made out for jurisdiction to grant relief under the Charter to be enlivened.¹² The Charter also confirms a person's right to seek any remedy in respect of an **act** or decision of a public authority otherwise than because of the Charter, including a right to seek judicial review, a declaration of unlawfulness and associated relief.¹³ The Charter precludes an award of damages for a breach of the Charter.¹⁴

The Charter requires courts and tribunals to interpret Victorian statutes and statutory instruments in a manner that is compatible with human rights 'so far as it is possible to do so consistently with their purpose.'¹⁵ International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.¹⁶ That rule of interpretation will not affect the validity of an **Act** or subordinate instrument.¹⁷ The Supreme Court of Victoria is empowered to make a declaration to the effect that a statutory provision cannot be interpreted consistently with a human right.¹⁸ The Minister administering the statutory provision must take certain steps within six months of receiving the declaration, notably prepare a written response and cause a copy of the declaration and response to be tabled in Parliament and published in the *Gazette*.¹⁹ A party must give notice to the Attorney-General and the Commission if a question of law arises in a proceeding (Supreme Court or County Court, or referral under section 33 of the Charter) that relates to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter.²⁰ The Commission may intervene in proceedings in which a question of law arises relating to the application of the Charter or interpretation according to the Charter.²¹

The Charter provides Parliament with the power to declare expressly that an **Act** or provision has effect despite being incompatible with one or more of the human rights.²² The Charter has no application to the extent of such declaration. An override declaration expires on the fifth anniversary of the day on which it came into operation.²³ Oversight of the operation of the Charter is conferred on the Victorian Equal Opportunity and Human Rights Commission.²⁴

Notes

- 1 (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) Pt 2 sets out the human rights protected by the Charter and the extent to which these rights may be limited. See also [80-15].

(B) Australian Use of International Covenant on Civil and Political Rights

The rights are generally expressed in the same terms as the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') including:

- (1) the right to equality and non-discrimination, modelled on articles 16, 26 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8;
- (2) the right to life, modelled on article 6 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 9;
- (3) protection from various forms of ill-treatment, modelled on article 7 of the ICCPR, extended to include medical or scientific treatment without consent — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 10;
- (4) protection from forced work, modelled on article 8 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 11;
- (5) freedom of movement, modelled on article 12 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 12;
- (6) the right to privacy, modelled on article 17 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 13;
- (7) freedom of thought, conscience, religion and belief, modelled on article 18 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 14;
- (8) freedom of expression, modelled on article 19 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 15;
- (9) the right of peaceful assembly and freedom of association, modelled on article 21 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 16;
- (10) protection of families and children, modelled on articles 23(1), 24(1) of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 17;
- (11) the right to take part in public life, modelled on article 25 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 18;
- (12) recognition of cultural rights, modelled on and extending article 27 of the ICCPR by incorporating article 25 of the (INT) United Nations Draft Declaration on Indigenous Rights — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 19;
- (13) the right to liberty and security of person, modelled on articles 9, 11 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 21;
- (14) humane treatment when a person is deprived of liberty, modelled on and broadening article 10 of the ICCPR by covering accused persons and persons who have been detained without charge — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 22;
- (15) rights for children in the criminal process, modelled on article 10(2)(b) of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 23;
- (16) the right to a fair hearing, modelled on article 14(1) of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 24;
- (17) various rights in criminal proceedings, modelled on, with modifications, article 14(2)-(4) of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 25. As to whether the presumption of innocence applies in a disciplinary proceeding, such as a hearing by Medical Practitioners Board of Victoria see *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 ; [2008] VSC 346; BC200809039 at [176] per Hollingworth J.
- (18) the right not to be tried or punished more than once for the same offence, modelled on article 14(7) of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 26; and
- (19) rights with respect to retrospective criminal laws, modelled on article 15 of the ICCPR — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 27.

Differences from the (ACT) [Human Rights Act 2004](#) include:

(B) Australian Use of International Covenant on Civil and Political Rights

- (1) the right not to be deprived of property other than in accordance with the law — (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 20; and
- (2) no right to compensation for wrongful conviction and unlawful arrest or detention (compare (ACT) [Human Rights Act 2004](#) s 18(7)).

Significantly, (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8(4) provides that '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination', a provision modelled on the (NZ) Bill of Rights [Act](#) 1990 s 19(2)'.

The Australian Capital Territory has legislated for the protection of the rights to education and work: (ACT) [Human Rights Act 2004](#) ss s, 27B.

On the scope of the Charter see *Re Application under the Major Crime (Investigative Powers) Act 2004 v Victorian Human Rights and Equal Opportunity Commission* (2009) 24 VR 415 ; 198 A Crim R 305; [2009] VSC 381; [BC200908160](#) at [80] per Warren CJ. As to whether the introduction of rights under the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) amounts to new facts or circumstances since being declared a vexatious litigant (when asserting access to the courts under *ibid* s 24) see *Attorney-General (Vic) v Kay* [2009] VSC 337 ; [BC200907400](#).

The leading case on Charter interpretation is *Momcilovic v R* (2011) 280 ALR 221 ; [2011] HCA 34; [BC201106881](#). Earlier cases must be read in the light of this decision. See also *Slaveski v Smith* (2012) 34 VR 206 ; 218 A Crim R 252; [2012] VSCA 25; [BC201200803](#).

- 2 *Ibid* s 7(2) provides that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account relevant factors including those listed. (This is not dissimilar to the formula under (ACT) [Human Rights Act 2004](#) s 28).

On the interaction of (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 7(2) with *ibid* s 32(1) see *Momcilovic v R* (2011) 280 ALR 221 ; [2011] HCA 34; [BC201106881](#) at [35] per French CJ (the limits in *ibid* s 7(2) are not incorporated into the content of the rights; whether a right is properly subject to a limit under *ibid* s 7(2) only arises if the statutory provision in question imposes a limit on the enjoyment of the right), at [568]-[576] per Crennan and Kiefel JJ (*ibid* s 7(2) has no bearing upon the meaning and effect of a statutory provision but this section may mean that a statutory provision restricts or limits a Charter right but is nevertheless compatible with it because the Charter allows the right to be viewed as reduced in a case where the limitation is justified), at [675]-[685] per Bell J (the Charter's recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights), at [409]-[427] per Heydon J (in assessing what human rights existed before the *ibid* s 32(1) process of interpretation is completed, it is necessary to apply *ibid* s 7(2) to *ibid* ss 8-27), at [431]-[439] per Heydon J considered *ibid* ss 7(2), 32(1) to be invalid (unlike the majority which upheld the validity of *ibid* s 32(1)) as *ibid* s 7(2) contemplates the making of laws by the judiciary, not the legislature). Victorian Courts have had difficulty obtaining a clear ratio from *Momcilovic*: see *Slaveski v Smith* (2012) 34 VR 206 ; 218 A Crim R 252; [2012] VSCA 25; [BC201200803](#); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569 ; [2012] VSCA 91; [BC201202920](#) at [26]-[31] per Warren CJ and Cavanough AJA.

For consideration of whether there is any 'less restrictive means available' under *ibid* s 7(2)(e) see *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 ; [2008] VSC 346; [BC200809039](#); *PJB v Melbourne Health* (2011) 39 VR 373 ; [2011] VSC 327; [BC201105182](#).

For application of limitation provisions and the weight to be given to international decisions see *Kracke v Mental Health Review Board* (2009) 29 VAR 1 ; [2009] VCAT 646 at [165] per Bell P; *PJB v Melbourne Health* (2011) 39 VR 373 ; [2011] VSC 327; [BC201105182](#).

- 3 *Ibid* s 6. As to the application of the Charter to non-humans see *Bank of Cyprus Australia Ltd v Registrar of Titles* [2008] VSC 327 ; [BC200807532](#) at [33] per Whelan J (accepting the position that, given that the only person whose property could possibly be affected is not a human being, submissions concerning the Charter were misconceived (under *ibid* s 6(1), 6(3)).
- 4 *Ibid* s 28(1), 28(2).
- 5 *Ibid* s 28(3). A statement is not binding on any court or tribunal: *ibid* s 28(4).
- 6 Compare (ACT) [Human Rights Act 2004](#) s 37(3).

(B) Australian Use of International Covenant on Civil and Political Rights

- 7 (VIC) [Subordinate Legislation Act 1994](#) s 12A. These criteria are based on those limitations allowed for under the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 7.
- 8 Ibid s 30; (VIC) [Subordinate Legislation Act 1994](#) s 21(1)(ha).
- 9 (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 38(1). This is qualified by ibid s 38(2) which provides that the prohibition does not apply if the public authority could not reasonably have **acted** differently due to a rule of law. See also qualifications in ibid s 38(3), 38(4). See further *Kerrison v Melbourne City Council* (2014) 228 FCR 87; 203 LGERA 169; [2014] FCAFC 130; [BC201408480](#) (ibid s 38 does not apply to the making of subordinate legislation).
- 10 Ibid s 4(1). A multi-factor test for determining whether a function is of a public nature appears in ibid s 4(2). An example of a 'public authority' is the Medical Practitioners Board of Victoria, which is also a tribunal but not excluded under ibid s 4(1)(j) which states a court or tribunal is not a public authority 'except when it is **acting** in an administrative capacity' (*Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; [2008] VSC 346; [BC200809039](#)). A 'public authority' does not include an entity declared by the regulations not to be a public authority for the purposes of the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#): ibid s 4(1)(k): see *Allen v Secretary to the Dept of Justice* [2008] VSC 288; [BC200806886](#) (Parole Board declared not to be a public authority under (VIC) Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007 (repealed)).
- For the duty of care owed by parole boards, for example, on release of convicted paedophile see *X v South Australia* (No 3) (2007) 97 SASR 180; [2007] SASC 125; [BC200702340](#). As the circumstances in which the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) applies to a court see *Kortel v Mirik* [2008] VSC 103; [BC200802182](#) at [5] per Bell J (court not a public authority 'except when it is **acting** in an administrative capacity', so when **acting** in its judicial capacity, the court is not positively obliged to **act** compatibly with the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 38(1)). Note also ibid ss 6(2)(b) (the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) applies to courts and tribunals 'to the extent that they have functions under ibid Pt 2'), 8 (which may be relevant, in so far as it may have procedural implications), 24(1) (a party to a civil proceeding has a right to have it decided 'after a fair ... hearing'). In *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327; [BC201105182](#) at [129] per Bell J, the guardianship and administration jurisdiction of the tribunal is administrative in nature; when exercising powers in that jurisdiction the tribunal is a public authority. See also *Director of Housing v Sudi* (2011) 33 VR 559; [2011] VSCA 266; [BC201106824](#); *Director of Public Transport v XFJ* [2010] VSC 319; [BC201005257](#) (on the obligation on public authorities to give proper consideration to human rights in ibid s 38); *Castles v Secretary to the Dept of Justice* (2010) 28 VR 141; [2010] VSC 310; [BC201004776](#).
- 11 Ibid s 39(1). Note *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; [2008] VSC 346; [BC200809039](#) at [104] per Hollingworth J ((VIC) [Charter of Human Rights and Responsibilities Act 2006](#) was not intended to create new causes of action against public authorities, additional to those already available outside the Charter but ibid s 39 provides that if a person otherwise has a right to seek relief or remedy on the basis that a public authority's decision was unlawful, then the person may seek that same relief or remedy on the ground that the **act** or decision was unlawful because of the Charter). Note also that the Explanatory Memorandum for the (VIC) Charter of Human Rights and Responsibilities Bill 2006 states that no new or independent right to relief or remedy is created. However, by retaining the right to seek remedies under the common law and (VIC) [Administrative Law Act 1978](#), it is arguable that the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) protects a direct right to seek a declaration or injunction. See also Evans S, *The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria*, Paper presented at the conference, 'Australian Bill of Rights: The **ACT** and Beyond', Canberra, 21 June 2006.
- 12 *Goode v Common Housing Equity* [2014] VSC 585; [BC201409830](#) at [30] per Bell J.
- 13 Ibid s 39(2).
- 14 Ibid s 39(3).
- 15 Ibid s 32(1). On the interpretive obligations of ibid s 32 see: *Momcilovic v R* (2011) 280 ALR 221; [2011] HCA 34; [BC201106881](#) ('[section] 32(1) ... requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms: ... s 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.' (at [51] per French CJ). Interpretation analogous to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, 382; [153 ALR 490](#); 72 ALJR 841; [BC9801389](#) per Brennan CJ (Mchugh, Gummow, Kirby and Hayne JJ agreeing) (at [146], [170]-[171] per Gummow J (Hayne J agreeing at [280])). On interpretation note also at [455] per Heydon J, at [565], [566] per Crennan and Kiefel JJ, at [684] per Bell J. See also *Slaveski v Smith* (2012) 34 VR 206; 218 A Crim R 252; [2012]

(B) Australian Use of International Covenant on Civil and Political Rights

[VSCA 25](#); [BC201200803](#); *XX v WW* [\[2014\] VSC 564](#) ; [BC201410777](#) (ibid s 32 only has a role to play if the words of the statute are capable of more than one interpretation). For discussion of the principle of legality see *PJB v Melbourne Health* [\(2011\) 39 VR 373](#) ; [\[2011\] VSC 327](#); [BC201105182](#) at [\[243\]-\[272\]](#) per Bell J.

See also *Director of Public Transport v XFJ* [\[2010\] VSC 319](#) ; [BC201005257](#) at [\[70\]](#) per Ross J; *Das v Victorian Human Rights & Equal Opportunity Commission* [\(2009\) 24 VR 415](#) ; 198 A Crim R 305; [\[2009\] VSC 381](#); [BC200908160](#) at [\[80\]](#) per Warren CJ; *WBM v Chief Cmr of Police* [\(2010\) 27 VR 469](#) ; 203 A Crim R 167; [\[2010\] VSC 219](#); [BC201003468](#) at [\[29\]](#) per Kaye J.

It is unclear whether the interpretation of statutes under s 32 is to be informed by the acceptable limitations on human rights as set out in ibid s 7(2). See, for example, discussion in *Director of Public Prosecutions (on behalf of Watson) v Kaba* [\(2014\) 44 VR 526](#) ; [69 MVR 137](#); [\[2014\] VSC 52](#); [BC201411237](#) at [\[211\]-\[216\]](#) per Bell J.

- 16** Ibid s 32(2).
- 17** Ibid ss 32(3), 33 (process by which a matter gets to the Court), 36 (provides for the relevant court to issue a declaration of inconsistent interpretation in certain circumstances).
- 18** Ibid s 36. On the validity of ibid s 36 see *Momcilovic v R* [\(2011\) 280 ALR 221](#) ; [\[2011\] HCA 34](#); [BC201106881](#) at [5], [89]-[97] per French CJ (ibid s 36 validly confers a non-judicial function on the Court of Appeal, not incidental to the Court's judicial function and not amenable to the appellate jurisdiction of the High Court of Australia under section 73 of the (CC) Commonwealth Constitution (Bell J agreeing at [661]). Compare [172]-[189] per Gummow J (at [280] Hayne J agreeing) (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 36 is invalid, offensive to the *Kable* principle; at [457] per Heydon J the power to make a 'section 36 declaration' takes the Supreme Court of Victoria outside the constitutional conception of a 'court'). On the interaction between ibid ss 7(2), 36 — ibid s 7(2) is excluded from consideration when determining, under ibid s 36(2), whether a statutory provision cannot be interpreted consistently with a human right but ibid s 7(2) could still have a role in informing the discretion of the Court to decline to make a declaration of inconsistent interpretation under ibid s 36(2) (at [36] per French CJ). Note also at [572]-[576], [582]-[606] per Crennan and Kiefel JJ (ibid s 36 valid). Declaration of inconsistent interpretation by the Court of Appeal under ibid s 36 set aside.
- 19** Ibid s 37.
- 20** Ibid s 35. See *Kuek v Victoria Legal Aid (VLA)* [\[2009\] VSC 43](#) ; [BC200900679](#) (counsel commenced an attack on a legal aid guideline by reference to the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) but an impediment was the fact that no notice had been given under ibid s 35).
- 21** Ibid s 40. See *Kortel v Mirik* [\[2008\] VSC 103](#) ; [BC200802182](#).
- 22** Ibid s 31(1).
- 23** Ibid s 31(7).
- 24** Ibid Pt 4.

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(C) No Australian Bill of Rights

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#) > [\(1\) INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#)

(C) No AUSTRALIAN BILL OF RIGHTS

[80-30] International Bills of Rights

The paragraph below is current to **19 February 2023**

Bills of Rights are recognised statements of rights and there is considerable variety in both the content and mode of enforcement of the rights they contain. At the domestic level, they may be entrenched constitutionally; or they may be merely statutory, and therefore subject to potential repeal by normal legislative processes.¹ They can apply to a particular legal system, which may be that of a limited geographic jurisdiction within a country (for example, a State or Territory within Australia); or that of a country, for example, the United States; or to a group of countries, for example those States Parties to the European Convention on Human Rights,² or the International Covenant on Civil or Political Rights.³

Notes

- ¹ The United States and Canadian Bills of Rights are constitutionally enshrined and are enforced by the courts. In the Australian Capital Territory, Victoria, New Zealand and the United Kingdom, they consist of statutes which require courts to interpret legislation consistently with the rights contained within where possible, and empower them to make declarations of incompatibility, but not to find that legislation is void or invalid as a result. At the regional level, the (INT) Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) (the 'European Convention') is in effect enforced by the Council of Ministers appointed under that Convention, but its effect comes principally through the judicial process of the European Court of Human Rights. As to the enforcement mechanisms of the International Bill of Rights see FOREIGN RELATIONS [\[215-645\]](#), [\[215-650\]](#).
- ² European (INT) Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221). For other such agreements see further FOREIGN RELATIONS [\[215-630\]](#).
- ³ (INT) International Covenant on Civil and Political Rights 1966 (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) adopted and opened for signature ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. See also [\[80-15\]](#).

[80-40] Commonwealth Constitution

The paragraph below is current to **19 February 2023**

(C) No Australian Bill of Rights

Although the Commonwealth Constitution (the 'Constitution') contains no collected statement of civil and political rights, a number of its provisions guarantee aspects of recognised civil and political rights. They cannot be regarded as an attempt to provide a Bill or collected statement of rights, or absolute protection of rights, and must be seen largely as protection against encroachment by the federal entity on the rights and liberties of citizens of the federating States (because in some cases, only the federal entity, but not the individual States, are prevented from encroaching on the particular individual rights and liberties). The Constitution contains the following explicit civil and political rights:

(1) Civil Rights

- (a) Aspects of due process in administration protected.¹
- (b) Taxation laws not to discriminate between States.²
- (c) Acquisition of property to be on just terms.³
- (d) No civil conscription may be authorised by Commonwealth laws relating to medical and dental services.⁴
- (e) Trial by jury guaranteed for indictable offences.⁵
- (f) Protection to transferred officers.⁶
- (g) Uniform customs levies to be imposed.⁷
- (h) Trade, commerce and intercourse among the States to be absolutely free.⁸
- (i) No preference to be given by the Commonwealth to a State or part of a State.⁹
- (j) Unreasonable State railway charges prohibited.¹⁰
- (k) No Commonwealth law to prohibit free exercise of religion or establish any religion and no religious test to be imposed for public office.¹¹
- (l) No discrimination between residents of different States.¹²

(2) Political Rights

- (a) Direct choice of members of House of Representatives and the Senate.¹³
- (b) Persons to have one vote and franchise no less comprehensive than for State electors.¹⁴
- (c) Qualifications for elected Commonwealth representatives.¹⁵
- (d) Amendment of the Constitution to be by referendum.¹⁶

The framers of the Constitution, however, refused to incorporate a comprehensive bill of rights, preferring instead the protections of the common law and responsible government. For example, their rejection of a proposal to introduce a 'due process/equal protection' provision similar to section 1 of the Fourteenth Amendment of the US Constitution appears to have been based on a concern that it might be

used to protect ethnic minorities from discriminatory State and federal laws.¹⁷ The framers of the Constitution also rejected moves to embed additional individual civil rights and protections in the Constitution, for example, by refusing an amendment which would have introduced a prohibition on States to deprive any person of life, liberty or property without due process of law.¹⁸

Notes

- 1** (CC) Commonwealth Constitution s 75.
- 2** Ibid s 51(ii). See also CONSTITUTIONAL LAW [\[90-1340\]](#).
- 3** Ibid s 51(xxxi). See also CONSTITUTIONAL LAW [\[90-1695\]](#).
- 4** Ibid s 51(xxiiiA). See also CONSTITUTIONAL LAW [\[90-1585\]](#).
- 5** Ibid s 80. See also CONSTITUTIONAL LAW [\[90-2233\]](#).
- 6** Ibid s 84.
- 7** Ibid ss 88, 90. See also CONSTITUTIONAL LAW [\[90-6075\]](#).
- 8** Ibid s 92. Generally see CONSTITUTIONAL LAW [\[90-2270\]](#)-[\[90-2290\]](#).
- 9** Ibid s 99. See also CONSTITUTIONAL LAW [\[90-6445\]](#).
- 10** Ibid ss 102, 104. See also CONSTITUTIONAL LAW [\[90-6390\]](#).
- 11** Ibid s 116. See also CONSTITUTIONAL LAW [\[90-2310\]](#).
- 12** Ibid s 117. See also CONSTITUTIONAL LAW [\[90-2335\]](#).
- 13** Ibid ss 7, 24. See also CONSTITUTIONAL LAW [\[90-480\]](#).
- 14** Ibid ss 8, 30. See also CONSTITUTIONAL LAW [\[90-485\]](#).
- 15** Ibid ss 16, 34. See also CONSTITUTIONAL LAW [\[90-430\]](#).
- 16** Ibid s 128. See also CONSTITUTIONAL LAW [\[90-270\]](#).
- 17** *Official Record of the Debates of the Australasian Federal Convention, Third Session*, Vol IV, Melbourne, 1898, p 665.
- 18** The discussion on these proposed amendments demonstrates a strong preference amongst delegates to imply protective principles from historical convention, rather than make them explicit in the text: see *Official Record of the Debates of the Australasian Federal Convention, Third Session*, Vol IV, Melbourne, 1898, pp 683, 688, 689.

[80-45] Constitutional implications

The paragraph below is current to **19 February 2023**

In addition to the express provisions in the Commonwealth Constitution (the 'Constitution'), constitutional implications have been identified by the High Court of Australia (the 'Court') in the area of civil and political rights which have been based on particular provisions or groups of provisions in, as well as the structure of, the Constitution.¹

As constitutional implications, these areas of civil and political rights are protected from removal by legislation. For example, in the civil rights area, it has been determined that there are limitations to the legislative power of a State parliament to vest administrative powers in a State court where such a function is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction,² and that there is a right to a fair trial which (according to some judges) is inherent in the exercise of the judicial power.³ The court must not be subjected to direction from the executive as to the content of judicial decisions.⁴ Legislation which requires a court exercising federal jurisdiction to

depart significantly from standards characterising the exercise of judicial power may be repugnant to Chapter III of the Constitution.⁵ The suggestion that there is a basic principle of equality underlying the Constitution no longer commands any authority, although there is probably a right of procedural 'due process' arising out of Chapter III of the Constitution.⁶ The Court has also upheld a constitutional immunity protecting citizens from some forms of administrative detention, as detention is normally punitive in character and can only be imposed by a Court vested with federal judicial power. Many exceptions exist to this right, and the constitutional immunity itself has come under heavy judicial criticism.⁷ In relation to political rights, a freedom of political communication (including non-verbal communication) has been identified⁸ and this freedom extends to the States and local government,⁹ and is accompanied to a limited extent by an implied freedom of movement and association that exists as a corollary to the freedom of political communication.¹⁰ There is no personal, constitutional right to vote,¹¹ and consequently there is no implied constitutional right to abstain from voting.¹²

Notes

- 1 For a summary of the law on constitutional implications in Australia see Dixon R and Appleby G, *The Invisible Constitution in Comparative Perspective*, Cambridge University Press, United Kingdom, 2018, pp 343-375.
- 2 *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814 at 837; per Toohey J, at 843, 848 per McHugh J, at 837 per Gaudron J, at 853, 860 per Gummow J; [BC9604181](#) (based on implications relating to the judicial power in the (CC) Commonwealth Constitution s 71). Subsequent cases, however, indicate that State parliaments can avoid this limitation with relative ease. See, for example, *Fardon v A-G (Qld)* (2004) 223 CLR 575 ; [210 ALR 50](#); [\[2004\] HCA 46](#); [BC200406384](#). See also *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[158\]](#), [\[201\]-\[230\]](#) per Hayne J, at [245]-[254] Heydon J (dissenting) (in which *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) was discussed at length); *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#); [\[2011\] HCA 24](#); [BC201104388](#) (*Kable* principle discussed at [44]-[53] per French CJ and Kiefel J, at [105] per Gummow J (Hayne, Crennan and Bell JJ agreeing) at [166]-[172] Heydon J (dissenting)); *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 ; [261 ALR 220](#); [\[2009\] HCA 49](#); [BC200910134](#) at [\[53\]](#), [\[54\]](#) per French CJ, at [88], [89] per Gummow and Bell JJ, at [140] per Heydon J; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 ; [229 ALR 223](#); [\[2006\] HCA 44](#); [BC200606891](#) (attack on validity based on the use of acting judges); *Hogan v Hinch* (2011) 275 ALR 408 ; [275 ALR 408](#); [\[2011\] HCA 4](#); [BC201101056](#) at [\[80\]](#) (public interest criterion for suppression orders does not impermissibly impair the character of a State court), at [91] per Gummow J (Hayne, Heydon, Crennan, Kiefel and Bell JJ agreeing) (nor deny an essential characteristic of a court exercising federal jurisdiction (open justice) and so attack institutional integrity within *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 ; [261 ALR 220](#); [\[2009\] HCA 49](#); [BC200910134](#) and *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#)); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ; [295 ALR 638](#); [\[2013\] HCA 7](#); [BC201301075](#).
See further *Momcilovic v R* (2011) 280 ALR 221 ; [\[2011\] HCA 34](#); [BC201106881](#) on the characterisation of a declaration of inconsistent interpretation under (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 36.
As to the interpretation of (CC) Commonwealth Constitution s 71 generally see CONSTITUTIONAL LAW [\[90-50\]](#), [\[90-2226\]-\[90-2231\]](#).
- 3 *Dietrich v R* (1992) 177 CLR 292  at 408 per Deane J, at 436 per Gaudron J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). Although the right is expressed as a common law right it has the effect of preventing a trial in the circumstances defined in the judgments and, based on the reasoning in *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#), it follows that it is an aspect of the judicial power in the (CC) Commonwealth Constitution Ch III that at least in the federal jurisdiction could not be removed by legislation.
- 4 *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[71\]](#) per French CJ (executive authorised to enlist Magistrates Court to implement its decisions); *Wilson v Minister for Aboriginal and Torres*

(C) No Australian Bill of Rights

- Strait Islander Affairs (Hindmarsh Island case)* (1996) 189 CLR 1  at 17; [138 ALR 220](#); 70 AJR 743; [BC9604085](#) per Brennan CJ (Dawson, Toohey, McHugh and Gummow JJ agreeing) reporting function to Minister incompatible with judicial office, incompatibility is ascertained by reference to functions performed in exercising the power); *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* (2008) 234 CLR 532 ; [242 ALR 191](#); [\[2008\] HCA 4](#); [BC200800373](#) at [\[10\]](#), [\[39\]](#) per Gummow J (Hayne, Heydon and Kiefel JJ agreeing); *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 ; [261 ALR 220](#); [\[2009\] HCA 49](#); [BC200910134](#) at [\[95\]-\[98\]](#) per Gummow and Bell JJ; *Public Service Assn and Professional Officers' Assn Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 ; [293 ALR 450](#); [\[2012\] HCA 58](#); [BC201209682](#) at [\[55\]-\[59\]](#) per Hayne J (Crennan, Kiefel and Bell JJ agreeing) (the application of government policy as prescribed by regulations by an industrial court does not constitute executive interference in a judicial task); *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174 ; 88 ALJR 522; [\[2014\] HCA 13](#); [BC201402411](#) at [\[65\]-\[69\]](#) per French CJ (Hayne, Crennan, Keifel, Bell and Keane JJ agreeing) (the legislative obligation on a state court to declare persons 'drug traffickers' based on statutory criteria did not impair normal judicial process and so was not a case of the executive government using the courts to further their own policy); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 ; [324 ALR 1](#); [\[2015\] HCA 32](#); [BC201508714](#) at [\[18\]-\[28\]](#) per French CJ (Kiefel, Bell and Keane JJ agreeing) (the retrospective validation of administrative acts does not impair the institutional integrity of a state court).
- 5 *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[111\]](#) per Gummow and Crennan JJ; *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[131\]-\[133\]](#) per Gummow J (distinguishing between legislative grant of jurisdiction and a legislative direction to the courts); *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#); [\[2011\] HCA 24](#); [BC201104388](#) (distinguishing *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[111\]](#) per Gummow (Hayne, Crennan and Bell JJ agreeing) as conferral of jurisdiction brought with it the usual incidents of the exercise of jurisdiction by the Supreme Court); *Nicholas v R* (1998) 193 CLR 173 ; [151 ALR 312](#); 72 ALJR 456; [BC9800075](#) (relationship between the judicial power of the Commonwealth and legislative authority and discretion to exclude evidence); *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319 ; [261 ALR 220](#); [\[2009\] HCA 49](#); [BC200910134](#) at [\[49\]-\[60\]](#) per French CJ; *Pollentine v Bleijie* (2014) 253 CLR 629 ; [311 ALR 332](#); [\[2014\] HCA 30](#); [BC201406387](#); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 ; [295 ALR 638](#); [\[2013\] HCA 7](#); [BC201301075](#).
- 6 *Leeth v Commonwealth* (1992) 174 CLR 455  at 486 per Deane and Toohey JJ (general principle of equality), at 502 per Gaudron J (Ch III precludes Courts acting in a discriminatory way); [107 ALR 672](#); 66 ALJR 529; [BC9202676](#); *Kruger v Commonwealth* (1997) 190 CLR 1  at 66 per Dawson J, at 112 per Gaudron J; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) (where the majority rejected Deane and Toohey JJ's earlier reasoning, but potentially endorsed constitutional rights of procedural equality).
- 7 See, for example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#) (reviewed in *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[208\]](#) per Hayne J); *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [79 ALD 233](#); [\[2004\] HCA 37](#); [BC200404861](#); *Re Woolley*; *Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [\[2004\] HCA 49](#); [BC200406534](#).
- 8 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#). As to the protection of non-verbal communication see *Levy v Victoria* (1997) 189 CLR 579 ; [146 ALR 248](#); 71 ALJR 837; [BC9703254](#); *Evans v New South Wales* (2008) 168 FCR 576 ; [104 ALD 234](#); [\[2008\] FCAFC 130](#); [BC200806500](#); *Love v Commonwealth* (2020) 270 CLR 152 ; [375 ALR 597](#); [\[2020\] HCA 3](#); [BC202000584](#).
- 9 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ; [124 ALR 80](#); 68 ALJR 765; [BC9404651](#); *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520  at 567; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) per Brennan CJ (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ agreeing).
- 10 *Tajjour v New South Wales* (2014) 254 CLR 508 ; [313 ALR 221](#); [\[2014\] HCA 35](#); [BC201408267](#) at [\[95\]](#) per Hayne J (confirmed that there was no implied freedom of movement and association independent of the implied freedom of political communication); *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#); [\[2011\] HCA 24](#);

(C) No Australian Bill of Rights

[BC201104388](#) at [\[112\]](#) per Gummow (Hayne, Crennan and Bell JJ agreeing) (freedom of association only exists as a corollary to the implied freedom of political communication and is subject to same tests of infringement and validity).

- 11** *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 ; [\[2012\] SASCFC 110](#); [BC201207542](#) at [\[26\]-\[27\]](#) per Gray J. The High Court refused leave to appeal the South Australian Supreme Court's decision in *Holmdahl v Australian Electoral Commission* [2013] HCATrans 72 . There is, however, the following dicta from the High Court: see *McGinty v Western Australia* (1996) 186 CLR 140  at 166, 167 per Brennan CJ, at 287 per Gummow J (with whom Toohey and Gaudron JJ agreed); [134 ALR 289](#); 70 ALJR 200; [BC9600206](#) (it is 'at least arguable that qualifications of age, sex, race and property ... could not now be reimposed so as to deprive a citizen of the right to vote'). See also *Langer v Commonwealth* (1996) 186 CLR 302  at 342 per McHugh J; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#).

- 12** *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 ; [\[2012\] SASCFC 110](#); [BC201207542](#).

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[\(D\) Australian Human Rights Commission](#)

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [I INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#) > [\(1\) INTRODUCTION TO CIVIL AND POLITICAL RIGHTS](#)

(D) AUSTRALIAN HUMAN RIGHTS COMMISSION

[80-50] Introduction

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') is established by the Australian Human Rights Commission Act 1986 (the 'Act').¹ Its functions are primarily directed at inquiries, conciliation and reporting rather than enforceable rights of redress. The Act creates an administration mechanism by which the Commission may inquire into any act or practice of the Commonwealth, or of an authority of the Commonwealth, or any enactment of the Commonwealth that is inconsistent with human rights.² The Commission also has certain functions resulting from inter-governmental arrangements or as conferred by State legislation.³ Human rights for the purposes of the Commission are contained in certain human rights instruments.⁴ While these instruments are not directly enforceable,⁵ the Act provides that the Commission may endeavour to effect a settlement by means of conciliation.⁶ Where the Commission's inquiries reveal that an act or practice is inconsistent with a human right, or a settlement cannot be achieved, the Commission must make a report to the Minister which is to be tabled in both Houses of Parliament.⁷ In addition, the Commission is responsible for the promotion of human rights and undertaking research and educational programs and legislative review relating to human rights matters.⁸

The Commission is also the vehicle through which the Commonwealth anti-discrimination legislation is administered⁹ and obligations under the (INT) Discrimination (Employment and Occupation) Convention 1958 are implemented.¹⁰

Notes

- 1** (CTH) [Australian Human Rights Commission Act 1986](#) s [7\(1\)](#). As to the constitution of the Commission see [80-55].
- 2** As to human rights inquiries see [80-70].
- 3** Ibid ss 3 (definitions of 'act', 'authority', 'human rights', 'practice'), 11(1)(b), 11(1)(c), 16, 20.
- 4** As to which instruments are specified in the definition of 'human rights' see [80-65].
- 5** As to the relevance of international treaties see [\[80-15\]](#).
- 6** Ibid ss 11(1)(f)(i), 27, 28, 29(2), 46. See further [80-90].
- 7** Ibid ss 11(1)(f)(ii), 29(2), 46. See further [80-90].

(D) Australian Human Rights Commission

⁸ Ibid s 11(1)(e), 11(1)(g), 11(1)(h). See further [80-60], [80-80].

⁹ Ibid s 11(1)(a); (CTH) [Disability Discrimination Act 1992](#) ss [4](#) (definition of 'Commission'), [67](#); (CTH) [Racial Discrimination Act 1975](#) ss [3](#) (definition of 'Commission'), [20](#); (CTH) [Sex Discrimination Act 1984](#) ss [4](#) (definition of 'Commission'), [48](#); (CTH) [Age Discrimination Act 2004](#) s [5](#) (definition of 'Commission'), [53](#). The Commission is given authority under these Acts to examine enactments, undertake research and educative functions, and intervene in proceedings (with leave). (CTH) [Australian Human Rights Commission Act 1986](#) Pt IIB contains provisions about enquiries into complaints of discrimination and conciliation of those complaints. See further [\[80-215\]-\[80-830\]](#).

On 22 September 2011, a discussion paper was released by the Attorney-General and Minister for Finance and Deregulation seeking submission on proposals to consolidate Commonwealth anti-discrimination law (see website: <http://www.ag.gov.au/>). The Senate Legal and Constitutional Affairs Committee released a report on a draft consolidation Bill on 21 February 2015. However, no consolidation Bill has ever been tabled before Federal Parliament.

¹⁰ (INT) Discrimination (Employment and Occupation) Convention 1958 (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31). See also [80-110].

[80-55] Constitution of Commission

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') is a body corporate¹ and is composed of:

- (1) a President;²
- (2) a Human Rights Commissioner;³
- (3) the Race Discrimination Commissioner;⁴
- (4) the Aboriginal and Torres Strait Islander Social Justice Commissioner;⁵
- (5) the Sex Discrimination Commissioner;⁶
- (6) the Age Discrimination Commissioner;⁷
- (7) the Disability Discrimination Commissioner;⁸ and
- (8) the National Children's Commissioner.⁹

The President may be either a full time or part time member. The President is the senior member of the Commission, and is responsible for managing its administrative affairs, which includes convening and presiding at meetings of the Commission.¹⁰

The President is required to inquire into each complaint alleging unlawful discrimination and attempt to conciliate it.¹¹ If the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation, the President may terminate it, after which the complainant may apply to the Federal Court of Australia or the Federal Circuit Court seeking a remedy to the alleged unlawful discrimination.¹² Certain of the President's functions are non-delegable.¹³

The Commissioners for Race, Sex and Disability Discrimination are appointed under the respective Commonwealth anti-discrimination legislation.¹⁴

The Aboriginal and Torres Strait Islander Social Justice Commissioner, who must have significant experience in the community life of Aboriginal persons or Torres Strait Islanders,¹⁵ is responsible for the

functions of the Commission relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders,¹⁶ and for reporting under the (CTH) [Native Title Act 1993](#) regarding the operation of that Act and its effect on the enjoyment of human rights of Aboriginal people and Torres Strait Islanders.¹⁷

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [7\(2\)](#).
- 2 Ibid s 8(1)(a).
- 3 Ibid s 8(1)(b).
- 4 Ibid s 8(1)(c). The Race Discrimination Commissioner is appointed under the (CTH) [Racial Discrimination Act 1975](#) s [29](#). As to the terms and conditions of appointment see ibid ss 30-35.
- 5 (CTH) [Australian Human Rights Commission Act 1986](#) s [8\(1\)\(ca\)](#). The Aboriginal and Torres Strait Islander Social Justice Commissioner is appointed under ibid s 46B(1). As to the terms and conditions of appointment see ibid ss 46D-46I.
- 6 Ibid s 8(1)(d). The Sex Discrimination Commissioner is appointed under the (CTH) [Sex Discrimination Act 1984](#) s [96](#). As to the terms and conditions of appointment see ibid ss 97-102.
- 7 (CTH) [Australian Human Rights Commission Act 1986](#) s [8\(1\)\(e\)](#), added by (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#) which amended (CTH) [Age Discrimination Act 2004](#) to establish an Age Discrimination Commissioner in response to Australia's ageing population, to address discrimination in the workplace and related issues. As to the terms and conditions of appointment see ibid ss 53A-53G.
- 8 (CTH) [Australian Human Rights Commission Act 1986](#) s [8\(1\)\(f\)](#). The Disability Discrimination Commissioner is appointed under the (CTH) [Disability Discrimination Act 1992](#) s [113](#). As to the terms and conditions of appointment see ibid ss 114-119.
- 9 (CTH) [Australian Human Rights Commission Act 1986](#) s [8\(1\)\(g\)](#). As to functions and terms and conditions of appointment see ibid s 46MB-46MK.
- 10 Ibid ss 8A, 44.
- 11 Ibid ss 11 (Commission's functions), 46PF. Under ibid s 8(6) the functions of the Commission under the following sections are performed by the President: ibid ss 11(1)(aa) (to enquire into complaints of unlawful discrimination), 11(1)(ab) (to deal with complaints), 11(1)(f) (to enquire into practices inconsistent with any human right), 11(1)(g) (to promote an understanding and acceptance, and the public discussion, of human rights in Australia), 31(b) (equal opportunity in employment — to inquire into any act or practice, including any systemic practice, that may constitute discrimination where the Commission considers it appropriate).
- 12 Ibid s 46PH(1B)(b), 46PH(1C) (redress for unlawful discrimination, including inquiry, conciliation and termination of complaints, and application to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) if a complaint is terminated). On the requirement that a complaint be terminated before it may be brought under ibid s 46PO see *Grigor-Scott v Jones* (2008) 168 FCR 450; [102 ALD 1](#); [\[2008\] FCAFC 14](#); [BC200804152](#); *Chadwick v New South Wales* [\[2022\] FCA 918](#); [BC202207597](#) at [\[55\]](#) per Cheeseman J.
- 13 Ibid s 19 (delegation).
- 14 (CTH) [Age Discrimination Act 2004](#) s [53A](#) (for functions of the Commission see ibid s 53); (CTH) [Disability Discrimination Act 1992](#) s [113](#) (for functions of the Commission see ibid s 67); (CTH) [Racial Discrimination Act 1975](#) s [19](#), (for functions of the Commission see ibid s 20); (CTH) [Sex Discrimination Act 1984](#) s [96](#) (for functions of the Commission see ibid s 48). See further [\[80-215\]-\[80-830\]](#).
- 15 (CTH) [Australian Human Rights Commission Act 1986](#) s [46B\(2\)](#).
- 16 Ibid s 46C(1). See further [\[80-120\]](#).
- 17 (CTH) [Native Title Act 1993](#) s [209](#).

[80-60] Functions

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') has a range of functions related to the promotion of the observance of human rights under its constituting legislation.¹ Its main functions include:

- (1) conducting inquiries into acts or practices² that may be inconsistent with or contrary to any human right,³ settlement of such matters by means of conciliation, and associated reporting functions;⁴
- (2) examining enactments and proposed enactments upon request by the Minister, to ascertain whether they may be, are, or would be, inconsistent with or contrary to any human right, and associated reporting functions;⁵
- (3) promoting an understanding and acceptance, and public discussion, of human rights in Australia;⁶
- (4) undertaking research and educational and other programs on behalf of the Commonwealth to promote human rights, and coordinate any such programs;⁷
- (5) reporting to the Minister on any laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;⁸
- (6) reporting to the Minister on any action that needs to be taken by Australia to comply with its international human rights obligations;⁹
- (7) examining any relevant international instrument to ascertain whether there are any inconsistencies between that instrument and the human rights instruments contained in the Schedules to the (CTH) [Australian Human Rights Commission Act 1986](#), or any other relevant international instrument, and reporting the results of any such examination to the Minister;¹⁰
- (8) preparing and publishing guidelines for the avoidance of acts or practices inconsistent with or contrary to human rights in respect of which it has an inquiry function;¹¹
- (9) intervening in proceedings involving human rights issues¹² or issues of discrimination in employment,¹³ subject to the leave of the court hearing the proceedings and to any conditions that the court may impose;¹⁴
- (10) doing anything incidental or conducive to the performance of any of the preceding functions,¹⁵ or necessary or convenient for, or in connection with, the performance of its functions;¹⁶ and
- (11) inquiring into, and attempting to conciliate, complaints of unlawful discrimination¹⁷ pursuant to the (CTH) [Age Discrimination Act 2004](#), (CTH) [Racial Discrimination Act 1975](#), the (CTH) [Sex Discrimination Act 1984](#) and the (CTH) [Disability Discrimination Act 1992](#).¹⁸

Functions are conferred on the Commission by the Commonwealth anti-discrimination legislation to carry out analogous functions (such as undertaking research and educational programs, and examining enactments for consistency with the object of the relevant Act)¹⁹ and may be conferred upon it by other Commonwealth enactments.²⁰ In addition, functions may be conferred upon the Commission under an arrangement between the Commonwealth government and a State government²¹ and by certain State enactments.²²

Additional functions are conferred upon the Commission relating to equal opportunity in employment in accordance with the (INT) Discrimination (Employment and Occupation) Convention 1958,²³ and to the enjoyment and exercise of human rights by Aboriginals and Torres Strait Islanders.²⁴

In the performance of its functions the Commission must have regard to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.²⁵

Notes

1 The long title of the (CTH) [Australian Human Rights Commission Act 1986](#) is 'to establish the Australian Human Rights Commission, to make provision in relation to human rights and in relation to equal opportunity in employment, and for related purposes'. The preamble to the (CTH) Human Rights Commission Act 1981 (repealed), not repeated in the largely identical legislation of 1986, included the words 'Whereas it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of [the international instruments annexed to the Act] ...', reviewed in *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550  at 630; [9 ALN N28](#); [62 ALR 321](#); [BC8501054](#).

2 'Acts' and 'practices' are defined as acts done, and practices engaged in:

- (1) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (2) under a Commonwealth or Territory enactment;
- (3) wholly within a Territory; or
- (4) partly within a Territory, to the extent to which the act was done, or the practice was or is engaged in, within a Territory: (CTH) [Australian Human Rights Commission Act 1986](#) s 3.

See also *ibid* s 3 (definition of 'Territory', which excludes the Australian Capital Territory and the Northern Territory), 3(3). As to the Commission see [80-50].

3 *Ibid* s 11(1)(f). Reference to an act or practice that is inconsistent with or contrary to any human right includes a reference to an act that is a victimisation offence under *ibid* s 26(2): *ibid* s 19A. See further [80-115]. As to 'human rights' see [80-65].

The grounds of discrimination encompassed by this section are race, colour, sex, religion, political opinion, national extraction or social origin; and other distinction, exclusion or preference that have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, as prescribed by legislation, being age, medical record, an irrelevant criminal record, disability, marital or relationship status, nationality, sexual orientation and trade union activity. See also *ibid* s 3(1) (definition of 'discrimination'): (CTH) [Australian Human Rights Commission Regulations 2019](#) reg 6.

4 (CTH) [Australian Human Rights Commission Act 1986](#) s [11\(1\)\(f\)\(iii\)](#).

5 *Ibid* ss 3 (definitions of 'enactment', 'proposed enactment', 'Territory enactment'), 11(1)(e). See also [80-95].

6 *Ibid* s 11(1)(g).

7 *Ibid* s 11(1)(h); (CTH) [Racial Discrimination Act 1975](#) s 20(c); (CTH) [Sex Discrimination Act 1984](#) s [48\(1\)\(e\)](#); (CTH) [Disability Discrimination Act 1992](#) s [67\(1\)\(h\)](#); (CTH) [Age Discrimination Act 2004](#) s [53\(1\)\(c\)](#).

8 (CTH) [Australian Human Rights Commission Act 1986](#) s [11\(1\)\(j\)](#). See further [80-105].

9 *Ibid* s 11(1)(k).

10 *Ibid* ss 3 (definition of 'Covenant', 'Declarations', 'relevant international instrument'), 11(1)(m), Schs 2 (International Covenant on Civil and Political Rights), 3 (Declaration of the Rights of the Child), 4 (Declaration on the Rights of Mentally Retarded Persons), 5 (Declaration on the Rights of the Disabled Persons).

11 *Ibid* s 11(1)(n).

12 *Ibid* s 11(1)(o).

13 *Ibid* s 31(j). See also definition of 'discrimination' in *ibid* s 3 which adopts similar terminology to that used in the (INT) Discrimination (Employment and Occupation) Convention 1958 (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31).

(D) Australian Human Rights Commission

- 14 See *Re Marion* (1990) 14 Fam LR 427 ; (1991) FLC ¶92-193, Fam C of A, Full Court; *Re Jane* (1988) 85 ALR 409 ; 12 Fam LR 662; 94 FLR 1; (1989) FLC ¶92-007, Fam C of A; *Re a Teenager* (1988) 94 FLR 181 ; (1989) FLC ¶92-006, Fam C of A; *Tarumi v Bankstown City Council* (1987) EOC ¶92-214, LEC(NSW).
- 15 (CTH) [Australian Human Rights Commission Act 1986](#) s 11(1)(p).
- 16 Ibid s 13. Specific areas of work mentioned on the Australian Human Rights Commission website include, for example, providing reports to the United Nations about Australia's performance in meeting its international human rights commitments, and running training and education programs for other human rights institutions within the Asia Pacific region.
- 17 'Unlawful discrimination' is defined in ibid s 3. See also [\[80-245\]](#).
- 18 Ibid s 11(1)(a), 11(1)(aa).
- 19 Ibid s 11(1)(a); (CTH) [Disability Discrimination Act 1992](#) ss 4 (definition of 'Commission'), 67 (functions of the Commission); (CTH) [Racial Discrimination Act 1975](#) ss 3 (definition of 'Commission'), 20; (CTH) [Sex Discrimination Act 1984](#) ss 4 (definition of 'Commission'), 48 (functions). There is no power to examine enactments under the (CTH) [Racial Discrimination Act 1975](#), although the Commission can examine whether enactments 'recognise and protect the human rights of Aboriginals and Torres Strait Islanders' under (CTH) [Australian Human Rights Commission Act 1986](#) s 46C(1)(d).
- 20 Ibid s 11(1)(a).
- 21 Ibid ss 11(1)(b), 16.
- 22 Ibid ss 11(1)(c), 18.
- 23 Ibid ss 11(1)(d), 31, Sch 1. See further [\[80-115\]](#). As to the (INT) Discrimination (Employment and Occupation) Convention 1958 (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) see FOREIGN RELATIONS [\[215-680\]](#).
- 24 (CTH) [Australian Human Rights Commission Act 1986](#) s 46C. See further [\[80-120\]](#).
- 25 Ibid s 10A.

[80-65] Human rights

The paragraph below is current to **19 February 2023**

'Human rights' are those rights and freedoms recognised or declared in the human rights instruments contained in certain Schedules to the (CTH) [Australian Human Rights Commission Act 1986](#).¹ These are:

- (1) the International Covenant on Civil and Political Rights ('as it applies to Australia');²
- (2) the Declaration of the Rights of the Child;³
- (3) the Declaration on the Rights of the Mentally Retarded Persons;⁴ and
- (4) the Declaration on the Rights of Disabled Persons.⁵

'Human rights' also include the rights and freedoms recognised by any further instrument that has been declared by the Minister to be a 'relevant international instrument', as they apply to Australia or as adopted by Australia, depending on the particular case.⁶ Through this mechanism, 'human rights' includes those rights contained in:⁷

- (1) the Convention on the Rights of the Child;
- (2) the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief; and

(3) the Convention on the Rights of Persons with Disabilities.

The definition of 'human rights' is qualified to include the rights and freedoms recognised or declared in the relevant instrument only as it applies to or (in the case of Declarations) was adopted by Australia.⁸ For the purposes of the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner,⁹ 'human rights' include, in addition to the rights and freedoms mentioned above, those recognised by the International Convention on the Elimination of all Forms of Racial Discrimination.¹⁰

Notes

¹ (CTH) [Australian Human Rights Commission Act 1986](#) s 3, 3(4).

² Ibid s 3 (definition of 'Covenant'), 3(4), Sch 2.

³ Ibid s 3 (definition of 'Declarations'), Sch 3.

⁴ Ibid s 3 (definition of 'Declarations'), Sch 4.

⁵ Ibid s 3 (definition of 'Declarations'), Sch 5.

⁶ Ibid ss 3 (definitions of 'human rights' and 'relevant international instrument'), 47 (declaration of international instruments).

As to the Convention on the Rights of the Child see FOREIGN RELATIONS [\[215-675\]](#).

⁷ (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) on 22 December 1992: Commonwealth Gazette, GN 1 of 13 January 1993, p 85 ; (INT) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (GA Res 36/55, 25 November 1981) on 3 February 1993: Commonwealth Gazette, GN 7 of 24 February 1993, p 525; (INT) Convention on the Rights of Persons with Disabilities (New York, 30 March 2007, GA Res. 61/106; Aust TS 2008 No 12) ratified by Australia: 17 July 2008, entry into force for Australia: 16 August 2008.

As to the Convention on the Rights of the Child see FOREIGN RELATIONS [\[215-675\]](#).

⁸ (CTH) [Australian Human Rights Commission Act 1986](#) s 3(4).

⁹ See [80-120].

¹⁰ Ibid s 46A (definition of 'human rights'). As to the (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) see FOREIGN RELATIONS [\[215-655\]](#).

[80-70] Human rights inquiries

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') must inquire into an act or practice¹ that may be inconsistent with, or contrary to, a human right when it receives a complaint in writing or is requested to do so by the Minister, or whenever it appears desirable to do so.²

An act or practice must not be regarded by the Commission as being inconsistent with, or contrary to, any human right where the act or practice is done or engaged in solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons.³

If the Commission is satisfied that the matter complained of is not inconsistent with, or contrary to, any human right, or that the person aggrieved by the act or practice does not wish the inquiry to be made or continued, the Commission may decide not to enquire or continue an inquiry.⁴ The Commission may also

decide not to inquire or continue an inquiry if it is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of the inquiry, into the act or practice is not warranted.⁵ The Commission may also refuse to make, or discontinue, an inquiry where the act or practice occurred more than 12 months before the complaint was made⁶ or the Commission is of the opinion that:

- (1) the complaint is frivolous, vexatious, misconceived or lacking in substance;⁷
- (2) the Commission is satisfied that there is no reasonable prospect of the matter being settled by conciliation;⁸
- (3) the subject matter of the complaint has been adequately dealt with by the Commission or another statutory authority, or by means of some other remedy;⁹
- (4) some other more appropriate remedy is reasonably available;¹⁰ or
- (5) the complaint could be dealt with more effectively or conveniently by another statutory authority.¹¹

The Commission can transfer a complaint to the Information Commissioner where the Commission is of the opinion that the complaint could be more effectively or conveniently dealt with by the Information Commissioner under the (CTH) [Privacy Act 1988](#).¹²

Notes

1 An 'act' and a 'practice' are defined as an act done, and a practice engaged in:

- (1) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (2) under a Commonwealth or Territory enactment;
- (3) wholly within a Territory; or
- (4) partly within a Territory, to the extent to which the act was done, or the practice was or is engaged in, within a Territory: (CTH) [Australian Human Rights Commission Act 1986](#) s 3.

'Territory' excludes the Australian Capital Territory and the Northern Territory: *ibid* s 3.

2 *Ibid* s 20(1). As to the form of inquiries and examinations see [80-80]. As to the power to obtain information and examine witnesses see [80-75].

3 *Ibid* s 11(2).

4 *Ibid* s 20(2)(a), 20(2)(b). Note that under *ibid* s 20(4) where the Commission decides not to inquire into an act or practice following a complaint, the Commission must give notice in writing to the complainant of that decision and of the reasons for that decision: *Hanes v Human Rights and Equal Opportunity Commission* (2007) 98 ALD 544 ; [2007] FCA 751; BC200704143 at [25] per Gordon J (reaffirmed that those reasons 'are not to be construed minutely and finely with an eye keenly attuned to the perception of error' (applying *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 ; 115 ALR 1; 18 AAR 9; BC9304888) and that the reasons are not required to refer expressly to every argument and all the evidence that might be relevant to its determination of factual issues).

5 *Ibid* s 20(2)(ba).

6 *Ibid* s 20(2)(c)(i).

7 *Ibid* s 20(2)(c)(ii).

8 *Ibid* s 20(2)(c)(iib).

9 *Ibid* s 20(2)(c)(iii), 20(2)(c)(v).

10 Ibid s 20(2)(c)(iv).

11 Ibid s 20(2)(c)(vi).

12 Ibid s 20(4A), 20(4B).

[80-75] Power to obtain information and examine witnesses relevant to inquiries

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') has the power to obtain information, whether in written form or by oral examination, and documents relevant to its inquiries.¹ Persons required to attend before the Commission may be examined on oath or affirmation.² Where the information or document originated with, or has been received from, an intelligence agency,³ the agency must be notified by the person required to provide that information.⁴ However, the Commission is not empowered to require any information where the Attorney-General certifies that its disclosure would be contrary to the public interest by reason that it would:

- (1) prejudice the security, defence or international relations of Australia;⁵
- (2) disclose Commonwealth-State communications (between Ministers), thereby prejudicing inter-governmental relations;⁶
- (3) disclose the deliberations of the Cabinet, a Cabinet committee or the Executive Council;⁷
- (4) prejudice a current criminal investigation or the fair trial of any person;⁸
- (5) disclose, or enable a person to ascertain, the identity of a confidential source of information relating to criminal law enforcement;⁹
- (6) prejudice the effectiveness of the operational methods or investigative practices or techniques of criminal law enforcement agencies;¹⁰ or
- (7) endanger the life or physical safety of any person.¹¹

A person must not hinder, obstruct, molest or interfere with a member of the Commission participating in an inquiry or an examination, or a person holding an inquiry or carrying out an investigation on behalf of the Commission.¹²

Notes

1 (CTH) [Australian Human Rights Commission Act 1986](#) ss s, 23 (failure to provide information or documents, and for failure to attend or answer questions).

2 Ibid s 22. It is an offence to refuse or fail to be sworn or make an affirmation: *ibid* s 23(1)(a). As to oaths and affirmations see EVIDENCE [\[195-7320\]](#), [\[195-7325\]](#).

3 An 'intelligence agency' is defined to include the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Australian Signals Directorate, the Office of National Intelligence, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation of the Department of Defence: *ibid* s 21(3). As to Australia's security and the Australian Security Intelligence Organisation see DEFENCE [\[150-1600\]](#)-[\[150-1775\]](#).

4 *Ibid* s 21(2).

(D) Australian Human Rights Commission

- 5 Ibid s 24(1)(a), 24(2) (information prejudicial to the performance of the functions of the Australian Crime Commission).
- 6 Ibid s 24(1)(b). As to public interest privilege see EVIDENCE [\[195-7520\]-\[195-7575\]](#).
- 7 Ibid s 24(1)(c), 24(1)(d).
- 8 Ibid s 24(1)(e).
- 9 Ibid s 24(1)(f).
- 10 Ibid s 24(1)(g). See further POLICE AND EMERGENCY SERVICES [\[320-1\]](#).
- 11 Ibid s 24(1)(h).
- 12 Ibid s 26(1).

[80-80] Form of inquiries and examinations

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') may make an examination or hold an inquiry as it sees fit and without being bound by the rules of evidence in informing itself in the course of an examination or inquiry.¹ Where the Commission considers it necessary to protect the security of employment, privacy or any human right² of a complainant or any person who has, or proposes to, furnish information, produce a document, give evidence or make a submission to the Commission, it may give directions prohibiting the disclosure of the identity of that person.³ The Commission may also give directions preventing publication of any such information, document or evidence given to it.⁴ In reaching a decision restricting publication, the Commission is to have regard, where relevant, to the need to prevent:

- (1) prejudice to the security, defence or international relations of Australia;⁵
- (2) prejudice to inter-governmental relations;⁶
- (3) disclosure of the deliberations or decisions of the Cabinet, a Cabinet committee or the Executive Council of the Commonwealth or a State or Territory;⁷
- (4) disclosure of the identity of a confidential source of information relating to criminal law enforcement;⁸
- (5) endangering the life or physical safety of any person;⁹
- (6) prejudice to proper enforcement of the law or the protection of public safety;¹⁰
- (7) disclosure of information which is the subject of a prohibition from disclosure in other legislation;¹¹ and
- (8) unreasonable disclosure of the personal affairs of any person or confidential commercial information.¹²

In having regard to these matters, the (CTH) [Australian Human Rights Commission Act 1986](#) requires the Commission to try to achieve an appropriate balance between the need to have regard to those matters and the desirability of ensuring that interested persons are sufficiently informed of the results of the Commission's examination or inquiry.¹³

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [14\(1\)](#).
- 2 Ibid s 14(2).
- 3 Ibid s 14(2).
- 4 Ibid s 14(3)-(7).
- 5 Ibid s 14(5)(a).
- 6 Ibid s 14(5)(b).
- 7 Ibid s 14(5)(c), 14(5)(d).
- 8 Ibid s 14(5)(e).
- 9 Ibid s 14(5)(f).
- 10 Ibid s 14(5)(g).
- 11 Ibid s 14(5)(h).
- 12 Ibid s 14(5)(j), 14(5)(k).
- 13 Ibid s 14(6).

[80-85] Victimisation of complainants and witnesses

The paragraph below is current to **19 February 2023**

It is an offence to victimise others by reason that they have made or propose to make complaints, (subject to a good faith defence),¹ or allegations that an act or practice is inconsistent with or contrary to a human right.² It is also an offence to victimise others by reason of their furnishing, or proposing to furnish, information or documents, or their having given or proposing to give evidence to the Australian Human Rights Commission (the 'Commission') or someone acting on its behalf, or their having alleged, or proposing to allege, that a person has done an act inconsistent with any human right.³ Victimisation may take the form of:⁴

- (1) refusal to employ a person;
- (2) dismissal or threatened dismissal from employment;
- (3) prejudice or threatened prejudice in the person's employment; or
- (4) intimidation or coercion, the imposition of pecuniary or other penalties, or taking any other disciplinary action.

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [26\(3\)](#).
- 2 Ibid s 26(2). See also [\[80-715\]](#).
- 3 Ibid s 26(2), 26(2)(f)-(h).
- 4 Ibid s 26(2)(a)-(d).

[80-90] Discretion to settle matters by conciliation

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') may, in connection with any inquiry, attempt by conciliation to effect a settlement of the matter giving rise to the inquiry.¹ In endeavouring to effect a settlement, the Commission must have regard to the need to ensure that any settlement of the matter reflects a recognition of human rights and the need to protect those rights.²

Where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, the Commission must notify the person who did the act or engaged in the practice of its findings and the reasons for those findings.³ The Commission may make recommendations for preventing a repetition of the act or a continuation of the practice,⁴ and make recommendations as to compensation or other remedial action.⁵ The Commission must include in any report to the Minister relating to the results of the inquiry, particulars of any such recommendations and whether, to the knowledge of the Commission, the person has taken or is taking any action as a result of the findings and recommendations.⁶

Notes

- 1** (CTH) [Australian Human Rights Commission Act 1986](#) ss s, 31(b)(i) (conciliation in relation to an act or practice that may constitute discrimination), 46PF (if a complaint is referred to the President under *ibid* s 46PD, the President must consider whether to inquire into the complaint and, unless he or she is of the opinion that the complaint should be terminated, attempt to conciliate the complaint).
- 2** *Ibid* s 28.
- 3** *Ibid* s 29(2)(a), 29(4) (certain material may be excluded from the notice).
- 4** *Ibid* s 29(2)(b).
- 5** *Ibid* s 29(2)(c).
- 6** *Ibid* s 29(2)(d), 29(2)(e), 29(3)-(5) (certain material may be excluded from the report). As to reports by the Commission see [80-105].

[80-95] Examination of enactments

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') must report to the Minister the results of any examination of an enactment or (when requested to do so by the Minister) proposed enactment undertaken to ascertain whether it is or would be inconsistent with or contrary to any human right.¹ An 'enactment' means a Commonwealth enactment or a Territory enactment,² but does not include an Australian Capital Territory enactment or a Northern Territory enactment.³

An enactment or proposed enactment must not be regarded by the Commission as being inconsistent with or contrary to any human right by reason that it is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons.⁴

Where the Commission finds that the enactment is, or the proposed enactment would be, inconsistent with or contrary to any human right, the Commission must include in its report any recommendations for appropriate amendment of the enactment or proposed enactment.⁵

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [11\(1\)\(e\)](#).
- 2 Ibid s 3 (definitions of 'Commonwealth enactment', 'instrument', 'proposed enactment', 'Territory Act', 'Territory enactment').
- 3 Ibid s 3 (definition of 'Territory'). As to Australia's other Territories see DEPENDENCIES [\[155-60\]/\[155-90\]](#).
- 4 Ibid s 11(2)(a).
- 5 Ibid s 29(1).

[80-100] Intervention in court proceedings

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') has power to intervene, with the leave of the court, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment.¹ Under the Guidelines for Interventions (which establish criteria for intervention), the Commission may intervene where intervention issues are significant and not peripheral to the proceedings, and intervention issues will not be adequately or fully so argued.²

The Commission has increased the number of interventions it has sought to make and in a number of cases it has been able to make substantive submissions.³

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) ss [11\(1\)\(o\)](#) (involving human rights issues), [31\(j\)](#) (concerning employment discrimination); (CTH) [Racial Discrimination Act 1975](#) s 20(e); (CTH) [Sex Discrimination Act 1984](#) s [48\(1\)\(gb\)](#); (CTH) [Disability Discrimination Act 1992](#) s [67\(1\)\(f\)](#); (CTH) [Age Discrimination Act 2004](#) s [53\(1\)\(g\)](#). For the broad definition of 'discrimination' in this context see (CTH) [Australian Human Rights Commission Act 1986](#) s [3\(1\)](#), outlined in [80-60] note 3.
- 2 See Guidelines on applications for interventions in court proceedings available at the Australian Human Rights Commission's website: <http://www.humanrights.gov.au>.
- 3 Examples of such interventions include: *Tarumi v Bankstown City Council* (1987) EOC ¶92-214, LEC(NSW) (religious discrimination); *Aldridge v Booth (Cakeshop Case)* [\(1988\) 80 ALR 1](#) ; [15 ALD 540](#); (1988) EOC ¶92-222, Fed C of A (sexual harassment); *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 (sterilisation of intellectually disabled child); *Re Jane* [\(1988\) 85 ALR 409](#) ; [12 Fam LR 662](#); 94 FLR 1; (1989) FLC ¶92-007, Fam C of A (sterilisation of intellectually disabled child); *P v P* (1994) 181 CLR 583 ; [120 ALR 545](#); [17 Fam LR 457](#); [BC9404622](#) (sterilisation of intellectually disabled child); *ZP v PS* (1994) 181 CLR 639 ; [122 ALR 1](#); 68 ALJR 554; [BC9404636](#) (abduction of child from Australia); *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301  at 308; [118 ALR 80](#); (1993) EOC ¶92-548; [BC9305085](#) per Lockhart J, Fed C of A, Full Court (health of women at work); *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ; [39 ALD 206](#); [128 ALR 353](#); [BC9506417](#) (deportation of father); *Wu Yu Fang v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245 .

(D) Australian Human Rights Commission

[135 ALR 583](#), Fed C of A (definition of refugee); *Langer v Australian Electoral Commission* (1996) 136 FLR 141, Fed C of A, Full Court (freedom of political speech); *Croome v Tasmania* (1997) 191 CLR 119 ; [142 ALR 397](#); 71 ALJR 430; [BC9700297](#) (inconsistency between Commonwealth and State law relating to homosexuality); *B v B* ([1997](#)) [21 Fam LR 676](#) , Fam C of A, Full Court (freedom of movement in relocation of a parent and best interests of the child); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ; [152 ALR 540](#); 72 ALJR 722; [BC9800961](#) (the interpretation of the race power in (CC) Commonwealth Constitution s 51(xxvi)); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 ; [152 ALR 365](#); 72 ALJR 634; [BC9800685](#) (meaning of 'inherent requirement' under International Labour Organisation's (INT) Discrimination (Employment and Occupation) Convention 1958 art 1(2)); *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [\[2002\] HCA 28](#); [BC200204355](#) (relevance of international law to interpretation of native title rights); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ; [194 ALR 538](#); [\[2002\] HCA 58](#); [BC200207517](#); *Luu v Minister for Immigration and Multicultural Affairs* ([2002](#)) [197 ALR 433](#) ; [72 ALD 84](#); [\[2002\] FCAFC 369](#); [BC200207082](#) (continued detention after serving a criminal sentence and pending deportation); *Ruddock v Vadarlis* (2001) 110 FCR 491 ; [183 ALR 1](#); [\[2001\] FCA 1329](#); [BC200105576](#) (rights of asylum seekers aboard the Tampa, especially with respect to arbitrary detention and expulsion); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249 ; [71 ALD 335](#); [\[2002\] FCAFC 390](#); [BC200207378](#) (power to detain under (CTH) *Migration Act 1958* s 196); *Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Applicants S134/2002* (2003) 211 CLR 441 ; [195 ALR 1](#); [\[2003\] HCA 1](#); [BC200300102](#) (interpretation of the 'privative clause' in the (CTH) *Migration Act 1958*); *Odiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 ; [69 ALD 312](#); [\[2002\] FCAFC 194](#); [BC200203335](#) (interpretation of law concerning guardianship of unaccompanied children consistent with Convention on the Rights of the Child arts 3, 12, 20, 22 and 37(d)); *Graincorp Operations Ltd v Markham* (2003) EOC ¶93-250 ; (2002) 120 IR 253 (sex-based insults and sexual harassment); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) (access to IVF treatment consistent with prohibition on discrimination on the grounds of sex, marital status or pregnancy); *AMWU v Gunn & Taylor* (2002) EOC ¶93-22 (pay equity for casual employees); *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 ; [30 Fam LR 1](#); (2003) EOC ¶93-265; [\[2003\] FamCA 94](#) (right of transgender marriage consistent with guarantees of equality before the law and non-discrimination in the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 2, 26, and the right not to be subject to arbitrary or unlawful interference with a person's privacy and family in ibid art 17(1)); several cases concerning arbitrary detention and detention of children under the (CTH) *Migration Act 1958*; *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [\[2004\] HCA 49](#); [BC200406534](#); *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [79 ALD 233](#); [\[2004\] HCA 37](#); [BC200404861](#); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 ; [208 ALR 201](#); [\[2004\] HCA 38](#); [BC200404862](#); *Behrooz v Secretary, Dept of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ; [208 ALR 271](#); [\[2004\] HCA 36](#); [BC200404860](#); *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; [81 ALD 66](#); [\[2004\] FCAFC 197](#); [BC200404916](#) (indirect discrimination in education); *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) 180 FLR 89 ; [31 Fam LR 503](#); (2004) FLC ¶93-175; [\[2004\] FAMCA 297](#) (consent to medical treatment on behalf of a child consistent with (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 12); *Baird v Queensland* (2006) 156 FCR 451 ; [236 ALR 272](#); [\[2006\] FCAFC 162](#); [BC200609326](#); *Hurst v Queensland* (2006) 151 FCR 562 ; [235 ALR 53](#); [\[2006\] FCAFC 100](#); [BC200605714](#); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#); *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#); *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [\[2008\] HCA 39](#); [BC200807527](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* ([2010](#)) [265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#); *Morton v Queensland Police Service* ([2010](#)) [271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 ; [292 ALR 243](#); [\[2012\] HCA 46](#); [BC201207588](#) (the granting of a protection visa after ASIO had assessed an asylum seeker as a direct or indirect threat to Australia); *Wilson v Francis (Minister for Corrective Services for Western Australia)* [\[2013\] WASC 157](#) ; [BC201302428](#) (whether certain prison units were suitable for the holding of juvenile offenders); *Bateman v Kavan* (2014) 296 FLR 234 ; [52 Fam LR 648](#); [\[2014\] FCCA 2521](#); [BC201411224](#) (whether a sperm donor not in a de facto or marriage relationship with the birth mother is a 'parent' of a child for the purposes of child support); *JWVH v National Disability Insurance Agency* [\[2022\] AATA 82](#) ; [BC202280067](#) (whether Tribunal required to invite

Commission to intervene); *Re Imogen* [2020] FamCA 393 ; [BC202050499](#) (leave granted to intervene in family law proceedings regarding medical procedures, where human rights issues raised).

[80-102] Amicus curiae role

The paragraph below is current to **19 February 2023**

A special-purpose Commissioner has the function of assisting the Australian Human Rights Commission, the Federal Court of Australia (the 'Federal Court') or Federal Circuit Court as amicus curiae in discrimination matters.¹ The amicus curiae function applies only in those matters in which a complaint alleging unlawful race, sex or disability discrimination has been terminated by the President of the Commission² and where the Federal Court or Federal Magistrates Service is subsequently hearing the application.³ The (CTH) [Australian Human Rights Commission Act 1986](#) provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner, Race Discrimination Commissioner, Sex Discrimination Commissioner, Age Discrimination Commissioner and National Children's Commissioner (each a special-purpose Commissioner) have the function of assisting the Federal Court or Federal Circuit Court as amicus curiae in proceedings in which such special-purpose Commissioner thinks that the orders sought may significantly affect the human rights of non-parties, or have significant implications for the administration of the relevant Act or Acts, or where the circumstances are such that it would be in the public interest to assist the courts.⁴

The function may only be exercised by leave of the Federal Court.⁵ The Commission has developed publicly available guidelines to assist in the determination of appropriate cases in which to seek leave to appear as amicus curiae for the exercise of the amicus curiae function.⁶

Notes

- 1** (CTH) [Australian Human Rights Commission Act 1986](#) s 46PV.
- 2** Ibid ss 46PH, 46PV.
- 3** Ibid Pt IIB Div 2.
- 4** Ibid s 46PV.
- 5** Ibid s 46PV(2).
- 6** The 2009 Commission Guidelines for the Exercise of the Amicus Curiae Function under the (CTH) [Australian Human Rights Commission Act 1986](#) (the 'Guidelines') give the following examples of situations in which the criteria in ibid ss 46PV, 46PH would be met where a case:

- (1) involves a new area of the law;
- (2) would clarify a disputed interpretation of the law;
- (3) has significant ramifications beyond the parties to the proceedings; or
- (4) may affect the human rights of a significant number of people.

The Guidelines also outline additional factors for the Commissioner to consider when deciding whether to seek leave to intervene. The other Commissioners (apart from the President, due to complaint handling procedures) may also comment upon the proposal of a special-purpose Commissioner to appear as amicus curiae; and more than one Commissioner may appear. The guidelines are available at <http://www.humanrights.gov.au>.

[80-105] Reports

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') has a broad discretion to report to the Minister on any matter arising in the course of the performance of its functions,¹ and must report to the Minister on certain matters if requested by the Minister.² The Commission is under obligation to report, and to include recommendations in the report, in the following circumstances:

- (1) where the Commission is of the opinion that an act or practice is inconsistent with or contrary to any human right or impairs equality of opportunity and that it is not appropriate to endeavour to effect a settlement, or the Commission has endeavoured without success to effect such a settlement;³
- (2) where, after an examination, it finds an enactment, or a proposed enactment, is or would be inconsistent with, or contrary to, any human right or impairs equality of opportunity;⁴
- (3) where, on its own initiative or when requested by the Minister, it finds that laws should be made or action taken by the Commonwealth on matters relating to human rights or equality of opportunity, including in order to comply with relevant or international human rights instruments;⁵ and
- (4) as soon as practicable after the conclusion of each financial year, concerning its operations during the year that ended on that 30 June under relevant enactments.⁶

Every report made to the Minister must be tabled in each House of Parliament within 15 sitting days of that House after the report is received by the Minister.⁷

Notes

¹ (CTH) [Australian Human Rights Commission Act 1986](#) ss [11\(1\)\(f\)\(iii\)](#), [11\(1\)\(j\)](#), [11\(1\)\(p\)](#), 31(b)(ii), 31(g).

² Ibid ss 11(1)(e), 11(1)(j), 11(1)(k), 11(1)(m), 31(a), 31(e), 31(f), 31(g).

³ Ibid ss 11(1)(f)(ii), 31(b)(ii). Where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right or constitutes discrimination, it must not furnish a report to the Minister until it has given the person who did the act or engaged in the practice a reasonable opportunity to make submissions to the Commission in relation to the act or practice: ibid s 27. Examples of reports by the Human Rights and Equal Opportunity Commission ('HREOC') and Australian Human Rights Commission include: Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr Kenneth Douglas of age discrimination in the Australian Defence Force*, Report No 26 (2004); Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002*, Report No 27 (2004); Human Rights and Equal Opportunity Commission, *Report of an inquiry into complaints by immigration detainees concerning their detention at the Curtin Immigration Reception and Processing Centre*, Report No 28 (2005); Human Rights and Equal Opportunity Commission, *Report of an inquiry into complaints by Ms Susan Campbell that the human rights of her daughter were breached by the Commonwealth of Australia under the Convention on the Rights of the Child*, Report No 29 (2005); Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr William Mayne of age discrimination in the Australian Defence Force*, Report No 30 (2005); *Report of an inquiry into a complaint by Mr Zacharias Manongga Consul for the Northern Territory, Consul of the Republic of Indonesia that the human rights of Indonesian Fishers detained on vessels in Darwin Harbour were breached by the Commonwealth of Australia*, Report No 31 (2005); *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine 'Framed'*, Report No 32 (2006); *Report of an inquiry into a complaint by Ms Tracy Gordon of discrimination in employment on the basis of criminal record*, Report No 33 (2006); *Report of an*

(D) Australian Human Rights Commission

inquiry into a complaint by Mr Daniel Clark against the Minister for Foreign Affairs and Trade of a breach of his human right to freedom of expression, Report No 34 (2006); Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention, Report No 35 (2006); Report of Ms CD's human rights at the Curtin Immigration Reception and Processing Centre, Report No 36 (2006); Report of an inquiry into Dr Julie Copeman's complaint that Derbarl Yerrigan Health Service terminated her employment on the basis of her trade union activity, Report No 37 (2007); Report of an inquiry into a complaint by Mr Frank Ottaviano of discrimination in employment on the basis of criminal record against South Australia Police (State of South Australia), Report No 38 (2007); Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd, Report No 39 (2007); Complaints by immigration detainees against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd, Report No 40 (2008); El Masri v Commonwealth (Dept of Immigration and Citizenship), Report No 41 (2009); Mr KL v State of NSW (Dept of Education) [2010] AusHRC 42, Report No 42 (2010); Mr NK v Commonwealth (Dept of Immigration and Citizenship): Report into arbitrary detention, the right of people in detention to protection of the family and freedom from arbitrary interference with the family, [2011] AusHRC 43 (2011); AG v Commonwealth (Dept of Foreign Affairs and Trade) and Finite Group APAC Pty Ltd: Report into discrimination in employment on ground of criminal record, [2018] AusHRC 123; Ms RC v Commonwealth (Dept of Home Affairs): Report into arbitrary detention, [2022] AusHRC 144; Mr Vakhobov v Commonwealth (Dept of Home Affairs): Report into a safe place of detention, [2022] AusHRC 146. These reports are available online at <http://www.humanrights.gov.au>.

4 Ibid ss 29(1), 31(a), 35(1). See also [80-95].

5 Ibid ss 11(1)(j), 11(1)(k), 31(e), 31(f). See also [80-110]. As to the schedule and relevant instruments see [80-65].

6 Ibid s 45 (note that there is no obligation to include recommendations in the annual report).

7 Ibid s 46.

[80-110] Equal opportunity in employment

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') has special functions relating to equal opportunity in employment or occupation in Australia, designed to give effect to obligations under the Discrimination Employment and Occupation Convention 1958.¹

Notes

- 1 As to discrimination in employment see [\[80-410\]-\[80-480\]](#). As to affirmative action see [\[80-810\]](#). As to the role of the Commission in government programs and employment see [\[80-820\]](#), [\[80-825\]](#). As to the (INT) Discrimination (Employment and Occupation) Convention 1958 (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) (the 'Convention') see FOREIGN RELATIONS [\[215-680\] note 9](#). Under (CTH) [Australian Human Rights Commission Act 1986](#) s [3\(8\)](#) an expression used in both the Act and the Convention will bear the Convention meaning.

[80-115] Employment discrimination inquiries and examinations

The paragraph below is current to **19 February 2023**

The Australian Human Rights Commission (the 'Commission') must conduct an inquiry into an act or practice¹ relating to equality of opportunity or treatment in relation to employment or occupation whenever it receives a complaint, is requested to do so by the Minister, or it appears desirable to do so.²

The Commission must not inquire, or continue to inquire, into an act or practice if it is satisfied that the subject matter of the complaint is dealt with under a prescribed enactment or a prescribed State

enactment.³ This would include complaints covered by Commonwealth, State or Territory anti-discrimination legislation.⁴

Notes

- ¹ As to the definitions of 'act' and a 'practice' see [80-70] note 1.
- ² (CTH) [Australian Human Rights Commission Act 1986](#) s 32(1). See also definition of 'discrimination' in *ibid* s 3 which adopts similar terminology to that used in the (INT) Discrimination (Employment and Occupation) Convention 1958 (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31). Note that in this aspect of its jurisdiction (under (CTH) [Australian Human Rights Commission Act 1986](#) Pt II Div 4), the Commission may receive complaints or carry out its other functions in relation to State as well as to the Commonwealth and Territories: *ibid* s 30. However, the reports are made to the Commonwealth Minister: *ibid* s 35.

As to the power to obtain information and examine witnesses see [80-75]. As to the form or inquiries and examinations see [80-80].
- ³ *Ibid* s 32(2).
- ⁴ See [\[80-410\]-\[80-480\]](#).

[80-120] Aboriginal and Torres Strait Islander Social Justice Commissioner

The paragraph below is current to **19 February 2023**

The Aboriginal and Torres Strait Islander Social Justice Commissioner (the 'Commissioner')¹ is responsible, in relation to the enjoyment and exercise of human rights² by Aboriginal persons and Torres Strait Islanders, for:

- (1) the submission of annual reports to the Minister, including recommendations as to appropriate action;³
- (2) the promotion of discussion and awareness of human rights;⁴
- (3) undertaking research and educational programs;⁵ and
- (4) examination of enactments and proposed enactments.⁶

In the performance of those functions on behalf of the Australian Human Rights Commission (the 'Commission'),⁷ the Commissioner may consult, as appropriate, organisations, agencies or persons, including organisations established by Aboriginal or Torres Strait Islander communities, organisations of indigenous people in other countries and international organisations and agencies.⁸ In the performance of these functions, the Commissioner must, as appropriate, have regard to specified existing international human rights instruments and to any others that are considered relevant.⁹ The Commissioner may also be involved in joint inquiries with other Commissioners or the President of the Commission.¹⁰

The Commissioner has the power to require a government agency¹¹ to provide information or produce a document to the Commissioner.¹² The Commissioner must provide to the Commission any information it requires relating to its operations.¹³

The Commissioner also has a reporting function under the (CTH) [Native Title Act 1993](#) (the 'Act'). The Commissioner is required to:¹⁴

(D) Australian Human Rights Commission

- (1) prepare an annual report to the Attorney-General on the operation of the Act and its effect on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander people; and
- (2) report, when requested by the Attorney-General, on any other matter relating to the rights of Indigenous people under the Act.

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) ss [46A](#) (defining Commissioner and 'human rights'), [46B](#) (creating the office of Commissioner) .
- 2 Human rights are defined for the purposes of ibid Pt IIA (concerning the Aboriginal and Torres Strait Islander Social Justice Commissioner) as meaning:
 - (1) the rights and freedoms recognised by the International Convention on the Elimination of all Forms of Racial Discrimination (the 'Convention'), a copy of which is set out in the Schedule to the (CTH) [Racial Discrimination Act 1975](#);
 - (2) the rights and freedoms recognised by the Convention; and
 - (3) the rights and freedoms declared by the Declarations or recognised or declared by any relevant international instrument: (CTH) [Australian Human Rights Commission Act 1986](#) s [46A](#).
- 3 Ibid s 46C(1)(a) (repealed). The Annual Reports usually provide overviews of important issues. For instance, the 2002 Social Justice Report provided an overview of the experiences of Indigenous women in the criminal justice system, highlighting the 'landscape of risk' that Indigenous women are exposed to which leads to their high level of involvement with the system. The report expressed concern at the rapid growth of the Indigenous female prison population, as well as high rates of recidivism. The 2009 Social Justice Report drew attention to the over-representation of Indigenous people in the criminal justice system, the risk of loss of Indigenous languages in Australia and the homelands movement of the Northern Territory.
- 4 Ibid s 46C(1)(b).
- 5 Ibid s 46C(1)(c).
- 6 Ibid s 46C(1)(d) (the Commissioner must report the results of any examination to the Minister).
- 7 Ibid s 46C(2).
- 8 Ibid s 46C(3).
- 9 Ibid s 46C(4). See [80-65].
- 10 See, for example, the terms of reference that resulted in *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997. The inquiry was conducted by the President and the Social Justice Commissioner.
- 11 A 'government agency' is defined as an authority of the Commonwealth, or of a State or Territory, or a person who performs the functions of, or performs functions within, an authority of the Commonwealth, or of a State or Territory: ibid s 46K(5).
- 12 Ibid s 46K(1), 46K(2).
- 13 Ibid s 46L.
- 14 (CTH) [Native Title Act 1993](#) s [209](#).

End of Document

(A) Introduction — Equality and Discrimination

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > II CIVIL RIGHTS > (1)
EQUALITY AND DISCRIMINATION

II CIVIL RIGHTS

(1) EQUALITY AND DISCRIMINATION

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(A) INTRODUCTION — EQUALITY AND DISCRIMINATION

[80-175] Introduction

The paragraph below is current to **07 March 2018**

Among the most important of the common law protections against discrimination and inequality¹ are those accorded by the courts under the rule of law and the associated doctrine of equality before the law.² In many areas, the operation of the common law has been supplemented by legislation making discrimination,³ harassment,⁴ vilification⁵ and victimisation⁶ unlawful.

Notes

- ¹ As to the protections accorded by the rule of law see [\[80-180\]-\[80-210\]](#).
- ² As to the protections accorded by the principles of equality before the law see [\[80-200\]](#), [\[80-205\]](#).
- ³ As to discrimination generally see [\[80-215\]-\[80-640\]](#).
- ⁴ As to harassment generally see [\[80-645\]-\[80-690\]](#).
- ⁵ As to vilification generally see [\[80-700\]-\[80-710\]](#).

(A) Introduction — Equality and Discrimination

6 As to victimisation generally see [\[80-715\]](#).

End of Document

(B) Rule of Law

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(1\) EQUALITY AND DISCRIMINATION](#)

(B) RULE OF LAW

(I) Supremacy of Regular Law

[80-180] Dicey

The paragraph below is current to **07 March 2018**

Writing in 1885, Albert Venn Dicey identified three main principles in the rule of law.¹ These were:

- (1) 'The absolute supremacy of regular law as opposed to the influence of arbitrary power and [this] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'. Punishment can be justly administered only for breach of the law.²
- (2) 'Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals'.³
- (3) 'The law of the constitution ... [is] not the source but the consequence of the rights of individuals, as defined and enforced by the courts ... [T]he constitution is the result of the ordinary law of the land'.⁴

Notes

- ¹ Dicey A V, *Introduction to the Study of the Law of the Constitution*, 10th ed, Oxford, 1960.
- ² Dicey A V, *Introduction to the Study of the Law of the Constitution*, 10th ed, Oxford, 1960 p 202.
- ³ Dicey A V, *Introduction to the Study of the Law of the Constitution*, 10th ed, Oxford, 1960 pp 202, 203. This principle was referred to in *Leeth v Commonwealth* (1992) 174 CLR 455  at 485, 486; [107 ALR 672](#); 66 ALJR 529; [BC9202676](#) per Deane and Toohey JJ.
- ⁴ Dicey A V, *Introduction to the Study of the Law of the Constitution*, 10th ed, Oxford, 1960 p 203.

[80-185] Supremacy of regular law and the absence of wide discretionary authority

The paragraph below is current to **07 March 2018**

The principle of the supremacy of regular law and the absence of wide discretionary authority means that officers of the state in particular do not have wide discretionary power and may not enter a person's home¹ or seize or search for papers without authority from a court.² Although the prerogative powers continue to be used,³ they are increasingly being subsumed in Australia by the concept of executive power, most notably in the context of the scope of section 61 of the Commonwealth Constitution.⁴ The exercise of executive power is subject to review by the courts⁵ and is therefore brought into conformity with the Diceyan precept of the rule of law.⁶ The doctrine of executive power has not been applied in a strict sense to the exercise by State governments of the prerogative power, and the common law doctrine of prerogative power continues to be applied in those jurisdictions.⁷ However, it has been suggested that the prerogative power may be subject to the requirement that it accord with the principles of natural justice.⁸ The position in the Territories is probably analogous to that of the States.⁹ It has been held that punishment in the shape of fine or imprisonment is exclusively the preserve of the courts.¹⁰

Notes

- 1 *Semayne's Case* (1604) 5 Co Rep 91a ; 77 ER 194 ('an Englishman's home is his castle'). See also *Plenty v Dillon* (1991) 171 CLR 635  at 653; [98 ALR 353](#); 65 ALJR 231; [BC9102635](#) per Gaudron and McHugh JJ.
- 2 *Entick v Carrington* (1765) 2 Wils 275 ; 19 State Tr 1030; 95 ER 807 (search and seizure of papers on warrant of the Secretary of State not lawful).
- 3 *Commonwealth v Colonial Combining, Spinning and Weaving Co Ltd (The Wool Tops Case)* (1922) 31 CLR 421 ; 29 ALR 138; [BC2200008](#) (the minority judgments began the modern trend); *Barton v Commonwealth* (1974) 131 CLR 477 ; [3 ALR 70](#); more recently, see *Oates v A-G (Cth)* (2003) 214 CLR 496 ; [197 ALR 105](#); [2003] HCA 21; [BC200301554](#) (common law prerogative relating to extradition, as it existed pre-federation, forms part of the executive power); *Mokbel v A-G (Cth)* (2007) 162 FCR 278 ; [244 ALR 517](#); [2007] FCA 1536; [BC200708517](#) at [19] (requests for the return of fugitives to Australia remains an exercise of executive power). For a review of the executive power of the Commonwealth see *Pape v Cmr of Taxation* (2009) 238 CLR 1 ; [257 ALR 1](#); [2009] HCA 23; [BC200905831](#) at [114]-[134] per French CJ.
- 4 See note 3 above. See also *Pape v Cmr of Taxation* (2009) 238 CLR 1 ; [257 ALR 1](#); [2009] HCA 23; [BC200905831](#) at [8], [112], [127], [133], [136] per French CJ, at [212], [213], [228] per Gummow, Crennan and Bell JJ, (tax bonus valid as the executive power of the Commonwealth conferred by (CC) Commonwealth Constitution s 61 extends to the power to expend public money for the purpose of avoiding or mitigating the effects of the global financial crisis consistent with the executive power as elaborated in *Davis v Commonwealth* (1988) 166 CLR 79 ; [82 ALR 633](#); 63 ALJR 35; [BC8802637](#) per Mason CJ, Brennan, Deane and Gaudron JJ); *Victoria v Commonwealth (AAP (Australian Assistance Plan) case)* (1975) 134 CLR 338  at 396; [7 ALR 277](#); 50 ALJR 157; [BC7500055](#) (applied *Pape v Cmr of Taxation* (2009) 238 CLR 1 ; [257 ALR 1](#); [2009] HCA 23; [BC200905831](#)); *Ruddock v Vadarlis* (2001) 110 FCR 491  at 540; [183 ALR 1](#); [2001] FCA 1329; [BC200105576](#) per French J ((CC) Commonwealth Constitution s 61 is to be ascertained from within the Constitution itself and is not subject to the common law limitations upon the royal prerogative). For a critique of the latter position, see Selway B, 'All at Sea — Constitutional Assumptions and The Executive Power of the Commonwealth' [2003] Federal Law Review 495.

(B) Rule of Law

- 5 *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274 ; [75 ALR 218](#); 14 ALD 307 (both the existence and exercise of prerogative power are justiciable); *Davis v Commonwealth* (1988) 166 CLR 79 ; [82 ALR 633](#); 63 ALJR 35; [BC8802637](#). There are categories of administrative decisions that are immune from judicial review, such as decisions relating to national defence (such as the declaration of war), or the power to enter a *rolle prosequi*: *Maxwell v R* (1996) 184 CLR 501  at 533, 534; [135 ALR 1](#); 70 ALJR 324; [BC9600609](#) per Gummow, Gaudron JJ. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 142; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#) per Mason CJ.
- 6 See [80-180].
- 7 *Toy v Musgrove* (1888) 14 VLR 349 ; *Joseph v Colonial Treasurer of New South Wales* (1918) 25 CLR 32 ; 24 ALR 185; 18 SR (NSW) 447; [BC1800033](#); *Commissioner of Taxation for the Commonwealth v EO Farley Ltd (in liq)(Farley's case)* (1940) 63 CLR 278 ; [1940] ALR 216; (1940) 14 ALJ 123; [BC4000018](#); *South Australia v O'Shea* (1987) 163 CLR 378 ; [73 ALR 1](#); 61 ALJR 477; [BC8701817](#).
- 8 *Macrae v A-G (NSW)* [\(1987\) 9 NSWLR 268](#)  per Kirby P.
- 9 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 ; [38 ALR 439](#); 56 ALJR 164; [BC8100136](#) (however, the exercise of power specifically at issue was statutory rather than common law). See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* [\(2001\) 192 ALR 625](#)  at [639-642](#); [\[2001\] FCA 1728](#); [BC200107645](#) at [\[65\]-\[81\]](#) per Weinberg J.
- 10 Generally see *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 ; [1970] ALR 449. As to taxation and legislative requirements see *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 ; [82 ALR 385](#); (1988) 63 ALJR 30; [BC8802633](#); *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541 ; [273 ALR 553](#); [\[2010\] FCAFC 124](#); [BC201007065](#).
- As to the implications for freedom of expression of the law relating to contempt of Parliament see [\[80-2020\]](#). As to contempt of Parliament generally see CONSTITUTIONAL LAW [\[90-500\]](#), [\[90-5045\]](#) (federal parliament), [\[90-740\]](#) (New South Wales), [\[90-745\]](#) (Queensland), [\[90-760\]](#) (Victoria).

[80-190] Retrospectivity of statutes

The paragraph below is current to **07 March 2018**

Law may be made retrospective either by an Act of Parliament or by a decision relating to the common law.¹ The principle enunciated in the International Covenant on Civil and Political Rights 1966 is that no person is to be convicted of an offence which did not constitute an offence at the time of the relevant act or omission, or to be subjected to a heavier penalty than was applicable at that time.² In Australia, all Parliaments are able to legislate retrospectively, although retrospective **criminal** laws may be subject to a declaration of incompatibility in the Australian Capital Territory and Victoria.³ However, under the various Acts Interpretation Act provisions, legislation is not to be construed retrospectively where the consequence would be that the rights of a person existing at the date of notification are prejudicially affected or **liabilities** are imposed in relation to actions prior to the notification, and in some jurisdictions retrospective operation of regulations is forbidden.⁴ When a statute is being interpreted, the common law rules of interpretation are that unless the language used in the statute plainly manifests in express terms or by clear implication a contrary intention a statute:⁵

- (1) divesting vested rights is to be construed as prospective;
- (2) which is merely procedural may be construed as retrospective; and

(B) Rule of Law

- (3) which, while procedural in character, affects vested rights adversely, is to be construed as prospective.

However, legislation purporting to eliminate the effect of section 109 of the Commonwealth Constitution by declaring retrospectively that Commonwealth legislation apparently covering the field is not intended to do so was allowed only prospective operation by a majority of the High Court of Australia.⁶ Despite the capacity of the power of the Commonwealth Parliament to legislate retrospectively, the general principle is that 'retrospective legislation which has the effect of subjecting to penalty actions which at the time of their commission were not so subject will often be abhorrent to those who are concerned to maintain a just society governed by the rule of law'.⁷ Nonetheless, the Commonwealth has legislated, notably in the taxation area, to create retrospective **criminal** offences⁸ and the retrospective operation of war crimes legislation has been upheld, albeit by a thin majority.⁹ More recently, anti-terrorism legislation has included provisions for retrospective operation of offences.¹⁰

Notes

- 1 See [80-195]. As to retrospectivity of statutes generally see STATUTES [\[385-495\]-\[385-505\]](#).
- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 15 which reads:
 - (1) 'No one shall be held guilty of any **criminal** offence on account of any act or omission which did not constitute a **criminal** offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the **criminal** offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
 - (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was **criminal** according to the general principles of law recognised by the community of nations.'
- 3 *R v Kidman* (1915) 20 CLR 425 ; 21 ALR 405; [BC1500019](#); *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 ; [101 ALR 545](#); [BC9102602](#).
(ACT) [Human Rights Act 2004](#) ss [25](#) (retrospective **criminal** laws), [32](#) (declaration of incompatibility)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss [27](#) (Retrospective **criminal** laws), [36](#) (declaration of inconsistent interpretation). On the interpretive obligations of (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [32](#) see [\[80-28\]](#).
- 4 (CTH) [Legislation Act 2003](#) s [12\(2\)](#) (a legislative instrument does not apply retrospectively if the result would affect a person's rights to their disadvantage or if a **liability** would be imposed on the person for something before the instrument was registered); (CTH) [Acts Interpretation Act 1901](#) s 46B
(ACT) [Legislation Act 2001](#) ss [75A](#), [75B](#) (Retrospective commencement requires clear indication), 76 (non-prejudicial provision may commence retrospectively). A prejudicial provision is defined to include one that operates by adversely affecting a person's rights, or imposing **liabilities**. See also (ACT) [Human Rights Act 2004](#) s [25](#) (retrospective **criminal** laws)
(NT) [Interpretation Act 1978](#) s [12](#). Regulations are not to take effect retrospectively if they adversely affect rights or obligations: *ibid* s 63(7)
(NSW) [Interpretation Act 1987](#) s 30 (effect of amendment or repeal of Acts and statutory rules). Regulations take effect on day of publication or a later specified date: *ibid* s 39
(QLD) [Criminal Code](#) s 11; (QLD) [Acts Interpretation Act 1954](#) s [20C](#)

(B) Rule of Law

(SA) [Acts Interpretation Act 1915](#) s 16(1)(d)

(TAS) [Acts Interpretation Act 1931](#) s 16(1). Regulations are not to take effect retrospectively if they adversely affect rights or obligations: *ibid* s 47(3)

(VIC) [Interpretation of Legislation Act 1984](#) ss 11(2), 14(2)(e), 14(2)(g); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 27 (retrospective **criminal** laws)

(WA) [Interpretation Act 1984](#) s 23.

As to the retrospective effect of statutes generally see STATUTES [\[385-495\]-\[385-505\]](#); *Statutory Interpretation in Australia* 3rd ed, Pearce and Geddes.

- 5 *Maxwell v Murphy* (1957) 96 CLR 261  at 270; [1957] ALR 231; (1957) 31 ALJ 143; [BC5700130](#) per Dixon J (followed *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228  at 240; [1972] ALR 63 per Gibbs J (since there was opportunity for the action of negligence to be maintained after new legislation was introduced shortening the period of limitation, the rule that merely procedural statutes may apply retrospectively applied and the action was barred); *Sykes v Queensland Gas Co* [\[2009\] QCA 163](#) ; [BC200905210](#) at [\[75\]-\[77\]](#) per Muir and Chesterman JJA and Wilson J); *Lodhi v R* (2006) 199 FLR 303 ; [\[2006\] NSWCCA 121](#); [BC200602710](#) (Commonwealth anti-terrorism legislation did not rebut the common law presumption that Parliament did not intend to affect pending proceedings). For the presumption against retrospective operation see *Chang v Laidley Shire Council* (2007) 234 CLR 1 ; [237 ALR 482](#); [\[2007\] HCA 37](#); [BC200707215](#). As to the strict construction of retrospective legislation see *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595 at 622-624 per Deane, Dawson, Toohey and Gaudron JJ. See also *R v S* [1999] QCA 311 ; [BC9904517](#); *R v Truong* [\[2000\] 1 Qd R 663](#) ; (1999) 105 A Crim R 345; [1999] QCA 021; [BC9900329](#) (both followed *R v Carlton* [\[2010\] 2 Qd R 340](#) ; (2009) 197 A Crim R 220; [\[2009\] QCA 241](#); [BC200907790](#)); *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 ; [253 ALR 133](#); [\[2008\] NSWCCA 252](#); [BC200809818](#) at [\[130\]](#) per Spigelman CJ, Hidden and Latham JJ; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 ; [256 ALR 32](#); [\[2009\] FCA 528](#); [BC200904335](#) (deeming provision to reverse effect of judicial decision not expressed in unambiguous and clear language to cancel a non-citizen's visa) following *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 ; [243 ALR 606](#); [\[2007\] FCAFC 203](#); [BC200711294](#) at [\[105\]-\[113\]](#) per Black CJ, French and Weinberg JJ). In the context of extradition see *O'Connor v Zentai* [\[2011\] FCAFC 102](#) ; [BC201106143](#). See further STATUTES [\[385-500\]](#). As to retrospectivity of statutes which are declaratory or related to matters of procedure see STATUTES [\[385-500\] note 2](#).
- 6 *University of Wollongong v Metwally* (1984) 158 CLR 447 ; [56 ALR 1](#); 59 ALJR 48 (however, note at 240 per Mason J (dissenting)); [BC8400485](#).
- 7 *University of Wollongong v Metwally* (1984) 158 CLR 447  at 472; [56 ALR 1](#); 59 ALJR 48; [BC8400485](#) per Wilson J.
- 8 See, for example, (CTH) Taxation (Unpaid Company Tax) Assessment Act 1982 (repealed) which operated in association with the (CTH) [Crimes \(Taxation Offences\) Act 1980](#) (concerning 'bottom of the harbour' tax evasion offences). See also the anti-hoax offence inserted in the (CTH) **Criminal** Code by the (CTH) [Criminal Code Amendment \(Anti-Hoax and other Measures\) Act 2002 Sch 1](#).
- 9 *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501  at 534-40 per Mason CJ, at 606-14, 629-32 per Deane J; [101 ALR 545](#); [BC9102602](#) (differing views were expressed as to the validity of acts of attainder and retrospective **criminal** legislation); (discussed in the context of control orders in *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[210\]](#) per Hayne J).
- 10 (CTH) **Criminal** Code s 106.3 provides that the amendments made by (CTH) [Anti-Terrorism Act 2005 Sch 1](#) apply to offences committed whether before or after the commencement of that section. In *Lodhi v R* (2006) 199 FLR 303 ; [\[2006\] NSWCCA 121](#); [BC200602710](#) the New South Wales Court of **Criminal** Appeal held that the retrospective amendments do not apply to a **criminal** trial that has already commenced.

[80-195] Retrospectivity of the common law

The paragraph below is current to **07 March 2018**

When a court declares a new rule of common or customary law, or varies an existing rule, the effect is retrospective, declaring what the common or customary law has been from time immemorial.¹ To maintain the rule of law, and the supremacy of the legislature, the High Court of Australia has on occasion refrained from altering the common law.² Alternatively, they may recognise that a development in the common law may require legislation passed before the date of the decision to be read according to earlier stated principles.³

Notes

- 1 Blackstone, *Commentaries on the Laws of England*, Vol 1, pp 67-70. See, however, *R v Joliffe* (1823) 2 B & C 54; 107 ER 303 (time is not necessarily taken to extend to time immemorial).
- 2 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617; 26 ALR 67. The House of Lords, however, has been willing to declare a new principle, or at least a new application of an already recognised principle, namely 'conspiracy to corrupt public morals' when hearing a case involving also charges under statutory provisions: *Shaw v DPP* [1962] AC 220 at 266; [1961] 2 All ER 446; [1961] 2 WLR 897 per Viscount Simonds. Considerable public controversy followed, directed towards the undesirability of declaring new criminal offences retrospectively.
- 3 *Bropho v Western Australia* (1990) 171 CLR 1 at 23; 93 ALR 207; 64 ALJR 374; BC9002906 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ (concerning the strength of the presumption that the Crown is not bound by general words of a Statute).

(II) Equality before the Law

[80-200] General

The paragraph below is current to **07 March 2018**

The second proposition expounded by Albert Venn Dicey entails that in the eyes of the law no distinction is to be made between persons on the basis of status.¹ The proposition is substantially reflected in Australian law,² although the High Court of Australia has continually reaffirmed that no guarantee of equality can be read into Commonwealth Constitution.³ Furthermore, constitutional heads of power that refer to aliens, migrants and races have been read to allow for discriminatory legislation.⁴ Although there are obstacles to standing for individuals representing groups, standing has been conferred (by statute) or recognised (under common law) in a number of areas including in relation to political issues,⁵ Aboriginal sites⁶ and conservation.⁷

The concept requires that all people in a defined situation be treated the same in the administration of any particular law.⁸ However, a uniform Commonwealth law, that produces different consequences in different States for prisoners convicted of Commonwealth offences, has been held to be valid.⁹ An alien may in some circumstances be treated in the same way as a citizen in regard to the right to natural justice,¹⁰ and in some cases may obtain a writ of habeas corpus,¹¹ but in other cases may not have the same rights as a citizen.¹² However, a naturalised person of enemy origin was held to have been lawfully excluded from owning an irrigation farm lease.¹³ Women have not in many areas always been accorded rights under the common law,¹⁴ as in admission to legal practice,¹⁵ appointment as a notary¹⁶ and voting.¹⁷ A criminal law provision has discriminated against a homosexual male.¹⁸ However, if persons are not in fact equal, the criminal law allows some recognition of difference through judicial discretion in the sentencing process.¹⁹

(B) Rule of Law

In selected areas of civil law, such as employment and the provision of goods and services, there is now legislation forbidding discrimination on certain grounds that frequently give rise to substantive inequality such as race and sex.²⁰ There is also some limitation in relation to applications for judicial review by reference to a 'person aggrieved'.²¹

There is ongoing debate about whether a consideration of cultural, ethnic and customary law during sentencing promotes or undermines 'equality before the law'.²² Federal amendments to the (CTH) [Crimes Act 1914](#) which removed cultural considerations from the sentencing process in the name of equality were criticised for undermining these same values.²³

Notes

- 1 See [80-180].
- 2 The basic principle was enunciated in *Campbell v Hall* (1774) 1 Cowp 204 ; [1558-1774] All ER Rep 252 at 254; (1774) 98 ER 1045 per Lord Mansfield. The most comprehensive reference is in *Leeth v Commonwealth* (1992) 174 CLR 455  at 483-90; [107 ALR 672](#); 66 ALJR 529; [BC9202676](#) per Deane and Toohey JJ. See, for example, *Plenty v Dillon* (1991) 171 CLR 635  at 639 per Mason CJ, Brennan and Toohey JJ, at 648 per Gaudron and McHugh JJ; [98 ALR 353](#); 65 ALJR 231; [BC9102635](#) (no action without law); *McInnis v R* (1979) 143 CLR 575  at 587, 588; [27 ALR 449](#); 54 ALJR 122 per Murphy J (equal protection of the law); *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#); *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1  at 193 per Dixon J (rule of law), at 209 per McTiernan J (deprivation of rights); [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  at 57; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#) per Gaudron J; *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [2007] HCA 33; [BC200706044](#) at [384] per Kirby J (courts must treat with essential equality all parties who come before them); *Bugmy v R* (2013) 249 CLR 571 ; [302 ALR 192](#); [2013] HCA 37; [BC201313361](#) (there is no reason to sentence an aboriginal offender with any differing method than a non-aboriginal offender, nor to take into account the high rate of indigenous incarceration. An individual's disadvantaged background should be taken into account the same way regardless of race).
- 3 *Leeth v Commonwealth* (1992) 174 CLR 455 ; [107 ALR 672](#); 66 ALJR 529; [BC9202676](#); *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#). Similarly, there is no implied principle of 'one vote, one value' that would ensure all electors have an equal vote. See *McGinty v Western Australia* (1996) 186 CLR 140 ; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#).
- 4 See *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [2004] HCA 37; [BC200404861](#) (indefinite administrative detention of aliens for whom there is no constitutional immunity that a citizen might enjoy); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ; [152 ALR 540](#); 72 ALJR 722; [BC9800961](#) (the races power can be used to pass legislation that is detrimental to a particular race).
- 5 As to arrangements under the (CTH) [Representation Act 1983](#) see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ; [7 ALR 593](#); [BC7500067](#). Compare *Haque v Cmr of Corrective Services (NSW)* (2008) 216 FLR 271 ; [2008] NSWSC 253; [BC200802021](#) at [38] per Fullerton J (even with the wider gateway to standing in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ; 45 LGRA 245; [28 ALR 257](#) at 263; [BC8000064](#) per Gaudron, Gummow and Kirby JJ insufficient interest for prisoner wishing to distribute newsletter to qualify for standing).
- 6 See *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 ; [36 ALR 425](#); 55 ALJR 631; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 ; [54 ALD 609](#); 98 LGRA 410; [BC9803589](#).
- 7 See *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ; 45 LGRA 245; [28 ALR 257](#); [BC8000064](#); *Byron Environmental Centre Inc v Arakwal People* (1997) 78 FCR 1 ; 96 LGRA 1; [148 ALR 46](#);

(B) Rule of Law

- [BC9703709](#) at [\[7\]](#) per Black CJ (interests enabling joinder as a party to a native title application identified); *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 ; [\[2010\] VSC 335](#); [BC201005649](#). For examples of expanded standing being granted by environmental statutes, see (CTH) [Environment Protection and Biodiversity Conservation Act 1999](#) ss 475 (injunctions and meaning of 'interested person'), 487 (extended standing for judicial review); (NSW) [Environmental Planning and Assessment Act 1979](#) s 123 (any person may bring proceedings whether or not any right of that person has been or may be infringed). The constitutionality of broad standing provisions in (CTH) Trade Practices Act 1974 ss 80, 163A (replaced by the (CTH) [Competition and Consumer Act 2010](#) as of 1 January 2011) were upheld in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 ; [169 ALR 616](#); [\[2000\] HCA 11](#); [BC200000766](#).
- 8 *Lowe v R* (1984) 154 CLR 606 ; [54 ALR 193](#); 12 A Crim R 408; *Green v R* (2011) 244 CLR 462 ; [283 ALR 1](#); [\[2011\] HCA 49](#); [BC201109382](#) (disparity in sentences). See also *Postiglione v R* (1997) 189 CLR 295 ; [\(1997\) 145 ALR 408](#); (1997) 71 ALJR 875; [1997] 15 Leg Rep C1; (1997) 94 A Crim R 397; [1997] HCA 26; [BC9703177](#) (interaction of the parity and totality principles).
- 9 *Leeth v Commonwealth* (1992) 174 CLR 455 ; [107 ALR 672](#); 66 ALJR 529; [BC9202676](#). See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103, AGPS, Canberra, 2006, which includes a detailed analysis of over 25,000 fraud and drug cases handled by the Commonwealth Director of Public Prosecutions between 2000 and 2004. The report shows a significant disparity in both the type and the severity of outcomes for federal offenders across state and territory lines.
- 10 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396  at 452, 453; [14 ALR 1](#) per Jacobs J; *Kioa v West* (1985) 159 CLR 550 ; [62 ALR 321](#); 60 ALJR 113; [BC8501054](#). Rights of procedural fairness that apply to alien and citizen alike have been recognised as having constitutional status see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#). See also *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 ; 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ; [267 ALR 204](#); [\[2010\] HCA 23](#); [BC201004220](#) at [\[56\]-\[59\]](#) per French CJ, Gummow, Hayne, Crennan and Kiefel JJ (natural justice hearing rule with respect to offshore visa applicants applied and Minister was obliged to provide an opportunity to answer adverse material); *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ; 81 ALJR 1190; [\[2007\] HCA 26](#); [BC200704430](#).
- 11 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 ; [1935] ALR 125; (1934) 8 ALJ 308; [BC3500060](#).
- 12 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  at 29-32 per Brennan, Deane and Dawson JJ, at 57 per Gaudron J, at 65 per McHugh J; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#) (aliens vulnerable to imprisonment without judicial process); *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#).
- 13 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 .
- 14 However, in relation to licensing a woman as a horse-trainer see *Nagle v Feilden* [\[1966\] 2 QB 633](#)  ; [\[1966\] 1 All ER 689](#), CA.
- 15 *Re Haynes* (1904) 6 WALR 209 .
- 16 *Re Kitson* (1920) SALR 230.
- 17 *Ex parte Ogden* (1893) 9 WN (NSW) 116 .
- 18 See, however, *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994) in which the Human Rights Committee found a law of Tasmania to have constituted an unlawful and arbitrary interference with the complainant's privacy and which resulted in the (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#). For a note of subsequent action to repeal the offending law see [\[80-1265\]](#).
- 19 See **CRIMINAL LAW** [\[130-17000\]-\[130-17315\]](#). There are echoes of the need to recognise substantive equality in *Mabo v Queensland (No 2)* (1992) 175 CLR 1  at 54-63 per Brennan J, at 104-10, 120 per Deane and Gaudron JJ, at 199-205, 215, 216 per Toohey J; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#).
- 20 See [\[80-215\]-\[80-805\]](#).
- 21 (CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#) s 3(4).

- 22** See, for example, *Munda v Western Australia* (2013) 249 CLR 600 ; [302 ALR 207](#); [\[2013\] HCA 38](#); [BC201313362](#) at [\[61\]-\[63\]](#) per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ.
- 23** See submission by the Human Rights and Equal Opportunity Commission to the Inquiry into the (CTH) Crimes Amendment (Bail and Sentencing) Bill 2006 available at <http://www.humanrights.gov.au>. Consideration of cultural practices or customary law as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the *criminal* behaviour to which the offence relates is prohibited in relation to sentencing Federal offences: see (CTH) [Crimes Act 1914](#) s [16A\(2A\)](#).

[80-205] Crown and its representatives subject to ordinary law

The paragraph below is current to **07 March 2018**

The second proposition expounded by Albert Venn Dicey stated that no exclusive body of administrative law exists that has the effect of separating the Crown and its representatives from the ordinary law and its administration by the ordinary courts.¹ In Australia, the *liability* of the Crown and its agents in tort and contract has been achieved by legislation.² Furthermore, the courts have since 1990 weakened the doctrine of the 'shield of the Crown' that states that legislation does not bind the Crown unless the Crown is expressly named therein or there is a necessary implication that the Crown was intended to be bound.³ In addition, under the 'new administrative law', decisions made pursuant to statutory powers conferred by Commonwealth legislation may be subject to:⁴

- (1) special judicial review through the (CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#);
- (2) review on the merits by tribunals, notably under the (CTH) [Administrative Appeals Tribunal Act 1975](#); and
- (3) public scrutiny through the (CTH) [Freedom of Information Act 1982](#) (although significant limitations exist).

In recent years, the High Court of Australia has recognised the existence of a constitutional right to the judicial review of decisions by Commonwealth officers⁵ which cannot be significantly limited by the operation of privative (or ouster) clauses, even for aliens.⁶

In the Australian Capital Territory, the Northern Territory, New South Wales, Queensland, Victoria and Western Australia, there are general administrative appeals tribunals⁷ and in South Australia, there is an Administrative and Disciplinary Division of the District Court with merits review jurisdiction conferred by other legislation as well as a Civil and Administrative Tribunal,⁸ although specialist review tribunals exist in all jurisdictions.⁹ Only the Australian Capital Territory and Queensland have enacted legislation equivalent to the (CTH) Administrative Decisions (Judicial Review) Act 1977.¹⁰

Anti-terrorism and security legislation and litigation have recently raised questions about reaching an appropriate reconciliation between the need for open justice with the need for protecting classified and security sensitive information.¹¹

1 See [80-180].

(B) Rule of Law

- 2 (CTH) [Judiciary Act 1903](#) Pt IX ss 56, 64
(ACT) [Court Procedures Act 2004](#) ss 21-31
(NSW) Crown Proceedings Act 1988
(QLD) [Crown Proceedings Act 1980](#) Pt 2
(SA) [Crown Proceedings Act 1992](#)
(TAS) [Supreme Court Civil Procedure Act 1932](#) Pt VI
(VIC) [Crown Proceedings Act 1958](#) Pt II
(WA) [Crown Suits Act 1947](#).
- 3 *Bropho v Western Australia* (1990) 171 CLR 1 ; [93 ALR 207](#); 64 ALJR 374; [BC9002906](#). See also *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 ; [210 ALR 312](#); [\[2004\] HCA 48](#); [BC200406480](#); *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [\[2002\] HCA 28](#); [BC200204355](#); *Commonwealth v Western Australia* (1999) 196 CLR 392 ; [160 ALR 638](#); [\[1999\] HCA 5](#); [BC9900217](#); *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 ; [\(2007\) 237 ALR 512](#); [\[2007\] HCA 38](#); [BC200707216](#) at [\[36\]-\[43\]](#), [\[48\]](#), [\[49\]](#), [\[63\]](#) per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ (applying *Bropho v Western Australia* (1990) 171 CLR 1 ; [93 ALR 207](#); 64 ALJR 374; [BC9002906](#) on crown immunity; States not in the course of carrying on a business).
- 4 Generally see ADMINISTRATIVE LAW [\[10-1\]](#).
- 5 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) (denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under (CC) Commonwealth Constitution s 75(v)).
- 6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#); *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 ; [234 ALR 114](#); [\[2007\] HCA 14](#); [BC200702595](#).
- 7 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#)
(NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#)
(NSW) [Civil and Administrative Tribunal Act 2013](#)
(QLD) [Queensland Civil and Administrative Tribunal Act 2009](#)
(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#)
(WA) [State Administrative Tribunal Act 2004](#).
- There are no equivalent provisions in the other jurisdictions.
- 8 (SA) [District Court Act 1991](#) ss 7, 8, 52. The court, in exercising this jurisdiction, is not bound by the rules of evidence, but must act according to 'equity, good conscience and the substantial merits of the case': *ibid* s 42E(2).
(SA) [South Australian Civil and Administrative Tribunal Act 2013](#).
See also ADMINISTRATIVE LAW [\[10-1310\]-\[10-1435\]](#) (freedom of information), [\[10-7150\]-\[10-7350\]](#) (Victorian Administrative Appeals Tribunal).
- 9 See ADMINISTRATIVE LAW [\[10-4000\]-\[10-9240\]](#).
- 10 (ACT) [Administrative Decisions \(Judicial Review\) Act 1989](#)
(QLD) [Judicial Review Act 1991](#).
- There are no equivalent provisions in the other jurisdictions.
- In Victoria, reasons for tribunal decisions may be obtained under the (VIC) [Administrative Law Act 1978](#) s 8. See also ADMINISTRATIVE LAW [\[10-284\]-\[10-288\]](#) (access to information), [\[10-11000\]-\[10-14355\]](#) (judicial review).
- 11 See, for example, the issues raised in *R v Lappas and Dowling* [\[2001\] ACTSC 115](#) ; [BC200107339](#) where the Crown made a claim for public interest immunity under (CTH) [Evidence Act 1995](#) s 130 in relation to two documents

sourced from a foreign power. The trial judge upheld the claim for immunity, but ordered that the charge be stayed on fair trial grounds. For analysis of classified and security information, see Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98, AGPS, Canberra, 2004.

(III) Source in the Rights of Individuals

[80-210] Individual rights

The paragraph below is current to **07 March 2018**

Individual rights in particular cases are defined and enforced by the courts. The third proposition expounded by Albert Venn Dicey is that in the British system of law, where there is no Bill of Rights, the rights of individuals are determined primarily by the courts in the administration of justice.¹ In general, statutes are construed so that they do not encroach upon fundamental rights and freedoms at common law.² The courts work on the principle that a person is free to do as he or she wishes, unless there is a law that imposes a prohibition or requires otherwise.³ This has led to decisions conferring 'rights' by the negative process of declaring actions that would have the effect of preventing others from engaging in lawful activities to be beyond power or unlawful.⁴ In some cases, this has resulted in decisions that are inconsistent with international human rights norms. For instance, it has been held that trade unions may not organise to withdraw labour because this would be a restriction of the right of the employer to earn his or her living in the way he or she wishes.⁵ It has also been held that contracts restraining the right to freedom of trade were illegal because they infringed the right to enter into contractual obligations.⁶ The fact that persons may not act in a negligent manner that would be likely to injure others gives a person a 'right' to be protected from negligent actions.⁷ Some of these 'negative' rights have led to significant developments in administrative law. Thus an administrator may not determine a matter without giving a hearing to a person whose interests would be affected and, in this sense, such persons have a 'right' to natural justice.⁸ Without constitutional protection, such rights are inherently fragile. For instance, while rights over land may inhere in the members of particular groups of Australia's indigenous people, they may be extinguished by inconsistent executive action.⁹

Analogous reasoning which has the effect of protecting the rights of individuals has been applied to the exercise of federal legislative power through the doctrine of implied Constitutional rights.¹⁰ However, the freedom is an immunity consequent on limitation of legislative power rather than a personal right.¹¹ Depending on statutory construction, complaints may survive the death of the complainant.¹²

Notes

- 1 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 28, 29; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#) per Mason CJ. As to Dicey's propositions see [80-180].
- 2 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 ; 165 LGERA 68; [\[2009\] HCA 12](#); [BC200902054](#) at [\[43\]](#) per French CJ (statutes are construed so that they do not encroach upon fundamental rights and freedoms at common law); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 83 ALJR 327  at 338; [252 ALR 471](#) at [481](#); [\[2009\] HCA 4](#); [BC200707447](#) at [\[47\]](#) per French CJ. See also *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 ; [249 ALR 602](#); [\[2008\] HCA 48](#); [BC200808584](#) at [\[13\]](#) per Kirby J.
- 3 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 ; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#). See also *R v Goreng-Goreng* (2008) 220 FLR 21 ; [\[2008\] ACTSC 74](#); [BC200807357](#) at [\[39\]-\[41\]](#) per Refshauge J (invalidity for uncertainty, applying *de Freitas v Permanent Secretary of Ministry of*

(B) Rule of Law

Agriculture, Fisheries, Lands and Housings [\[1999\] 1 AC 69](#)   , HL; citing *G v Federal Republic of Germany* App No 13079/87, 60 D & R 256 at 261 per European Commission ('legal provisions which interfere with individual rights must be ... formulated with sufficient precision to enable the citizen to regulate his conduct').

- 4 *Quinn v Leatham* [\[1901\] AC 495](#)  at [525](#) per Lord Brampton, at 534 per Lord Lindley; [\[1900-3\] All ER Rep 1](#).
- 5 *Quinn v Leatham* [\[1901\] AC 495](#)  at [507](#) per Earl of Halsbury, at 515 per Lord Shand; [\[1900-3\] All ER Rep 1](#).
- 6 *Quinn v Leatham* [\[1901\] AC 495](#)  at [510](#); [\[1900-3\] All ER Rep 1](#) per Lord MacNaghten.
- 7 *Rylands v Fletcher* [\(1868\) LR 3 HL 330](#) ; [\[1861-73\] All ER Rep 1](#). See also NEGLIGENCE [\[300-1\]](#).
- 8 *Kioa v West* (1985) 159 CLR 550 ; [62 ALR 321](#); 60 ALJR 113; [BC8501054](#); *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 ; [143 ER 414](#). For procedural fairness see ADMINISTRATIVE LAW [\[10-12630\]-\[10-12990\]](#).
- 9 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#); *Wik Peoples v Queensland* (1996) 187 CLR 1 ; [141 ALR 129](#); [BC9606282](#). The fragility of native title has been confirmed by the tests for recognition and extinguishment established in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ; [194 ALR 538](#); [2002] HCA 58; [BC200207517](#); *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [2002] HCA 28; [BC200204355](#). On the criteria for extinguishment see *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [\(2010\) 268 ALR 149](#) ; [\[2010\] FCA 498](#); [BC201003450](#) at [\[74\]-\[86\]](#) per Bennett J (reviewing *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [2002] HCA 28; [BC200204355](#)).
- 10 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 51, 52; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#) per Brennan J.
- 11 See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 150; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#) per Brennan J.
- 12 *Stephenson as Executrix of the Estate of Dibble v Human Rights & Equal Opportunity Commission* (1996) 68 FCR 290 ; [\(1996\) 139 ALR 678](#); (1996) EOC ¶92-833; [BC9604126](#).

End of Document

(C) Discrimination

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(1\) EQUALITY AND DISCRIMINATION](#)

(C) DISCRIMINATION

(I) Introduction

[80-215] Discrimination law

The paragraph below is current to **07 March 2018**

In some respects the common law has protected individuals from discriminatory application of the law, largely through the principles of equality associated with the rule of law. This has been achieved by applying the pre-existing principles of the common law to the particular cases coming before the courts in an attempt to achieve, where a disadvantage or inequality is present, a just outcome according to the law. Examples of such cases are:

- (1) where an indigent person was accused of a serious offence, a refusal to conduct a trial without counsel;¹
- (2) where authorities were seeking sterilisation of an intellectually disabled young woman, a prohibition unless a court gives approval based only on the best interests of the child;²
- (3) enabling a minor to give informed consent to medical treatment before reaching the age of majority when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed;³
- (4) ensuring that detained aliens were not deprived of the means of challenging the lawfulness of their detention;⁴
- (5) ensuring that aliens may not be detained by a public official or private person whether or not the alien's entry was lawful or unlawful;⁵
- (6) ruling that there is no presumption that a married woman gives consent to sexual intercourse with her husband whatever the circumstances;⁶
- (7) preventing police officers from entering a person's property even where the welfare of a child may have been involved;⁷
- (8) preventing proscription simply because of membership of a particular association;⁸

(C) Discrimination

- (9) recognising a form of native title, where that title has not been extinguished;⁹ and
- (10) ruling that the presumption of advancement extends to dealings by mothers in favour of children and is not limited to dealings by fathers in favour of children.¹⁰

Judgments in these cases rarely made specific reference to the rule of law or to equality, but those principles appear to provide an essential part of the reasoning leading to the particular decisions in each case.¹¹

All Australian legislatures have now supplemented the development of the common law by enacting laws making certain kinds of discrimination unlawful.¹² Care must be taken to ensure the relevant discrimination occurred after the relevant legislation commenced operation.¹³ The legislation singles out particular grounds¹⁴ or attributes¹⁵ which it is considered should not be brought into operation when an action is being taken or an issue is being decided. The legislation makes it unlawful to use those grounds or attributes in the course of activities in certain areas¹⁶ in ways which cause disadvantage to a person on the basis of the specified ground or attribute.¹⁷ The legislation specifies exceptions to its provisions, some of general application across the whole of the legislation,¹⁸ and some particular to a specified ground or area.¹⁹

All the legislation is complaint-based, meaning that an aggrieved person complains to an administrative agency which is required to provide a process of inquiry and conciliation.²⁰ This process commonly concludes the matter but where there is continuing disagreement a tribunal (often established under the discrimination legislation itself) will hear and determine the issues.²¹ All the legislation provides for ultimate recourse to the courts, and for certain consequences to apply.²²

In addition, much of the legislation provides for other important and related matters, such as the prohibition of racial²³ and sexual harassment²⁴ and the provision of remedies against racial vilification or denigration²⁵ and homosexual vilification.²⁶

Notes

- 1 *Dietrich v R* (1992) 177 CLR 292 ; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). See further CRIMINAL LAW [\[130-13170\]](#).
- 2 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300.
- 3 *Gillick v West Norfolk & Wisbech Area Health Authority* [\[1986\] AC 112](#)  ; [\[1985\] 3 All ER 402](#), incorporated into the Australian common law by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300.
- 4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#).
- 5 *Ex parte Lo Pak* (1888) 9 LR(NSWR) L 221 at 243, 244; *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36  at 79, 80; (1926) 32 ALR 46; [BC2500003](#) per Isaacs J; *Kioa v West* (1985) 159 CLR 550  at 631; [62 ALR 321](#) at [382](#) per Deane J; 60 ALJR 113; [BC8501054](#); *Re Bolton*; *Ex parte Beane* (1987) 162 CLR 514  at 528; [70 ALR 225](#); [BC8701765](#) per Deane J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  at 19, 63; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#).
- 6 *R v L* (1991) 174 CLR 379 ; [103 ALR 577](#); 66 ALJR 36; [BC9102611](#).

(C) Discrimination

- 7 *Plenty v Dillon* (1991) 171 CLR 635 ; [98 ALR 353](#); 65 ALJR 231; [BC9102635](#); *Coco v R* (1994) 179 CLR 427 ; [120 ALR 415](#); 68 ALJR 401; [BC9404609](#). Contrast *Halliday v Nevill* (1984) 155 CLR 1 ; [57 ALR 331](#); 59 ALJR 124; [BC8400463](#) (limitation on the prevention of police entry; Brennan J dissenting).
- 8 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 ; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#) (declaration that the relevant Act was ultra vires with the defence power).
- 9 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#); *Wik Peoples v Queensland* (1996) 187 CLR 1 ; [141 ALR 129](#); [BC9606282](#).
- 10 *Nelson v Nelson* (1995) 184 CLR 538 ; [132 ALR 133](#); [1995] HCA 25; BC9501517. It is to be noted that while the presumption of advancement applies in respect of dealings of husbands in favour of wives, it has not been held to arise in respect of dealings of wives in favour of their husbands: *Moore v Whyte (No 2)* (1922) 22 SR (NSW) 570 ; (1922) 39 WN (NSW) 194; *March v March* (1945) 62 WN (NSW) 111 .
- 11 It is to be noted also that, unlike the United States, Australia has 'a unified common law which applies in each State but is not the creature of each State': *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814 at 845; [BC9604181](#) per McHugh J; *Lipohar v R* (1999) 200 CLR 485  at 505-508; [168 ALR 8](#); [1999] HCA 65; [BC9908013](#) at [43]-[51] per Gaudron, Gummow, and Hayne JJ. See also *Thompson v R* (1989) 169 CLR 1  at 32-7; [86 ALR 1](#) per Deane J; *Breavington v Godleman* (1988) 169 CLR 41  at 121-4; [80 ALR 362](#); 62 ALJR 447; [BC8802620](#) per Deane J; *Commonwealth of Australia v Mewett* (1997) 191 CLR 471  at 526; [146 ALR 299](#); [BC9703255](#) at [40] per Gaudron J.
- 12 (CTH) [Racial Discrimination Act 1975](#); (CTH) [Sex Discrimination Act 1984](#); (CTH) [Disability Discrimination Act 1992](#); (CTH) [Australian Human Rights Commission Act 1986](#); (CTH) [Age Discrimination Act 2004](#). See also (CTH) [Fair Work Act 2009](#) ss [153](#), [195](#), [340](#), [772](#), Pt 2.4, 7B; (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) ss [21](#), [22](#). See further *Carr v Blade Repairs Australia Pty Ltd (No 2)* [2010] FCA 688 ; [BC201004629](#) in the context of (CTH) [Workplace Relations Act 1996](#) s 659 (now (CTH) [Fair Work Act 2009](#)) (age discrimination); *Sterling Commerce (Aust) Pty Ltd v Iliff* (2008) EOC ¶¶93-496 ; (2008) 173 IR 378; [2008] FCA 702; [BC200803650](#) (refusal to reinstate after maternity leave in breach of (CTH) [Workplace Relations Act 1996](#) Sch 1A (now (CTH) [Fair Work Act 2009](#))); *Claveria v Pilkington Australia Ltd* [2007] FCA 1692 ; [BC200709540](#); *CSR Viridian Ltd (formerly Pilkington Australia Ltd) v Claveria* (2008) 171 FCR 554 ; 177 IR 147; [2008] FCAFC 177; [BC200809544](#) (unlawful termination of employment under (CTH) [Workplace Relations Act 1996](#) s 659(2)(e) (now (CTH) [Fair Work Act 2009](#) s [772\(1\)\(e\)](#)) for reasons including complaint to trade union about work treatment). As to whether (CTH) [Workplace Relations Act 1996](#) s 170HB (now (CTH) [Fair Work Act 2009](#)) precludes proceedings under a law of a State ((NSW) [Anti-Discrimination Act 1977](#)) see: *Deva v University of Western Sydney* (2009) 191 IR 268 ; [2009] NSWCA 389; [BC200910831](#).
(ACT) [Discrimination Act 1991](#); (ACT) [Human Rights Act 2004](#)
(NT) [Anti-Discrimination Act 1992](#)
(NSW) [Anti-Discrimination Act 1977](#)
(QLD) [Anti-Discrimination Act 1991](#)
(SA) [Equal Opportunity Act 1984](#)
(TAS) [Anti-Discrimination Act 1998](#)
(VIC) [Equal Opportunity Act 2010](#); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#).
(WA) [Equal Opportunity Act 1984](#).
- 13 *Maxwell v Murphy* (1957) 96 CLR 261  at 267; [1957] ALR 231; (1957) 31 ALJ 143; [BC5700130](#) per Dixon J; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#); *Boyn v Schering Pty Ltd* (2008) 103 ALD 108 ; [2008] FCA 961; [BC200804947](#).
- 14 (CTH) [Racial Discrimination Act 1975](#); (CTH) [Sex Discrimination Act 1984](#); (CTH) [Disability Discrimination Act 1992](#); (CTH) [Age Discrimination Act 2004](#)
(NSW) [Anti-Discrimination Act 1977](#)

(C) Discrimination

(SA) [Equal Opportunity Act 1984](#)

(WA) [Equal Opportunity Act 1984](#).

15 (ACT) [Discrimination Act 1991](#)

(NT) [Anti-Discrimination Act 1992](#)

(QLD) [Anti-Discrimination Act 1991](#)

(TAS) [Anti-Discrimination Act 1998](#)

(VIC) [Equal Opportunity Act 2010](#).

As to the grounds or attributes of discrimination generally see [80-290], [80-295].

16 As to areas of discrimination generally see [80-405].

17 For the definition of 'discrimination' see [80-245]-[80-285].

18 As to general exemptions see [80-595]-[80-640].

19 As to area specific exemptions see [80-435]-[80-482] (work), [80-505], [80-510] (education), [80-535]-[80-545] (provision of goods and services and dealings in land and access to public places), [80-555]-[80-565] (accommodation), [80-580], [80-585] (clubs and associations).

20 Generally see [80-725].

21 See [80-750].

22 See [80-730] (Commonwealth), [80-755] (States and Territories).

23 See [80-685], [80-700], [80-705].

24 See [80-655], [80-670].

25 See [80-700], [80-705].

26 See [80-710].

[80-220] Discrimination provisions in the Commonwealth Constitution

The paragraph below is current to **07 March 2018**

The concept of discrimination is incorporated in a number of provisions in the Commonwealth Constitution (the 'Constitution') notably section 51(ii) of the Constitution dealing with taxation, section 99 of the Constitution dealing with preference in trade, commerce or revenue and section 117 of the Constitution dealing with residents of States. Early decisions of the High Court of Australia (the 'High Court') had in effect rendered the provisions nugatory or of formal effect only.¹ However, the High Court has now overruled its earlier decision in *Henry v Boehm* in relation to the concept of discrimination in section 117 of the Constitution, by focusing on the fact of the occurrence of a hypothetical disadvantage to the non-resident arising from the discriminatory provision rather than on the situation of that non-resident once resident in the State.²

Notes

- 1** See particularly *Elliott v Commonwealth* (1936) 54 CLR 657 ; [1936] ALR 174; (1936) 9 ALJ 455; [BC3600041](#) ((CC) Commonwealth Constitution ss 51(ii), 99); *Henry v Boehm* (1973) 128 CLR 482 ; [1 ALR 181](#); 47 ALJR 429; [BC7300021](#) ((CC) Commonwealth Constitution s 117). Generally see CONSTITUTIONAL LAW [\[90-2140\]-\[90-2175\]](#) (discrimination, uniformity and preference), [\[90-2335\]-\[90-2360\]](#) (section 117).

- 2 *Street v Queensland Bar Assn* (1989) 168 CLR 461 ; [88 ALR 321](#); [BC8902696](#); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 ; [120 ALR 605](#); 68 ALJR 432; [BC9404612](#) per Brennan J.

[80-225] Constitutional validity: Commonwealth legislation

The paragraph below is current to **07 March 2018**

There have been challenges to the validity of the (CTH) [Racial Discrimination Act 1975](#) and to the (CTH) [Sex Discrimination Act 1984](#). The High Court of Australia (the 'High Court') decided that section 9 of the (CTH) Racial Discrimination Act 1975 was valid and that it bound the States.¹ A retrospectively operating amendment was held invalid by majority insofar as it had retrospective effect.² The (CTH) [Sex Discrimination Act 1984](#) and the (CTH) [Age Discrimination Act 2004](#) contain a complex statement of the application of each Act that is designed to buttress its validity by reference to relevant Commonwealth legislative powers.³ The validity of the (CTH) [Sex Discrimination Act 1984](#) has been considered by the Federal Court of Australia (the 'Federal Court').⁴ The machinery aspects of the (CTH) [Racial Discrimination Act 1975](#), (CTH) [Sex Discrimination Act 1984](#) and the (CTH) [Disability Discrimination Act 1992](#) were challenged on the grounds of the enforcement action conferred on the Federal Court following a decision of the Human Rights and Equal Opportunity Commission (the 'Commission') in inquiry mode, which was held to be invalid.⁵

The High Court has extended the administrative law doctrine of legitimate expectation to obligations arising under an international treaty so that its ratification by Australia will give rise to a legitimate expectation that, where its provisions are relevant, decisions will be taken in conformity with those provisions even if there has been no implementing legislation, absent statutory or executive indications to the contrary.⁶

Notes

- 1 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#).
- 2 *University of Wollongong v Metwally* (1984) 158 CLR 447 ; [56 ALR 1](#); 59 ALJR 48; [BC8400485](#).
- 3 (CTH) [Sex Discrimination Act 1984](#) s 9; (CTH) [Disability Discrimination Act 1992](#) s 12; (CTH) [Age Discrimination Act 2004](#) ss 9, 10.
- 4 *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1 ; [15 ALD 540](#); (1988) EOC ¶92-222, Fed C of A.
- 5 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ; [37 ALD 340](#); [127 ALR 1](#); [BC9506412](#). See also *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 ; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) at [\[208\]](#), [\[222\]](#), [\[248\]](#) per Kenny J ((TAS) [Anti-Discrimination Act 1998](#) is invalid in conferring jurisdiction on the Tribunal in relation to the Commonwealth since the Tribunal is not a 'court of a State' within (CC) Commonwealth Constitution s 77(iii)); *Attorney-General v Alinta Ltd* (2008) 233 CLR 542 ; [\(2008\) 242 ALR 1](#); (2008) 82 ALJR 382; [\(2008\) 64 ACSR 507](#); (2008) 26 ACLC 1; [\[2008\] HCA 2](#); [BC200800208](#) at [\[93\]](#)-[\[100\]](#) per Hayne J (when making a declaration of unacceptable circumstances under (CTH) [Corporations Act 2001](#) s 657A and vesting orders, the Takeovers Panel did not exercise judicial power of the Commonwealth. As to the separation of judicial powers under the Commonwealth Constitution see CONSTITUTIONAL LAW [\[90-5010\]](#)-[\[90-5040\]](#)).
- 6 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#) (the treaty involved was the United Nations (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) . The Convention had been declared by the Attorney-General on 22 December 1992 to be a relevant international instrument for the purposes of the (CTH) [Australian Human Rights Commission Act 1986](#) s 47). However, some members of the High Court of Australia have expressed reservations about the extension and application of the doctrine in this case and have suggested that it warrants further

(C) Discrimination

consideration: see *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273  at 313-315; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#) per McHugh J (dissenting); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ; [195 ALR 502](#); [\[2003\] HCA 6](#); [BC200300198](#) at [\[81\]-\[102\]](#) per McHugh and Gummow JJ, at [\[121\]-\[122\]](#) per Hayne J, and at [\[140\]-\[148\]](#) per Callinan J; . On the relevance of international treaties see *Cheedy obh Yindjibarndi People v Western Australia* [\[2010\] FCA 690](#) ; [BC201004571](#) at [\[100\]-\[103\]](#) per Mckerracher J (the fact that an international instrument such as the International Covenant on Civil and Political Rights has not been incorporated into Australian domestic law does not necessarily mean that its ratification holds no significance for Australian law (following *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273  at 286-7; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#) per Mason CJ and Deane J; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#) (where Brennan J observed (at 42) that international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights)); *Cheedy obh Yindjibarndi People v Western Australia* (2011) 194 FCR 562 ; [\[2011\] FCAFC 100](#); [BC201106027](#) (at [108] per North, Mansfield and Gilmour JJ; primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision)*Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#) and *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ; [195 ALR 502](#); [\[2003\] HCA 6](#); [BC200300198](#) were reviewed in detail in *C Inc v Australian Crime Commission* [\(2008\) 106 ALD 453](#) ; [251 ALR 424](#); [\[2008\] FCA 1806](#); [BC200810540](#) at [\[41\]-\[57\]](#) per Reeves J (decision upheld on appeal in *C Inc v Australian Crime Commission* [\(2010\) 113 ALD 226](#) ; [\[2010\] FCAFC 4](#); [BC201000211](#)). The recognised sources of legitimate expectations have generally been restricted to material emanating from or adopted by Parliament: *Metera v Administrative Appeals Tribunal* [\[2008\] FCA 1627](#) ; [BC200809773](#) at [\[31\]](#) per Cowdroy J. See also *RK v Mirik* [\[2009\] VSC 14](#) ; [BC200900212](#) at [\[7\]](#) per Bell J (a declaration is not domestic law but it can assist the courts to appreciate the significance of fundamental values (following *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 266; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 per Brennan J. For a discussion of when it is appropriate to refer to international instruments see *Ragg v Magistrates' Court* [\(2008\) 18 VR 300](#) ; 179 A Crim R 568; [\[2008\] VSC 1](#); [BC200800133](#) at [\[35\]-\[44\]](#); *Tomasevic v Travaglini* [\(2007\) 17 VR 100](#) ; [\[2007\] VSC 337](#); [BC200707864](#) at [\[60\]-\[65\]](#).

On the significance of the Human Rights Committee material when identifying the scope of human rights see *PJB v Melbourne Health (Patrick's Case)* [\[2011\] VSC 327](#) ; [BC201105182](#) at [\[64\]-\[73\]](#) per Bell J.

[80-230] Constitutional validity: State legislation

The paragraph below is current to **07 March 2018**

State anti-discrimination legislation is, in itself, unlikely to be held beyond power, but may be declared invalid for inconsistency with Commonwealth legislation under section 109 of the Commonwealth Constitution.¹ Inconsistency may arise where the Commonwealth law evinces an intention to 'cover the field' exclusively, and a direct inconsistency renders it impossible to obey both laws, or where State law prohibits or permits something which is expressly or impliedly permitted or prohibited by Commonwealth law.² Thus, section 19 of the (NSW) Anti-Discrimination Act 1977 was held invalid for inconsistency with section 9 of the (CTH) Racial Discrimination Act 1975.³ The (CTH) [Racial Discrimination Act 1975](#) was amended in 1983 to provide that the Commonwealth Parliament did not, and had never, intended to exclude or limit the operation of State or Territory legislation with a like purpose.⁴ The retrospective application of the amendment was challenged, and by majority the High Court of Australia (the 'High Court') held it to be valid only from its commencement date.⁵ The (CTH) [Sex Discrimination Act 1984](#), (CTH) [Disability Discrimination Act 1992](#) and (CTH) [Age Discrimination Act 2004](#) contain sustaining provisions for State laws that are based on, but are more expressly stated than, those contained in section 6A of the (CTH) Racial Discrimination Act 1975.⁶

(C) Discrimination

In a number of cases, it has appeared that the High Court will apply a strict test for inconsistency. Thus a dismissal of a staff member by the Australian Broadcasting Commission was held not to be appealable in the South Australian Industrial Court⁷ and two Vietnamese women failed in an appeal under the (NSW) [Anti-Discrimination Act 1977](#) over employment conditions in Australia Post set by the (CTH) Postal Services Act 1975 (repealed).⁸ Again, general Commonwealth regulatory legislation in the area of life insurance may render State disability discrimination legislation inoperative.⁹ However, it is possible for State equal opportunity legislation to apply despite Commonwealth legislation or a federal award in general terms, if the legislation or award does not, because of the generality of its terms, fully cover the field,¹⁰ and a legislative scheme for the advancement of the Pitjantjatjara people in South Australia has been upheld, despite a discriminatory provision, as a special measure.¹¹

In spite of literal inconsistency, some courts have been prepared to adopt an interpretation of consistency to racial discrimination exceptions in Commonwealth and State legislation.¹²

Some state laws against homosexual vilification in anti-discrimination statutes have been held to be compatible with the implied freedom of political communication in the Constitution.¹³

Notes

- 1 See *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 ; [128 ALR 1](#); [BC9506415](#) (held (CTH) [Native Title Act 1993](#) valid as a 'special law' under (CC) Commonwealth Constitution s 51(xxvi)). Compare *Commonwealth v Wood* (2006) 148 FCR 276 ; (2006) EOC ¶93-427; [\[2006\] FCA 60](#); [BC200600408](#) (Tasmanian anti-discrimination legislation found not to be inconsistent with Commonwealth cadet forces legislation and found to bind the Commonwealth). See also *Croome v Tasmania* (1997) 191 CLR 119 ; [142 ALR 397](#); 71 ALJR 430; [BC9700297](#) at [\[20\]](#) per Gaudron, McHugh and Gummow JJ (challenge to the validity of the 'unnatural sexual intercourse' and 'indecent practice between male persons' offences in (TAS) *Criminal Code* ss 122, 123 as being inconsistent with (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#). The offences were subsequently repealed by the (TAS) *Criminal Code* Amendment Act 1997 ss 4, 5); *McBain v Victoria* (2000) 99 FCR 116 ; [177 ALR 320](#); [\[2000\] FCA 1009](#); [BC200004187](#) (appeal to High Court of Australia dismissed without consideration of the merits: *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#)) ((VIC) Infertility Treatment Act 1995 (repealed) s 8 found to be inconsistent with (CTH) [Sex Discrimination Act 1984](#) and, under the (CC) Commonwealth Constitution s 109, inoperative to the extent of the inconsistency). However, State laws inconsistent with Commonwealth anti-discrimination law cannot be declared invalid by the Human Rights and Equal Opportunity Commission: *MW, DD, TA & AB v Royal Women's Hospital* (1997) EOC ¶92-886, HREOC. See also *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 ; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) (Tribunal exercising judicial power in a complaint against the Commonwealth); *Central Northern Adelaide Health Service v Atkinson* ([2008](#)) [252 ALR 168](#) ; 222 FLR 207; [\[2008\] SASC 371](#); [BC200811606](#); *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ; [97 ALD 548](#); [\[2007\] FCAFC 140](#); [BC200707248](#) (statutory provision for recording a transsexual as female in birth records, only if unmarried, not invalid for inconsistency between the Commonwealth and State legislation within (CC) Commonwealth Constitution s 109 — related matter on appeal to the High Court of Australia (*AB v Western Australia* [2011] HCATrans 87 ). Note also (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#) s 62 which added a new (CTH) [Sex Discrimination Act 1984](#) s 40(4) to the effect that nothing in ibid Div 2 renders it unlawful to refuse to make, issue or alter an 'official record of a person's sex' if a law of a State or Territory requires the refusal because the person is married. As to (CC) Commonwealth Constitution s 109 consistency see also *Momcilovic v R* ([2011](#)) [280 ALR 221](#) ; [\[2011\] HCA 34](#); [BC201106881](#) at [206]-[277] per Gummow J, [281]-[369] per Hayne J, [470]-[486] per Heydon J, [613]-[657] per Crennan and Kiefel JJ.
- 2 *University of Wollongong v Metwally* (1984) 158 CLR 447  at 455-6; [56 ALR 1](#); 59 ALJR 48; [BC8400485](#) per Gibbs CJ; *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61 ; [161 ALR 489](#); [\[1999\] HCA 12](#); [BC9901017](#) at [\[27\]](#), [\[28\]](#) per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

(C) Discrimination

- 3 *Viskauskas v Niland* (1983) 153 CLR 280 ; [47 ALR 32](#); [BC8300077](#); *Gerhardy v Brown* (1983) 34 SASR 452 ; [49 ALR 169](#); 77 FLR 213, SC(SA) (reversed in *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#)).
- 4 (CTH) Racial Discrimination Amendment Act 1983 (inserting (CTH) [Racial Discrimination Act 1975](#) s 6A).
- 5 *University of Wollongong v Metwally* (1984) 158 CLR 447 ; [56 ALR 1](#); 59 ALJR 48; [BC8400485](#) (frustrating the claim of a university research student who had sought relief from racial discrimination under the New South Wales legislation).
- 6 (CTH) [Sex Discrimination Act 1984](#) ss [10](#), [11](#); (CTH) [Disability Discrimination Act 1992](#) s [13](#); (CTH) [Age Discrimination Act 2004](#) s [12](#).
- 7 *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 ; [15 ALR 609](#); [BC7700075](#). See also *Barry v Australian Broadcasting Corp* (2002) 112 IR 33 ; [2002] NSWIRComm 14. Compare *Re The Residential Tenancies Tribunal of New South Wales v Henderson*; *ex parte The Defence Housing Authority* (1997) 190 CLR 410 ; [146 ALR 495](#); [BC9703511](#).
- 8 *Dao v Australian Postal Commission* (1987) 162 CLR 317 ; [70 ALR 449](#); [BC8701768](#). See also *Lansdown v City of Oakleigh* (1988) EOC ¶92-225, EOB(VIC).
- 9 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 ; [65 ALR 637](#); [BC8601433](#).
- 10 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 ; [28 ALR 449](#); [BC8000065](#); *Caulfield v Gunnedah Coal Ltd* (1997) EOC ¶92-893, EOT(NSW) (federal awards; note that the (CTH) [Workplace Relations Act 1996](#) s 16(2) (now the (CTH) [Fair Work Act 2009](#) s [27](#)) expressly provides that it is not intended to apply to the exclusion of a State or Territory law that deals with the prevention of discrimination or the promotion of equal employment opportunity or both); *Commonwealth v Wood* (2006) 148 FCR 276 ; (2006) EOC ¶93-427; [\[2006\] FCA 60](#); [BC200600408](#) (Commonwealth legislation regulating air force cadets subject to Tasmanian discrimination legislation).
- 11 *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#) (the discriminatory provision was (SA) [Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981](#) s [19](#) which enabled persons to be excluded on grounds of their race). As to special measures or affirmative action see [80-600]. As to inconsistency between Commonwealth and State legislation see CONSTITUTIONAL LAW [\[90-1985\]](#).
- 12 *Central Northern Adelaide Health Service v Atkinson* [\(2008\) 252 ALR 168](#) ; 222 FLR 207; [\[2008\] SASC 371](#); [BC200811606](#) at [\[112\]](#) per Gray J.
- 13 *Sunol v Collier (No 2)* [\(2012\) 289 ALR 128](#) ; 260 FLR 414; [\[2012\] NSWCA 44](#); [BC201201590](#) at [\[46\]-\[53\]](#) per Bathurst CJ (declaring the validity of the prohibition of vilification of homosexuals in the (NSW) [Anti-Discrimination Act 1977](#)); *Owen v Menzies* [\[2013\] 2 Qd R 327](#) ; [\(2012\) 293 ALR 571](#); [\[2012\] QCA 170](#); [BC201204479](#) at [\[72\]](#) per McMurdo P (declaring the validity of the prohibition of vilification of homosexuals in (QLD) [Anti-Discrimination Act 1991](#)).

[80-235] Significance of international law

The paragraph below is current to **07 March 2018**

International human rights law has made an important contribution to discrimination law.¹ By reference to the (INT) International Covenant on Civil and Political Rights 1966 (the 'ICCPR') and other relevant international instruments,² the Australian Human Rights Commission (the 'Commission') is required to identify where the Commonwealth or its agencies have infringed human rights, and to take action as provided by the (CTH) [Australian Human Rights Commission Act 1986](#) (the 'Act').³ Human rights are defined as the rights contained in the ICCPR and any other relevant international instruments.⁴ Under article 2 of the ICCPR all persons within the jurisdiction are to be guaranteed enjoyment of the rights recognised in the ICCPR 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.⁵ Under article 26 of the

(C) Discrimination

ICCPR all persons are equal before the law and are entitled without any discrimination to the equal protection of the law; the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶

The (CTH) [Racial Discrimination Act 1975](#) and the (CTH) [Sex Discrimination Act 1984](#) are based on the two relevant international conventions,⁷ and indeed in important respects owe their validity to Australia's being a party to them.⁸ The annexing of International Labour Organisation Convention No 111 — Convention concerning Discrimination in respect of Employment and Occupation, to the (CTH) [Australian Human Rights Commission Act 1986](#), the associated provisions in the legislation and the regulations and the reference to that Convention in the (CTH) [Disability Discrimination Act 1992](#) and the (CTH) [Age Discrimination Act 2004](#) have the effect of adding further grounds to the Commission's mandate on the legislation dealing with discrimination on the ground of disability and age and in the employment field.⁹

Note, however, that Federal discrimination laws operate within territorial limits.¹⁰

Notes

- 1 As to the relevance of international treaties see [80-225] (constitutional validity and Commonwealth legislation).
- 2 (CTH) [Australian Human Rights Commission Act 1986](#) ss 3 (definitions of 'human rights' and 'relevant international instruments'), 47.
- 3 Ibid ss 11, 12. As to the Commission generally see [80-50], [80-60] (functions).
- 4 Ibid s 3(1), 3(4). Relevant international instruments are declared by the Attorney-General under ibid s 47.
- 5 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 2. The ICCPR is annexed to the (CTH) [Australian Human Rights Commission Act 1986 Sch 2](#).
- 6 International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 26. The ICCPR is annexed to the (CTH) [Australian Human Rights Commission Act 1986 Sch 2](#).
- 7 Respectively the (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) and the (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980)). Each convention is annexed in the schedule to its respective Act.
- 8 As to the (CTH) [Racial Discrimination Act 1975](#) see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#). As to the (CTH) [Sex Discrimination Act 1984](#) see *Aldridge v Booth (Cakeshop Case)* (1988) [80 ALR 1](#) ; [15 ALD 540](#); (1988) EOC ¶92-222, Fed C of A. Generally see [80-225].
- 9 (CTH) [Australian Human Rights Commission Act 1986](#) Pt II Div 4; (CTH) Australian Human Rights Commission Regulations 1989 reg 4. Additional grounds of discrimination in employment for the purposes of (CTH) [Australian Human Rights Commission Act 1986](#) Pt II Div 4 were added to the those specified in the (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) art 1 which is included in (CTH) [Australian Human Rights Commission Act 1986 Sch 1](#). See [80-725]-[80-740].
- 10 See, for example, *Brannigan v Commonwealth* (2000) 110 FCR 566 ; [\[2000\] FCA 1591](#); [BC200006833](#); *Vijayakumar v Qantas Airways Ltd* [\[2009\] FCA 1121](#) ; [BC200909107](#).

[80-240] Unlawfulness, motive and intention

The paragraph below is current to **07 March 2018**

(C) Discrimination

Unlawful conduct in the context of anti-discrimination legislation is generally not **criminal**, nor actionable as a civil wrong unless expressly provided.¹ The initial avenue for redress is the lodging of a complaint with the relevant discrimination commissioner. Only if the inquiry and conciliation process leaves the issue unresolved may a matter be taken for adjudication to a tribunal, and only after that to a court. In the tribunal or court, the remedies are similar to those available in equivalent civil litigation, primarily in the field of tort.² However, a number of anti-discrimination statutes create specific offences for serious vilification,³ victimisation⁴ and discriminatory advertising.⁵

Neither motive nor intention are, it appears, relevant to the commission of an unlawful act of discrimination.⁶ Several jurisdictions have legislated to declare motive irrelevant,⁷ or to make awareness of indirect discrimination unnecessary.⁸ Most of the legislation recognises that an act may be done with several intents and provides that discrimination for the purposes of the Act occurs if one of the reasons for it is based on an unlawful ground, even if it is not the sole or dominant reason.⁹ Changes to the (CTH) [Age Discrimination Act 2004](#) (the 'Act') substitute the 'dominant purpose' test in section 16 of the Act with one that takes an act to be done because of age if it is only one of the reasons.¹⁰ However, even if the legislation makes no such provision, it has been held that, provided the discriminatory element is significant, it will lead to a remedy under the legislation.¹¹

Notes

- 1** (CTH) [Racial Discrimination Act 1975](#) ss [26](#), [45](#); (CTH) [Sex Discrimination Act 1984](#) ss [85](#), [110](#); (CTH) [Disability Discrimination Act 1992](#) ss [41](#), [125](#); (CTH) [Age Discrimination Act 2004](#) ss [49](#), [59](#)
(ACT) [Discrimination Act 1991](#) ss [71-72](#)
(SA) [Equal Opportunity Act 1984](#) s [99](#)
(VIC) [Equal Opportunity Act 2010](#) s [188](#)
(QLD) [Anti-Discrimination Act 1991](#) ss [265](#) (protects persons with official functions under the Act from civil **liability** in relation to their functions), [266](#) (only provides for no civil **liability** merely because of complaint or submission)
(WA) [Equal Opportunity Act 1984](#) s [154](#).
There are no equivalent provisions in the other jurisdictions.
- 2** See [80-725]-[80-755].
- 3** (NSW) [Anti-Discrimination Act 1977](#) ss [20D](#), [38T](#), [49ZTA](#), [49ZXC](#). For civil **liability** see *ibid* ss [20C](#), [38S](#), [49ZT](#), [49ZXB](#)
(QLD) [Anti-Discrimination Act 1991](#) s [131A](#). For civil **liability** see *ibid* s [124A](#).
(SA) [Racial Vilification Act 1996](#) s [4](#). For civil **liability** see (SA) [Civil Liability Act 1936](#) s [73](#).
(VIC) [Racial and Religious Tolerance Act 2001](#) ss [24](#), [25](#). For civil **liability** see *ibid* s [7](#).
(WA) [Criminal Code Act Compilation Act 1913](#) ss [77](#), [78](#) (conduct intended or likely to incite racial animosity or racist harassment).
There are no equivalent provisions in the other jurisdictions.
- 4** (CTH) [Racial Discrimination Act 1975](#) s [27\(2\)](#); (CTH) [Sex Discrimination Act 1984](#) s [94](#); (CTH) [Disability Discrimination Act 1992](#) s [42](#); (CTH) [Age Discrimination Act 2004](#) s [51](#).
(QLD) [Anti-Discrimination Act 1991](#) ss [129](#), [130](#).
There are no equivalent provisions in the other jurisdictions.
Note, however, that victimisation is unlawful in many jurisdictions in which it is not **criminal**:
(ACT) [Discrimination Act 1991](#) s [68](#)
(NT) [Anti-Discrimination Act 1992](#) s [23](#)

(C) Discrimination

(NSW) [Anti-Discrimination Act 1977](#) s 50

(SA) [Equal Opportunity Act 1984](#) s 86

(TAS) [Anti-Discrimination Act 1998](#) s 18

(VIC) [Equal Opportunity Act 2010](#) ss 103, 104

(WA) [Equal Opportunity Act 1984](#) s 67.

- 5 (CTH) [Disability Discrimination Act 1992](#) s 44; (CTH) [Sex Discrimination Act 1984](#) s 86; (CTH) [Age Discrimination Act 2004](#) s 50

(NT) [Anti-Discrimination Act 1992](#) ss 109, 109A

(NSW) [Anti-Discrimination Act 1977](#) s 51

(QLD) [Anti-Discrimination Act 1991](#) ss 127, 128

(SA) [Equal Opportunity Act 1984](#) s 103

(VIC) [Equal Opportunity Act 2010](#) s 182.

While discriminatory advertising is unlawful in the (CTH) [Racial Discrimination Act 1975](#) s 16 and the following jurisdictions, it is not an offence:

(ACT) [Discrimination Act 1991](#) s 69

(NT) [Anti-Discrimination Act 1992](#) s 25

(TAS) [Anti-Discrimination Act 1998](#) s 20

(WA) [Equal Opportunity Act 1984](#) s 68.

The (SA) [Equal Opportunity Act 1984](#) s 88 also creates an offence of separating a person with a disability from their therapeutic dog. There is no such offence in the other jurisdictions.

- 6 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  at 176 per Deane and Gaudron JJ and, less specifically, at 184 per Dawson J; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#); *Waters v Public Transport Corp* (1991) 173 CLR 349  at 359; [103 ALR 513](#); [BC9102598](#) per Mason CJ, Gaudron J; *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[160\]](#) per McHugh and Kirby JJ (though emphasising attention to the particular statutory provision); *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC  ¶93-457; [\[2007\] QSC 075](#); [BC200702388](#) (sufficient for direct discrimination to be unconscious).

Similar conclusions were reached in *Birmingham City Council v Equal Opportunities Commission* [\[1989\] AC 1155](#) ; [\[1989\] 1 All ER 769](#); [\[1989\] 2 WLR 520](#) ; *James v Eastleigh Borough Council* [\[1990\] 2 AC 751](#) ; [\[1990\] 2 All ER 607](#); [\[1990\] 3 WLR 55](#) ; HL; *Canadian National Railway v Canadian Human Rights Commission* [1987] 1 SCR 1114 ; SC(Canada). See also *Reddrop v Boehringer Ingelheim Pty Ltd* (1982) EOC ¶92-031, EOT(NSW); *Perth City v DL* (1994) 88 LGERA 45 ; (1994) EOC ¶92-634; [BC9402072](#).

Accordingly, views to the contrary which have previously been expressed can no longer be regarded as good law: *Chief General Manager, Dept of Health (Vic) v Arumugam* [\[1988\] VR 319](#) ; (1987) EOC ¶92-195; *Jamal v Secretary, Dept of Health* [\(1988\) 14 NSWLR 252](#) ; (1988) EOC ¶92-234, CA(NSW); *Koh v Mitsubishi Motors Australia Ltd* (1985) EOC ¶92-122 at 76,222, ADB(SA).

However, statements in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[236\]](#) per Gummow, Hayne and Heydon JJ and, less specifically, at [16] per Gleeson CJ, warn that a person's motive or intention should not be confused with the person's reason or grounds for subjecting another to less favourable treatment, which is the central question in determining whether unlawful discrimination occurred, and motive or intention may bear upon that question. These comments appear consistent with views of Lockhart J (with whom Black CJ agreed) in *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301  at 324-6; [118 ALR 80](#); (1993) EOC ¶92-548; [BC9305085](#) (interpreted in *Penhall-Jones v New South Wales* [\[2007\] FCA 925](#) ; [BC200705185](#) at [\[72\]](#) per Buchanan J that the test was not wholly objective but purpose and motive may also be relevant). See also *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#) at [\[159\]-\[161\]](#); *Forbes v Australian Federal Police*

(C) Discrimination

(Commonwealth of Australia) [\[2004\] FCAFC 95](#) ; [BC200402343](#) at [\[69\]](#) per Black CJ, Tamberlin and Sackville JJ (noting that in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) Gummow, Hayne and Heydon JJ thought that motive was at least relevant; Gleeson CJ thought that motive was relevant and, perhaps, could be determinative; McHugh and Kirby JJ thought motive was not relevant; all agreed that it is necessary to ask *why* the alleged discriminator took the action against the alleged victim); *Kowalski v Domestic Violence Crisis Service* [\[2005\] FCA 12](#) ; [BC200500069](#).

- 7 (NT) [Anti-Discrimination Act 1992](#) s [20\(4\)](#)

(QLD) [Anti-Discrimination Act 1991](#) s 10(3) (in relation to direct discrimination)

(TAS) [Anti-Discrimination Act 1998](#) s [14\(3\)\(c\)](#) (in relation to direct discrimination)

(VIC) [Equal Opportunity Act 2010](#) s [10](#); (VIC) [Racial and Religious Tolerance Act 2001](#) s [9\(1\)](#).

There are no equivalent provisions in the other jurisdictions. Note in (SA) [Equal Opportunity Act 1984](#) s [6\(4\)](#) an act will be regarded as a discriminatory act even if done on the basis of a mistaken assumption (for example, that another person was of a particular sexual orientation or gender identity or a particular race).

- 8 (QLD) [Anti-Discrimination Act 1991](#) s 11(3)

(TAS) [Anti-Discrimination Act 1998](#) s [15\(2\)](#)

(VIC) [Equal Opportunity Act 2010](#) s [9\(4\)](#).

There are no equivalent provisions in the other jurisdictions. But see also the changes implemented by (NSW) Courts and Other Miscellaneous Legislation Amendment Act 2013 which amended the (NSW) [Anti-Discrimination Act 1977](#) to clarify that the attribute was the reason why the discriminatory requirement was implemented.

- 9 (CTH) [Racial Discrimination Act 1975](#) ss [18](#), [18B](#) (amended in 1990 from a requirement that race be the dominant reason); (CTH) [Sex Discrimination Act 1984](#) s [8](#); (CTH) [Disability Discrimination Act 1992](#) s [10](#).

(ACT) [Discrimination Act 1991](#) s [4A\(2\)](#)

(NT) [Anti-Discrimination Act 1992](#) s [20\(3\)](#)

(NSW) [Anti-Discrimination Act 1977](#) s 4A

(QLD) [Anti-Discrimination Act 1991](#) s 10(4) (refers to a 'substantial' reason; direct discrimination only)

(SA) [Equal Opportunity Act 1984](#) s [6\(2\)](#) (refers to a 'substantial' reason)

(TAS) [Anti-Discrimination Act 1998](#) s [14\(3\)\(a\)](#) (direct discrimination only); but see also *ibid* s 15(2) (indirect discrimination)

(VIC) [Equal Opportunity Act 2010](#) s [8\(2\)\(b\)](#); (VIC) [Racial and Religious Tolerance Act 2001](#) s [9\(2\)](#) (both requires that there be a 'substantial reason' or 'substantial ground' respectively)

(WA) [Equal Opportunity Act 1984](#) s 5.

However, a local council decision was held not to be discriminatory unless it could be shown that a majority of members voted for a discriminatory reason: *City of Perth v D L (Representing Members of People Living with Aids (WA) Inc)* (1996) 90 LGERA 178 ; (1996) EOC ¶92-796; [BC9601048](#), SC(WA), Full Court. Note that the case appears to have been argued on direct discrimination grounds ((WA) [Equal Opportunity Act 1984](#) s 66A(1)) and not to have involved consideration of indirect discrimination: *ibid* s 66A(3).

- 10 (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) s [3](#) replaced (CTH) [Age Discrimination Act 2004](#) s [16](#) to take an act to be done because of age if age, or a characteristic generally appertaining or imputed to persons of that age, is only one of the reasons.

- 11 *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023 at 75,499; (1983) 5 IR 320 per Matthews J; *Reddrop v Boehringer Ingelheim Pty Ltd* (1982) EOC ¶92-031 at 75,569. In relation to the need for a causally operative effect see *Director-General of Education v Breen* (1982) 2 IR 93  per Street CJ, SC(NSW). See also [80-295], [80-300].

(iii) Definition of Discrimination

[80-245] General definition of unlawful discrimination

The paragraph below is current to **07 March 2018**

Discrimination as an unlawful act is usually described as direct or indirect.¹ Unlawful direct discrimination is constituted by subjecting a person to less favourable treatment than another person, when based on the presence of a defined unlawful ground or attribute.² In some jurisdictions it is sufficient that the person was treated unfavourably because of that attribute without the need for the comparator.³ Indirect discrimination is constituted by subjecting a person or group to less favourable treatment than another person or group that results from an attribute they possess, for example, race, sex or disability and arises through the imposition of a requirement or condition on the first person or group that does not operate, or operates with less difficulty, on the other person or group.⁴

Notes

- 1 See, for example, (CTH) [Disability Discrimination Act 1992](#) ss [5](#) (definition of 'direct' discrimination), [6](#) (definition of 'indirect' discrimination); (CTH) [Sex Discrimination Act 1984](#) s [5\(1\)](#) (definition of 'direct' discrimination), [5\(2\)](#) (definition of 'indirect' discrimination). As to direct discrimination see [80-250]-[80-260]. As to indirect discrimination see [80-265]-[80-285].
- 2 For example, questioning, during an employment interview, about an applicant's parenthood and child care may amount to less favourable treatment: *Ballarat University College v Bridges* (1994) EOC ¶92-627 ; [BC9304179](#), SC(VIC). As to grounds or attributes see [80-290].
- 3 See, for example, (ACT) [Discrimination Act 1991](#) s [8](#); (VIC) [Equal Opportunity Act 2010](#) s [8\(1\)](#). It is no longer necessary to compare the person with another who does not possess a protected attribute in the same or similar circumstances see Explanatory Memorandum to (VIC) Equal Opportunity Bill 2010 clause 8. As to possession of an attribute see [80-250]. As to less favourable treatment see [80-255].
- 4 (CTH) [Racial Discrimination Act 1975](#) s [9\(1A\)](#) (defines 'indirect discrimination' in terms of a requirement or condition that has the purpose or effect of reducing the enjoyment by a person, on an equal footing with others, by persons of the same race, colour, descent or national or ethnic origin as the other person, of human rights and fundamental freedoms). In *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46 ; [137 ALR 653](#) at [674](#); (1996) EOC ¶92-838; [BC9603088](#) Heerey J and Sackville J each examined the extrinsic materials to the (CTH) [Racial Discrimination Act 1975](#) which inserted *ibid* s 9(1A) and noted that the provision was inserted because of concerns that *ibid* s 9(1) would not extend to indirect discrimination (at 29). Their Honours concluded that the preferable course was to regard *ibid* ss 9(1), 9(1A) as mutually exclusive (at [15]), *ibid* s 9(1) being confined to direct discrimination (at [28]) and *ibid* s 9(1A) being confined to indirect discrimination (at [28]) (although Sackville J noted that it was at least arguable that the definition of 'racial discrimination' in art 1(1) of the Convention, which is incorporated into *ibid* s 9(1), was intended to apply to indirect as well as to direct discrimination). The elements in all discrimination are thus less favourable treatment of one person than another as a result of using an unlawful, or prohibited, ground or attribute, to which must be added the fact that the circumstances of the two persons are the same or not materially different.

[80-250] Possession of an attribute

The paragraph below is current to **07 March 2018**

The more recent anti-discrimination legislation¹ requires that a complainant, to be successful, must have been discriminated against by reference to a particular attribute, for example, sex or race, if the legislation is to be invoked.² The older style legislation refers to the status of a person, for example, sex or marital status, and makes discrimination based on that status unlawful.³

Notes

- 1 (ACT) [Discrimination Act 1991](#) ss 7, 8
(NT) [Anti-Discrimination Act 1992](#) ss 19, 20
(QLD) [Anti-Discrimination Act 1991](#) ss 7, 8
(TAS) [Anti-Discrimination Act 1998](#) s 16
(VIC) [Equal Opportunity Act 2010](#) ss 6, 7.
- 2 The (CTH) [Disability Discrimination Act 1992](#) (normally refers to a 'person with a disability' or a 'person's disability'). As to the attributes see [80-290].
- 3 (CTH) [Sex Discrimination Act 1984](#) ss 5, 5A, 5B, 5C, 6, 7, 7AA, 7A; (CTH) [Racial Discrimination Act 1975](#) Pt II; (CTH) [Age Discrimination Act 2004](#) Pt 3 (which follows the older-style format of the other federal discrimination statutes)
(NSW) [Anti-Discrimination Act 1977](#) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA
(SA) [Equal Opportunity Act 1984](#) ss 29, 51, 66, 85A, 85T
(WA) [Equal Opportunity Act 1984](#) ss 8-10, 10A, 35AB, 35A, 35O, 36, 53, 66A, 66V.
As to the application of the defined grounds of unlawful discrimination see [80-290].

[80-255] Less favourable treatment

The paragraph below is current to **07 March 2018**

All anti-discrimination legislation incorporates the concept of unfavourable or less favourable treatment.¹ The person complaining of discrimination on the basis of a particular attribute or status has to show that he or she has received less favourable, or unfavourable, treatment. In some jurisdictions, it is sufficient that the person was treated unfavourably because of that attribute² but in others a comparator analysis must be undertaken where the necessary comparison is between the actual treatment of the complainant and the treatment they would have received if they did not have the relevant status or attribute.³ In making the comparison, however, it is necessary to keep the circumstances surrounding the treatment in the hypothesised situation the same as, or similar to, the circumstances surrounding the treatment in the actual situation.⁴ For example, in the case of disability, in determining whether a person has been treated 'less favourably' in circumstances that are the same or not materially different, the proper comparator is a person with the same behavioural characteristics without the disability.⁵ If the treatment was less favourable the next question is whether that difference was because of the disability.⁶ It is also necessary to identify the disability claimed to be the reason for less favourable treatment at the relevant period of time.⁷ The meaning of 'less favourable' has been considered in relation to:

(1) employment where

- (a) a marriage partner is employed by a rival firm;⁸ where a person is not employed simply because of his or her sex,⁹
- (b) termination of employment was allegedly on the basis of an imputed psychological disability,¹⁰
- (c) a medical examination was required of an employee with unexplained work absences,¹¹
- (d) the selection of airline cabin staff favouring younger applicants as a result of flawed selection process,¹²

(C) Discrimination

- (e) there was a requirement to work an irregular shift pattern as barmaid,¹³
- (f) there was action against female employee who would not tolerate sexual harassment and robust work environment,¹⁴
- (g) there was racist taunts by workmates,¹⁵ and
- (h) there was withdrawal of an offer of employment (made subject to a condition of fitness to work) on discovery of hypertension;¹⁶

(2) education where

- (a) a female student did not receive the same subject options as a male student in another school,¹⁷
- (b) there was exclusion from school on the basis of disturbed behaviour resulting from a disorder,¹⁸ and
- (c) there was termination of candidature as a PhD student allegedly on the basis of an imputed psychological disability;¹⁹

(3) pregnancy where

- (a) a person was demoted in status (although not in salary) on account of her having taken maternity leave,²⁰ and
- (b) there was denial of payments in lieu of notice unless the person signed a release following refusal to reinstate them after maternity leave;²¹

(4) disability where

- (a) a higher standard of driving was required of a person with a disability permit seeking an unconditional driving licence,²² and
- (b) disseminating information about a complainant's Hepatitis C which caused stress and depression;²³

- (5) treatment of prisoners (in requiring a Muslim prisoner to eat general prison diet);²⁴ and
- (6) taxi services (the complainant must be an actual, intended or potential beneficiary of the relevant supply).²⁵

The disadvantage must be a matter of substance.²⁶ The test is an objective one.²⁷ Unfavourable treatment can involve the threat of disciplinary action.²⁸

(C) Discrimination

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss [5\(1\)](#), [5A\(1\)](#), [5B\(1\)](#), [5C\(1\)](#), [6\(1\)](#), [7\(1\)](#), [7AA\(1\)](#), [7A](#); (CTH) [Disability Discrimination Act 1992](#) s [5](#); (CTH) [Age Discrimination Act 2004](#) s [14](#). The (CTH) [Racial Discrimination Act 1975](#) s [9](#) does not use the terms 'less favourable treatment' but refers to 'nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom.'

(ACT) [Discrimination Act 1991](#) s [8](#) (refers to treating a person 'unfavourably' rather than 'less favourably')

(NT) [Anti-Discrimination Act 1992](#) s [20\(2\)](#)

(NSW) [Anti-Discrimination Act 1977](#) ss [7](#), [24](#), [38B](#), [39](#), [49B](#), [49T](#), [49ZG](#), [49ZYA](#)

(QLD) [Anti-Discrimination Act 1991](#) s [10](#)

(SA) [Equal Opportunity Act 1984](#) ss [6\(3\)](#), [29](#), [51](#), [66](#) (includes failure to provide proper access for those with disability), [85A](#), [85T](#)

(TAS) [Anti-Discrimination Act 1998](#) s [14\(2\)](#)

(VIC) Equal Opportunity Act 2010 s [8\(1\)](#) (refers to treating a person 'unfavourably' rather than 'less favourably', see note 2 below). As to (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [8](#) (equality) see *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; [BC201004776](#) at [\[90\]](#) per Emerton J (no finding of discrimination in denying a prisoner access to IVF; if the comparator is a fertile prisoner wishing to become pregnant, no less favourable treatment – but note 'discrimination' defined by reference to (VIC) Equal Opportunity Act 1995 (repealed))

(WA) [Equal Opportunity Act 1984](#) ss [8\(1\)](#), [9\(1\)](#), [10\(1\)](#), [10A\(1\)](#), [35AB\(1\)](#), [35A\(1\)](#), [35O\(1\)](#), [35O\(2\)](#), [36\(1\)](#), [36\(1a\)](#), [53\(1\)](#), [66A\(1\)](#), [66A\(1a\)](#), [66V\(1\)](#), [66V\(2\)](#).
- 2 (ACT) [Discrimination Act 1991](#) s [8](#); (VIC) [Equal Opportunity Act 2010](#) s [8\(1\)](#). It is no longer necessary to compare the person with another who does not possess a protected attribute in the same or similar circumstances: see Explanatory Memorandum to (VIC) Equal Opportunity Bill 2010 clause 8. But see also *Aitken v Victoria* (2013) 46 VR 676 ; [\[2013\] VSCA 28](#); [BC201300703](#) at [\[45\]](#), [\[46\]](#) per Neave and Priest JJA (stated that the question of whether the test of unfavourable treatment required reference to a comparator was unresolved as regards the (VIC) [Equal Opportunity Act 2010](#)) and *Kuyken v Chief Cmr of Police* (2015) 249 IR 327 ; [\[2015\] VSC 204](#); [BC201503828](#) at [\[98\]](#) per Garde J (unfavourable treatment test without comparator was correct).
- 3 *Boehringer Ingelheim Pty Ltd v Reddrop* [\[1984\] 2 NSWLR 13](#) ; (1984) EOC ¶92-108 at 76,052 per Mahoney J, EOB(NSW). Compare *Street v Queensland Bar Assn* (1989) 168 CLR 461  at 486-9; [88 ALR 321](#); [BC8902696](#) per Mason CJ (interpretation of (CC) Commonwealth Constitution s 117, discrimination on grounds of residence in a State). In the Australian Capital Territory, the relevant legislation refers to treating a person 'unfavourably' rather than 'less favourably' and so does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute. All that is required is an examination of whether the way the aggrieved person is treated or the conditions upon which the aggrieved person is dealt are unfavourable or would disadvantage that person see *Re Prezzi v Discrimination Commissioner and Quest Group Pty Ltd; party joined* (1996) [39 ALD 729](#)  at [\[736\]](#); (1996) EOC ¶92-803; but see also *Aitken v Victoria* (2013) 46 VR 676 ; [\[2013\] VSCA 28](#); [BC201300703](#) at [\[45\]](#), [\[46\]](#) per Neave and Priest JJA (stated that the question of whether the test of unfavourable treatment required reference to a comparator was unresolved as regards the (VIC) [Equal Opportunity Act 2010](#)); *Kuyken v Chief Cmr of Police* (2015) 249 IR 327 ; [\[2015\] VSC 204](#); [BC201503828](#) at [\[98\]](#) per Garde J (unfavourable treatment test without comparator was correct). Although the South Australian legislation also uses the term 'unfavourably', it includes a definition of unfavourable treatment which includes the concept of comparative treatment: (SA) [Equal Opportunity Act 1984](#) s [6\(3\)](#).
- 4 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[11\]](#) per Gleeson CJ; at [222]-[224] per Gummow, Hayne and Heydon JJ; at [273] per Callinan J. See also *Capodicasa v Herald and Weekly Times Ltd* (1999) EOC ¶92-969, VCAT; *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254 ; 132 IR 102; [\[2003\] FCA 1475](#); [BC200307661](#); *Fetherston v Peninsula Health* (2004) EOC ¶93-331 ; [\[2004\] FCA 485](#); [BC200402081](#); *Forbes v Australian Federal Police (Commonwealth of Australia)* [\[2004\] FCAFC 95](#) ; [BC200402343](#); *Varas v Fairfield City Council* [\[2009\] FCA 689](#) ; [BC200905497](#) at [\[26\]-\[31\]](#) per Graham J; *BKY v University of Newcastle* [2014] NSWCATAD  124; [BC201407144](#).

See also *Collier v Austin Health* (2011) 36 VR 1 ; [\[2011\] VSC 344](#); [BC201105473](#) at [\[61\]](#), [\[110\]](#) per Bell J (neither Purvis nor the statutory requirement for a comparator is to be interpreted and applied such that a claim of disability discrimination based on refused access to return to work or rehabilitation services on the basis of the person's disability

(C) Discrimination

must fail for want of a comparator (the proper comparator in this case is a worker with a different disability to the particular disability which the complainant has, who (like the complainant) is fit, willing and able to return to graduated work and who is otherwise in the same or similar circumstances)).

- 5 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[11\]](#) per Gleeson CJ; *Zhang v University of Tasmania* (2009) 174 FCR 366 ; [\[2009\] FCAFC 35](#); [BC200901761](#) at [\[64\]](#) per Jessup and Gordon JJ at [\[64\]](#) (the required comparison is with a PhD candidate without the disability, not a PhD candidate without the behaviour); *Flanagan v Murdoch Community Services Inc* (2010) 188 FCR 300 ; [115 ALD 697](#); [\[2010\] FCA 647](#); [BC201004300](#) at [\[69\]](#) per Gordon J (failure to establish less favourable treatment when it was claimed that a directive restricting vehicular access out of safety concerns would not have been issued to non-disabled workers — the relevant comparator is a non-supported employee involved in a similar incident with a history of related incidents); *Hamden v Commonwealth* [\[2010\] FCA 924](#) ; [BC201006190](#) (discrimination claim on the basis of anxiety disorder failed as employment was terminated because of failure to attend work). Compare the situation where there was failure by an employer to accommodate disability: *McNeill v Commonwealth* (1995) EOC ¶92-714 (conditions imposed on employment made it difficult, if not impossible, for the complainant to perform job functions); *Ware v OAMPS Insurance Brokers Ltd* (2005) EOC ¶93-402 ; [\[2005\] FMCA 664](#); *BKY v University of Newcastle* [2014] NSWCATAD  124; [BC201407144](#).
- 6 See, for example, *Razumic v Brite Industries* [\[2008\] FCA 985](#) ; [BC200805124](#) (employer at disability supported factory terminated applicant's employment because applicant was unable to work co-operatively, not because of the disability); *Devers v Kindilan Society* [\(2009\) 263 ALR 433](#) ; [\[2009\] FCA 1392](#); [BC200910753](#) (upheld in *Devers v Kindilan Society* [\(2010\) 116 ALD 239](#) ; [269 ALR 404](#); [\[2010\] FCAFC 72](#); [BC201004166](#)); *Flanagan v Murdoch Community Services Inc* [\(2010\) 115 ALD 697](#) ; [\[2010\] FCA 647](#); [BC201004300](#).
- 7 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [\[89\]-\[92\]](#) per French and Jacobson JJ. Note that in (VIC) [Equal Opportunity Act 2010](#) s 7(2) discrimination on the basis of an attribute includes discrimination on the basis that a person has that attribute or had it at any time, whether or not at the time of the discrimination.
- 8 *Boehringer Ingelheim Pty Ltd v Reddrop* [\[1984\] 2 NSWLR 13](#) ; (1984) EOC ¶92-108, EOB(NSW).
- 9 *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC ¶92-002, EOB(VIC). See also *Victorian Women Lawyers' Assn Inc v Cmr of Taxation* (2008) 170 FCR 318 ; [250 ALR 516](#); [\[2008\] FCA 983](#); [BC200806841](#) (judicial notice taken of the disadvantage of women practitioners in the legal profession as a matter of 'common knowledge ... generally' within the meaning of (CTH) [Evidence Act 1995](#) s 144(1)(a)).
- 10 *Varas v Fairfield City Council* [\[2009\] FCA 689](#) ; [BC200905497](#) at [\[80\]](#) per Graham J (in cases where a disability is imputed but is in dispute, the test is what would have been done if the claimant was not disabled or a person to whom a disability had been imputed. The circumstance giving rise to dismissal was a propensity to engage in serious acts of discourtesy, rudeness and intimidating and provocative behaviour).
- 11 *Thompson v IGT (Aust) Pty Ltd* (2008) 173 IR 395 ; [\[2008\] FCA 994](#); [BC200805151](#) at [\[60\]](#) per Goldberg J (employer would have required an employee taking large amounts of unexplained leave to provide evidence to exclude a medical condition).
- 12 *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC ¶93-457 ; [\[2007\] QSC 075](#); [BC200702388](#).
- 13 *Thompson v Big Bert Pty Ltd t/as Charles Hotel* (2007) 168 IR 309 ; [\[2007\] FCA 1978](#); [BC200711029](#) (no finding of indirect sex discrimination, as circumstances of caring for children were not distinguished from that of other single parents).
- 14 *Employment Services Australia Pty Ltd v Poniatowska* [\[2010\] FCAFC 92](#) ; [BC201005221](#) (given the sympathetic treatment of male employees the same approach would not have been taken to a male who was sexually harassed and complained).
- 15 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [\[76\]](#), [\[77\]](#) per French and Jacobson JJ (the linkage between criticism or denigration and race may be established in a remark, critical of one person in a group but not others and can have the effect of impairing that person's enjoyment of the right to work or to just and favourable conditions of work).
- 16 *Gordon v Commonwealth* (2008) EOC ¶93-495 ; [\[2008\] FCA 603](#); [BC200803167](#).

(C) Discrimination

- 17 *Leves v Haines* (1986) EOC ¶92-167 at 76,624, EOT(NSW) (dismissed *Haines v Leves* [\(1987\) 8 NSWLR 442](#) ; (1987) EOC ¶92-192 at 76,842 per Kirby P, CA(NSW)).
- 18 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#); *Walker v Victoria* [\[2011\] FCA 258](#) ; [BC201101493](#).
- 19 *Zhang v University of Tasmania* (2009) 174 FCR 366 ; [\[2009\] FCAFC 35](#); [BC200901761](#) at [\[63\]](#), [\[66\]-\[68\]](#) per Jessup and Gordon JJ (it could not be said that the University would have treated a person without her 'disability' any differently).
- 20 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#) at [\[165\]](#) (maternity leave found to be generally a characteristic of women who are pregnant).
- 21 *Sterling Commerce (Aust) Pty Ltd v Iliff* (2008) EOC ¶93-496 ; (2008) 173 IR 378; [\[2008\] FCA 702](#); [BC200803650](#).
- 22 *McInnes v Roads and Traffic Authority (NSW)* (1997) EOC ¶92-894, EOT(NSW).
- 23 *Matthews v Hargreaves (No 4)* (2013) 274 FLR 138 ; [\[2013\] FMCA 4](#); [BC201300055](#).
- 24 *Queensland v Mahommed* (2007) EOC ¶93-452 ; [\[2007\] QSC 018](#); [BC200700466](#) (finding of direct and indirect discrimination upheld on appeal in term requiring Muslim prisoner to eat general prison diet when a higher proportion of Muslims would not have been able to comply than people in the general population; less favourable treatment as there was clearly detriment).
- 25 *Black & White (Quick Services) Taxis Ltd v Sailor* [\[2010\] QSC 073](#) ; [BC201001397](#) at [\[15\]-\[18\]](#) per Jones J (for a complainant to be treated less favourably than the hypothetical comparator in the supply of goods or services, it is essential to the comparison that the complainant be an actual, intended or potential beneficiary of the relevant supply, not a bystander).
- 26 *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#)  at [105](#); (1984) EOC ¶92-023; (1983) 5 IR 320 per Mathews DCJ (adopting the meaning given to 'detriment' in *Ministry of Defence v Jeremiah* [\[1980\] QB 87](#)   at [99](#)  per Brandon LJ). See also *Leonard v Youth Hostels Assn of Victoria* (1995) EOC ¶92-763; *Varas v Fairfield City Council* [\[2009\] FCA 689](#) ; [BC200905497](#); *Hamden v Commonwealth* [\[2010\] FCA 924](#) ; [BC201006190](#) at [\[150\]](#) (refusal to transfer employee to a new team leader or remove the team leader did not constitute a detriment). Whether detriment has been suffered for the purposes of (CTH) [Disability Discrimination Act 1992](#) s [15\(2\)](#) is to be answered objectively: *Varas v Fairfield City Council* [\[2009\] FCA 689](#) ; [BC200905497](#); *Hamden v Commonwealth* [\[2010\] FCA 924](#) ; [BC201006190](#) (both following *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023; (1983) 5 IR 320).
- 27 *Leonard v Youth Hostels Assn of Victoria* (1995) EOC ¶92-763, at 78,651; *Lina Obieta v New South Wales Dept of Education and Training* [\[2007\] FCA 86](#) ; [BC200700398](#); *Georgiou v Spencer Holdings Pty Ltd* (1990) 170 CLR 104 ; [93 ALR 483](#); [\[2010\] FCA 1409](#); [BC201010263](#).
- 28 *Kukyen v Lay* (2013) 240 IR 89 ; [2013] VCAT 1972.

[80-260] Discrimination on account of a characteristic

The paragraph below is current to **07 March 2018**

All anti-discrimination legislation provides that discrimination on the basis of a specified ground, attribute or status is unlawful not only if it is directly based on that ground, attribute or status, but also if it is based on a characteristic appertaining generally to those of the relevant status or attribute, or is based on a ground or attribute generally imputed to persons with that status.¹ The expression 'generally imputed' can include a characteristic that is usually, extensively or always present or that, when it does occur, is applicable to most or all of the persons of that status.² A 'characteristic' has been held to include 'without family' in relation to a single member of the defence force for purposes of discrimination on grounds of marital status in relation to accommodation,³ the likelihood that women will have breaks in the continuity of employment because of child-rearing,⁴ an assumption that because of their marital status wives will be

corrupted by their husbands;⁵ the tendency of persons suffering coronary disease to undergo bypass surgery,⁶ and speaking in a foreign language for the purposes of discrimination on grounds of race.⁷

Notes

- 1 As to grounds, attributes and status see [80-290]. (CTH) [Disability Discrimination Act 1992](#) couches direct discrimination (ibid s 5) and indirect discrimination (ibid s 6) in terms differing from the above formula in the text. Ibid s 4(k) of definition of 'disability') defines 'disability' to include a disability that is imputed to a person and covers claims based on wrongly imputing a disability (see *Varas v Fairfield City Council* [2009] FCA 689 ; [BC200905497](#) (claim against termination of employment on the basis of imputed illness or disease); *Zhang v University of Tasmania* (2009) 174 FCR 366 ; [2009] FCAFC 35; [BC200901761](#) at [16] per Gray J for meaning of 'imputed' under (CTH) [Disability Discrimination Act 1992](#) s 4(k)).
- 2 *Bear v Norwood Private Nursing Home* (1984) EOC ¶92-019; *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [2002] FCA 939; [BC200204194](#) at [167], [168].
- 3 *Sullivan v Dept of Defence* (1991) EOC ¶92-366 (confirmed on this point *Commonwealth v Human Rights & Equal Opportunity Commission* (1991) 32 FCR 468 ; [25 ALD 467](#); [109 ALR 490](#); [BC9103526](#)).
- 4 *Kemp v Minister for Education* (1991) EOC ¶92-340 (the determination of a promotion was based on length of service and discriminated against a person who had been absent because of child-rearing responsibilities). See also *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [2002] FCA 939; [BC200204194](#) at [53] (job responsibility and customer base reduced in importance after return from maternity leave, amounting to a demotion).
- 5 *Waterhouse v Bell* (1991) 25 NSWLR 99 ; (1991) EOC ¶92-376; 41 IR 435, CA(NSW) (the wife of a deregistered horse trainer was not allowed to be registered because she might be 'corruptible' by her husband as a person imputed to have influence over her; the New South Wales Court of Appeal, overruling the Equal Opportunity Tribunal's determination, directed a fresh determination by the Tribunal according to law). See also *Ciemcioch v Echuca-Moama RSL Citizens Club Ltd* (1994) EOC ¶92-657 (loyalty towards, and support of, a husband's lawful activities a characteristic generally imputed to the relationship of marriage for the purposes of discrimination on grounds of marital status).
- 6 *State Transit Authority v Sloey* [1999] NSWSC 47 ; [BC9900892](#).
- 7 *Moreira v Peter Robert Motors Pty Ltd* (2002) EOC ¶93-209. Compare *Kapoor v Monash University* (2001) 4 VR 483 ; (2002) EOC ¶93-188; [2001] VSCA 247; [BC200108171](#) (in obiter, Victorian Court of Appeal doubted whether personality trait of being socially reserved was established as a 'characteristic' of Indian Hindus of Brahmin caste); *Trindall v NSW Cmr of Police* [2005] FMCA 2 ; [BC200500200](#) (sickle cell trait found not to be a characteristic of persons of African descent, although it was common among such persons).

[80-265] Indirect discrimination

The paragraph below is current to **07 March 2018**

Indirect or systemic discrimination occurs when the elements of discrimination occur, but the action taken does not appear on the face of it to be discriminatory.¹ Some legislation expressly uses the terms 'indirect discrimination'.² The earlier style legislation used a test of 'systemic' discrimination evolved in United States jurisprudence.³ The test incorporated in the older style legislation for indirect discrimination is where there is imposition on a person (the complainant), because of his or her status, of a requirement or condition that:⁴

- (1) a substantially higher proportion of persons of another status than the complainant can comply with;

(C) Discrimination

- (2) the complainant cannot comply with; and
- (3) is not reasonable.

In some jurisdictions, indirect discrimination now occurs if a person imposes a requirement or condition that simply has (or is likely to have) the effect of disadvantaging persons with a protected attribute and that is not reasonable without having to demonstrate a substantially higher proportion of those without the relevant attribute can comply.⁵ In some legislation the result of the discrimination must also be to produce (or, in some cases, be likely to produce) a less favourable or disadvantageous outcome.⁶ The Queensland and Victorian legislation in addition defines 'reasonableness' by referring to the consequences of failure to comply, the cost of alternative terms and the financial situation of the imposer of the terms.⁷ The Commonwealth and Australian Capital Territory legislation defines 'reasonableness' by referring to the extent of the resulting disadvantages, the feasibility and cost of overcoming them and whether the result will be proportionate to the object of the requirement under scrutiny.⁸ Recent changes to the (CTH) [Disability Discrimination Act 1992](#) substitute the 'proportionality test' for indirect discrimination with proof that the condition or requirement had the effect of disadvantaging people with disability.⁹ In defining 'reasonableness' the Northern Territory does not draw on the concepts of direct and indirect discrimination but rather refers to the impairment of equality of opportunity and less favourable treatment.¹⁰ Even where direct and indirect discrimination are mutually exclusive¹¹ the factual basis of claims may be common to both.¹²

Notes

¹ See [80-245], [80-255], [80-260].

² (CTH) [Disability Discrimination Act 1992](#) s 6; (CTH) [Age Discrimination Act 2004](#) s 15; (CTH) [Sex Discrimination Act 1984](#) s 7A (referred to in section heading only, so technically not part of Act under (CTH) [Acts Interpretation Act 1901](#) s 13(3))

(QLD) [Anti-Discrimination Act 1991](#) s 11

(TAS) [Anti-Discrimination Act 1998](#) s 15

(VIC) [Equal Opportunity Act 2010](#) s 9

There is no express reference in the other jurisdictions.

³ *Griggs v Duke Power Co* 401 US 424 (1971), SC(USA) (applying Title VII of the (US) Civil Rights Act 1964).

⁴ (CTH) [Racial Discrimination Act 1975](#) s 9(1A) (the first limb of the above test is in terms that the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom); (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2) (refer to a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same attribute as the aggrieved person), 7B; (CTH) [Disability Discrimination Act 1992](#) s 6; (CTH) [Age Discrimination Act 2004](#) s 15 (the first limb in the latter two statutes is expressed as the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability/persons of the same age as the aggrieved person)

(NSW) [Anti-Discrimination Act 1977](#) ss 7(1)(c), 24(1)(b), 38(1)(b), 38(1)(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b)

(QLD) [Anti-Discrimination Act 1991](#) s 11

(SA) [Equal Opportunity Act 1984](#) ss 29(2)(b), 29(2a)(b), 29(3)(b), 51(b), 66(b), 85A(b), 85T(2)(b), 85T(4)(b), 85T(6)

(WA) [Equal Opportunity Act 1984](#) ss 8(2), 9(2), 10(2), 10A(2), 35AB(3), 35A(2), 35O(3), 36(2), 53(2), 66A(3), 66V(3).

As to the position in the other jurisdictions see note 6 below.

(C) Discrimination

- 5 (ACT) [Discrimination Act 1991](#) s 8(VIC) [Equal Opportunity Act 2010](#) s 9(1). The onus of proving reasonableness is on the person imposing the requirement (the test is whether the condition has, or is likely to have, the effect of disadvantaging persons with an attribute).
- 6 (CTH) [Racial Discrimination Act 1975](#) s 9(1A); (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2); (CTH) [Age Discrimination Act 2004](#) s 15
(NT) [Anti-Discrimination Act 1992](#) s 20(1) ('nullifying or impairing equality of opportunity')
(TAS) [Anti-Discrimination Act 1998](#) s 15.
- 7 (QLD) [Anti-Discrimination Act 1991](#) s 11(2)
(VIC) [Equal Opportunity Act 2010](#) s 9(3).
- 8 (CTH) [Sex Discrimination Act 1984](#) s 7B
(ACT) [Discrimination Act 1991](#) s 8(3).
There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#) or the (CTH) [Age Discrimination Act 2004](#).
- 9 (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) s 17; (CTH) [Disability Discrimination Act 1992](#) s 6.
- 10 (NT) [Anti-Discrimination Act 1992](#) s 20.
The other jurisdictions do not define 'reasonableness'.
- 11 *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46 ; [137 ALR 653](#); (1996) EOC ¶92-838; [BC9603088](#); *Hamden v Commonwealth* [2010] FCA 924 ; [BC201006190](#) at [142] per Lander J (obiter). See also [80-245].
- 12 *Walker v Victoria* [2011] FCA 258 ; [BC201101493](#) at [28] per Tracey J.

[80-270] Imposition of a requirement or condition

The paragraph below is current to **07 March 2018**

Except in the Northern Territory, all anti-discrimination legislation specifies that a central element in indirect or systemic discrimination is the imposition of a requirement or condition.¹ The term 'impose' need not involve a formal act, and may include a decision not yet implemented.² However, the requirement must come from the discriminator, rather than being a function of the inherent nature of the goods or services provided or the legislative structure within which the discriminator operates.³ Whether a condition is not reasonable is a question of fact.⁴ The criterion is an objective one.⁵ The requirement or condition must be stated with some precision.⁶ A requirement may be a term of employment, such as a rule about seniority for promotion.⁷ However, the rule need not necessarily be formal, such as a practice relating to the order of dismissal in times of retrenchment,⁸ or an assessment that certain customers cannot be managed on a part-time basis,⁹ nor must the rule constitute an absolute bar to promotion, if there is to be 'a practical (and not merely a theoretical) chance of selection'.¹⁰ Indeed, the rule must not be given a 'narrow construction' because it is concerned 'not with form and intention, but with the impact or outcome of certain practices'.¹¹ A requirement may also apply outside the field of employment, relating to the way a service is provided¹² or is made available.¹³ The requirement or condition has been described as being one which is 'fair in form and intention but discriminatory in impact and outcome'.¹⁴ The ability to comply with the requirements or condition must not be literal or theoretical, but a practical ability.¹⁵

(C) Discrimination

- 1 (CTH) [Racial Discrimination Act 1975](#) s 9(1A) (refers to a 'term' as well as a requirement or condition); (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2) (refers to a 'practice' as well as a requirement or condition); (CTH) [Disability Discrimination Act 1992](#) s 6; (CTH) [Age Discrimination Act 2004](#) s 15 (refers to a 'practice' as well as a requirement or condition)

(ACT) [Discrimination Act 1991](#) s 8(1)(b)

(NSW) [Anti-Discrimination Act 1977](#) ss 7(1)(c), 24(1)(b), 38B(1)(b), 38B(1)(c), 38B(1)(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b)

(QLD) [Anti-Discrimination Act 1991](#) s 11(1) (refers to a 'term' rather than a requirement or condition)

(SA) [Equal Opportunity Act 1984](#) ss 29(2), 29(2a), 51, 66, 85A, 85T

(TAS) [Anti-Discrimination Act 1998](#) s 15(1) (refers to a 'practice' as well as a requirement or condition)

(VIC) [Equal Opportunity Act 2010](#) s 9(1). See *Victoria v Turner* (2009) 23 VR 110 ; [2009] VSC 66; BC200901163 at [100] per Kyrrou J (review of general principles applied to a 'not reasonable' requirement in (VIC) Equal Opportunity Act 1995 (repealed) s 9(1)(c) and at [101] for the relevance of a policy or program on whether a condition is not reasonable (indirect discrimination in relation to access to education for a child with a brain dysfunction by imposing a condition that she access education without a teacher's aide))

(WA) [Equal Opportunity Act 1984](#) ss 8(2), 9(2), 10(2), 10A(2), 35AB(3), 35A(2), 35O(3), 36(2), 53(2), 66A(3), 66V(3).

There are no equivalent provisions in the Northern Territory. See however [80-265] note 10.

As to requirements or conditions see *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; 249 ALR 145; [2008] FCAFC 96; BC200804217; *Walker v Victoria* [2011] FCA 258 ; BC201101493 at [189]-[195] per Tracey J (reviewing authorities).
- 2 *Waters v Rizkalla* [1991] 1 VR 12 ; (1990) EOC ¶92-282 at 77,854, SC(VIC) (Cummins J commented that not every decision would be covered, for example, a philosophical, metaphysical or theoretical decision: 'But the impugned decision here is none of these ... It is a decision made by a public authority (Metropolitan Transit Authority of Victoria) ... made and announced with the intention and will to implement it in fact'). See also *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC ¶92-903, Human Rights and Equal Opportunity Commission. But see note 7 below.
- 3 *Waters v Public Transport Corp* (1991) 173 CLR 349  at 360, 361; 103 ALR 513 at 521; BC9102598 per Mason CJ and Gaudron J (with whom Deane J agreed) (the condition 'would seem to involve something over and above that which is necessarily inherent in the goods and services provided'); see also (CLR) at 397 per Dawson and Toohey JJ, and at 406, 407 per McHugh J; *New South Wales v Amery* (2006) 230 CLR 174 ; 226 ALR 196; [2006] HCA 14; BC200603095 at [81] per Gummow, Hayne and Crennan JJ, at [205]-[207] per Callinan J (finding that the distinction between permanent and non-permanent teachers which resulted in their differential pay scales under the award was 'a feature of the structure of the workforce' and was not a decision or practice of the Department of Education but was imposed by the (NSW) [Teaching Service Act 1980](#)), and at [15]-[17] per Gleeson CJ (reaching a different conclusion from the majority in finding that although the requirement to have permanent status in order to access the higher pay scales under the award was not a requirement imposed by the Department, the Department had imposed a 'practice' of paying teachers in accordance with the award). See also *Keech v Western Australia Metropolitan Health Service t/as King Edward Memorial Hospital* (2010) 276 ALR 118 ; [2010] FCA 1332; BC201009051 at [44] per Siopis J (respondent simply acted in response to the terms of workers compensation legislation when paying entitlements conditioned on age). Compare *Clarke v Catholic Education Office* (2003) 76 ALD 84 ; 202 ALR 340; [2003] FCA 1085; BC200305857 at [45] per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; 81 ALD 66; [2004] FCAFC 197; BC200404916) (Madgwick J rejected the argument that it was an 'intrinsic feature' of the Catholic Education Office's education service that it be conducted without the aid of interpreter).
- 4 *Waters v Public Transport Corp* (1991) 173 CLR 349  at 378, 395-6; 103 ALR 513; BC9102598.
- 5 It requires the Tribunal to weigh the nature and extent of the discriminatory effect against the reasons advanced in favour of the condition: *Waters v Public Transport Corp* (1991) 173 CLR 349  at 395-6; [1991] HCA 49; *Victoria v Turner* (2009) 23 VR 110 ; [2009] VSC 66; BC200901163 at [100].
- 6 See, for example, *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  at 185; 89 ALR 1 at 15; 64 ALJR 53; BC8902682 per Dawson J (in relation to employment 'the requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees; 'nevertheless, it is necessary ... to formulate ... the condition with some precision'); *Waters v Public Transport Corp* (1991) 173 CLR 349

(C) Discrimination

- ◆ at 360, 361; [103 ALR 513](#) at [521](#); [BC9102598](#) per Mason CJ and Gaudron J (with whom Deane J agreed) (the condition 'would seem to involve something over and above that which is necessarily inherent in the goods and services provided'). See also *Fetherston v Peninsula Health* (2004) EOC ¶93-331 ◆; [\[2004\] FCA 485](#); [BC200402081](#) at [\[81\]](#) per Heerey J in obiter (there must be 'some positive criterion or test or qualification or activity' with which the person is called on to comply); *Hamden v Commonwealth* [\[2010\] FCA 924](#) C; [BC201006190](#) at [\[140\]-\[142\]](#) per Lander J ('requirement' or 'condition' not properly identified); *Walker v Victoria* [\[2011\] FCA 258](#) ◆; [BC201101493](#) at [\[194\]](#) per Tracey J.
- 7 *Kemp v Minister for Education* (1991) EOC ¶92-340.
- 8 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ◆; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#).
- 9 *Hickie v Hunt* (1998) EOC ¶92-910 at 10.2 per Commissioner Evatt, Human Rights and Equal Opportunity Commission.
- 10 *Styles v Secretary, Dept of Foreign Affairs & Trade* [\(1988\) 16 ALD 234](#) ◆; [84 ALR 408](#); (1988) EOC ¶92-239 per Wilcox J, Fed C of A (affirmed *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ◆; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265 at 77,368 per Bowen CJ and Gummow J).
- 11 *Styles v Secretary, Dept of Foreign Affairs & Trade* [\(1988\) 16 ALD 234](#) ◆; [84 ALR 408](#); (1988) EOC ¶92-239 per Wilcox J, Fed C of A (affirmed *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ◆; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265 at 77,368 per Bowen CJ and Gummow J); *New South Wales v Amery* (2006) 230 CLR 174 ◆; [226 ALR 196](#); [\[2006\] HCA 14](#); [BC200603095](#) at [\[63\]](#) per Gummow, Hayne and Crennan JJ (although at [86]-[89] Kirby J suggests that the majority's approach reflects a narrow construction). See also *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC ¶92-903.
- 12 *Waters v Public Transport Corp* (1991) 173 CLR 349 ◆; [103 ALR 513](#); [BC9102598](#) (requirement that scratch tickets be obtained for public transport). Compare *Vance v State Rail Authority* [2004] FMCA 240 ◆ (train guard allowed insufficient time for a visually impaired passenger to board, but such a practice was not imposed by the Authority and was in fact contrary to the Authority's procedures). See also *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ◆; [240 ALR 399](#); [\[2007\] FCAFC 140](#); [BC200707248](#) at [\[29\]](#) per Black CJ (the alteration of a person's sex on their birth registration is a 'service', applying a purposive interpretation (note in *AB v Western Australia* [2011] HCATrans 87 C special leave to appeal was granted by the High Court of Australia)); *Rainsford v Victoria* (2008) 167 FCR 26 ◆; [100 ALD 483](#); [\[2008\] FCAFC 31](#); [BC200801493](#) (the proper identification of the 'service' (if it exists) was 'prison transport generally').
- 13 *Byham v Preston City Council (Vic)* (1991) EOC ¶92-377 (no lift installed by a municipal council, thereby imposing impossible conditions on disabled persons needing access to higher floors to obtain the service); *Queensland v Mahommed* (2007) EOC ¶93-452 C; [\[2007\] QSC 018](#); [BC200700466](#) (term required Muslim prisoner to eat general prison diet when a higher proportion of Muslims would not have been able to comply). Compare *Ball v Silver Top Taxi Service Ltd* (2005) EOC ¶93-370 ▲; [\[2004\] FMCA 967](#) (taxi service did all it could on the particular day to provide services to disabled person). See also *Ball v Morgan* [\[2001\] FMCA 127](#) ◆; [BC200108534](#) for a case where the services involved are illegal.
- 14 *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ◆; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265 at 77,636 per Bowen CJ and Gummow J, Fed C of A, Full Court).
- 15 *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC ¶92-889, HREOC. See also *Mandla (Sewa Singh) v Dowell Lee* [\[1983\] 2 AC 548](#) ▲; 1 All ER 1062; 2 WLR 620; *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46 ▲ at 80; [137 ALR 653](#); (1996) EOC ¶92-838; [BC9603088](#) per Heerey J; *Travers v New South Wales* (2001) 163 FLR 99 ◆ at [17]; [2001] FMCA 18; *Clarke v Catholic Education Office* [\(2003\) 76 ALD 84](#) ◆; [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) at [\[49\]](#) per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ◆; [81 ALD 66](#); [\[2004\] FCAFC 197](#); [BC200404916](#)).

[80-275] Condition with which a substantially higher proportion of persons can comply

The paragraph below is current to **07 March 2018**

Three criteria must be met before a situation satisfies the legislative stipulation that in order for there to be indirect discrimination there must be a requirement or condition with which the complainant cannot comply.¹

The first is that the requirement or condition must be one with which a 'substantially higher proportion' of persons of a different status or attribute than that of the complainant can comply. The use of the concept of 'proportion' makes it necessary to establish two groups or 'pools', and then to compare the proportion of the one (the complainant's 'pool') that are disadvantaged by the requirement or condition with the proportion of the rest of the people involved (the not-disadvantaged persons' 'pool').² There has been much discussion, and little agreement as yet in the courts, as to how the 'pools' into which the complainant and the group not discriminated against are to be identified. The range of options is wide³ but it is established that separate pools will be ascertained for the purposes of determining the proportions and that the constitution of the pools will depend upon the circumstances.⁴ It has been suggested that identifying the 'pools' in cases of alleged disability discrimination may be more straightforward than in other cases because the presence of a physical disability makes it easy to determine whether or not persons in the 'pool' can comply.⁵ In some Commonwealth legislation, and in the Australian Capital Territory, the Northern Territory, Tasmania and Victoria the proportionate and pooling requirements no longer exist. The provisions now indicate that the requirement or condition must have or be likely to have the effect of disadvantaging persons with the same attribute as the complainant.⁶ This means that it is for the courts and tribunals to determine whether a discriminatory requirement has been imposed that has the effect of disadvantaging the relevant group.⁷

Notes

- 1** As to the imposition of a requirement or a condition see [80-270]. As to conditions with which the complainant cannot comply see [80-280]. As to conditions which are not reasonable in the circumstances see [80-285].
- 2** *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#); *Clarke v Catholic Education Office* (2003) 76 ALD 84 ; [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) at [46]-[48] per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; [81 ALD 66](#); [2004] FCAFC 197; [BC200404916](#)). See also *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [2008] FCAFC 96; [BC200804217](#) at [119]-[126] per Spender and Emmett JJ (successful appeal because at trial there was no evidence to establish the respective proportions of persons in the base group and comparator group). (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) clarified (by changes to (CTH) [Disability Discrimination Act 1992](#) s 8) that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability, addressing the issues in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [2008] FCAFC 96; [BC200804217](#).
- 3** *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  at 177-80 per Deane and Gaudron JJ, at 187 per Dawson J; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#) (see further (CLR) at 198-207 per McHugh and Brennan JJ (dissenting) who took different 'pools' and pointed to differences in the New South Wales Court of Appeal).
- 4** *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  at 177, 178 per Deane and Gaudron JJ, at 187 per Dawson J; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#); *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#). See also *Kemp v Minister for Education* (1991) EOC ¶92-340 at 78,370 (promotion in the Education

(C) Discrimination

Department of Western Australia); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 118-121 per Sackville J; [150 ALR 1](#); [BC9706323](#).

5 *Minns v New South Wales (Dept of Education and Training)* [\[2002\] FMCA 60](#) at [\[250\]-\[253\]](#) per Raphael FM.

6 (CTH) [Sex Discrimination Act 1984](#) ss [5\(2\)](#), [6\(2\)](#), [7\(2\)](#); (CTH) [Age Discrimination Act 2004](#) s [15\(1\)](#)

(ACT) [Discrimination Act 1991](#) s [8\(1\)\(b\)](#)

(NT) [Anti-Discrimination Act 1992](#) s [20\(1\)](#) (discrimination includes any distinction, restriction, exclusion or preference based on a specified attribute that has the effect of nullifying or impairing equality of opportunity)

(TAS) [Anti-Discrimination Act 1998](#) s [15](#)

(VIC) [Equal Opportunity Act 2010](#) s [9\(1\)](#) (has, or is likely to have, the effect of disadvantaging persons with an attribute).

7 There have been a number of cases under the (CTH) [Sex Discrimination Act 1984](#) in which the requirement to work full time has been found to be a 'requirement or condition' which has the effect of disadvantaging women. In these cases, the courts have taken judicial notice of the fact that women bear the dominant responsibility for child rearing and therefore have a greater need for part time work than men. In *Howe v Qantas Airways Ltd* (2004) 188 FLR 1; (2004) EOC ¶93-359; [\[2004\] FMCA 242](#), the Federal Sex Discrimination Commissioner, appearing as amicus curiae, submitted that it was permissible for the courts to take judicial notice of this fact at the present time. See *Hickie v Hunt* (1998) EOC ¶92-910, HREOC; *Escobar v Rainbow Printing Pty Ltd (No 2)* (2002) EOC ¶93-229; (2002) 120 IR 84; [\[2002\] FMCA 122](#); *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC ¶93-285; [\[2003\] FMCA 209](#). There are few cases on whether a discriminatory requirement 'disadvantages' the relevant group under the (ACT) [Discrimination Act 1991](#), but see *J v Federal Capital Press of Australia Ltd* [1999] ACTDT 2 (restriction on advertisers whose advertisements are restricted to the 'adult services' column would be likely to disadvantage persons whose occupation is that of a sex worker) (not reversed on that point on appeal *Edgley v Federal Capital Press of Australia Ltd* [\(1999\) 139 ACTR 1](#); [\[1999\] ACTSC 95](#); [BC9906382](#); *Edgley v Federal Capital Press of Australia Ltd* (2001) 108 FCR 1; [192 ALR 395](#); [\[2001\] FCA 379](#); [BC200101462](#)).

[80-280] Condition with which the complainant cannot comply

The paragraph below is current to **07 March 2018**

The second condition in some jurisdictions is that the complainant must be one who has a status or attribute, who does not or is not able to comply with the condition, and a substantially higher proportion of those who do not have that status or attribute are able to comply.¹ The provision has been construed beneficially, so that an element of pragmatism has been incorporated, it may be sufficient that a person cannot 'in practice' comply.² For example, where a staff member, through management discouragement, failed to enter a superannuation scheme, that may be sufficient inability to comply.³ Some anti-discrimination legislation refers to a requirement or condition that has the effect of 'disadvantaging' persons who have the status or attribute, rather than a requirement or condition with which such persons are unable to comply.⁴

Notes

1 As to the imposition of a requirement or a condition see [80-270]. As to the first and third conditions see [80-275], [80-285].

(NSW) [Anti-Discrimination Act 1977](#) ss [7\(1\)\(c\)](#), [24\(1\)\(b\)](#), [38B\(1\)\(b\)](#), [38B\(1\)\(c\)](#), [39\(1\)\(b\)](#), [49B\(1\)\(b\)](#), [49T\(1\)\(b\)](#), [49ZG\(1\)\(b\)](#), [49ZYA\(1\)\(b\)](#)

(QLD) [Anti-Discrimination Act 1991](#) s [11\(1\)](#)

(SA) [Equal Opportunity Act 1984](#) ss [29\(2\)](#), [29\(2a\)](#), [29\(3\)](#), [51](#), [66](#), [85A](#), [85T](#)

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) ss 8(2), 9(2), 10(2), 10A(2), 35AB(3), 35A(2), 35O(3), 36(2), 53(2), 66A(3), 66V(3).

As to the position in the other jurisdictions see note 4 below.

- 2 See *Styles v Secretary, Dept of Foreign Affairs & Trade* (1988) 16 ALD 234 ; 84 ALR 408; (1988) EOC ¶92-239 at 77,238 per Wilcox J, Fed C of A (quoting and following *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548  ; 1 All ER 1062; 2 WLR 620, HL); *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC ¶92-889, HREOC; *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46  at 80; 137 ALR 653; (1996) EOC ¶92-838; BC9603088 per Heerey J; *Travers v New South Wales* (2001) 163 FLR 99  at [17]; [2001] FMCA 18; *Clarke v Catholic Education Office* (2003) 76 ALD 84 ; 202 ALR 340; [2003] FCA 1085; BC200305857 at [49] per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; 81 ALD 66; [2004] FCAFC 197; BC200404916).
 - 3 *Australian Public Service Assn v Australian Trade Commission* (1988) EOC ¶92-228 per Einfeld J, President, HREOC. See also *Byham v Preston City Council (Vic)* (1991) EOC ¶92-377, EOB(VIC) (complainant could not comply with requirement to use staircase as he could only do so with able-bodied assistance). Compare *Spiteri v Manly Pacific International Hotel Pty Ltd t/as Manly Pacific Park Royal* (unreported, EOTrib(NSW), 27/94, 12 August, 1997) (complainant could not comply with requirement to be clean shaven despite back injury because he had failed to pursue practical, simple and inexpensive ways of shaving comfortably without causing damage or pain to his back).
 - 4 (CTH) [Racial Discrimination Act 1975](#) s 9(1A) (the requirement to comply has the requisite purpose or effect); (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2); (CTH) [Age Discrimination Act 2004](#) s 15; (CTH) [Disability Discrimination Act 1992](#) s 6 (in these Acts the requirement to comply must simply have the adverse effect on those with the relevant status or attribute). On (CTH) [Disability Discrimination Act 1992](#) s 6 before amendment by (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) see *Hurst v Queensland* (2006) 151 FCR 562 ; 235 ALR 53; [2006] FCAFC 100; BC200605714 at [134] per Ryan, Finn and Weinberg JJ (it is sufficient for (CTH) [Disability Discrimination Act 1992](#) s 6(c) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can 'cope' with the requirement or condition); *Rainsford v Victoria* (2008) 167 FCR 26 ; 100 ALD 483; [2008] FCAFC 31; BC200801493 at [98]-[102] per Sundberg J; *Nojin v Commonwealth* (2012) 208 FCR 1 ; 298 ALR 410; [2012] FCAFC 192.
- (ACT) [Discrimination Act 1991](#) s 8(1)(b)
- (NT) [Anti-Discrimination Act 1992](#) s 20
- (TAS) [Anti-Discrimination Act 1998](#) s 15(1)
- (VIC) [Equal Opportunity Act 2010](#) s 9(1) (the condition must have, or be likely to have, the effect of disadvantaging persons with an attribute).

While a person having the status or attribute might be able to comply with a requirement or condition it may nevertheless operate to disadvantage the person. See, for example, *J v Federal Capital Press of Australia Ltd* [1999] ACTDT 2 (not reversed on that point on appeal *Edgley v Federal Capital Press of Australia Ltd* (1999) 139 ACTR 1 ; [1999] ACTSC 95; BC9906382; *Edgley v Federal Capital Press of Australia Ltd* (2001) 108 FCR 1 ; 192 ALR 395; [2001] FCA 379; BC200101462).

[80-285] Condition not reasonable in the circumstances

The paragraph below is current to **07 March 2018**

The third stipulation requires that if a condition or requirement is to constitute indirect or systemic discrimination, it be not reasonable in the circumstances.¹ The question of reasonableness in the circumstances is a question of fact, which must be determined by the tribunal,² and which will if necessary be returned to the tribunal for determination in accordance with law. The onus of showing unreasonableness usually rests with the complainant.³ However, construction of the term has been favourable to the complainant, in that 'reasonable' means more than simply that the condition would suit business convenience — what is required is 'the removal of artificial, arbitrary and unnecessary barriers'.⁴ Matters of administrative tidiness and even of expense involved in the payment of higher duties are not sufficient.⁵ However, a rule such as 'last on, first off', though 'facially neutral' may not, when its

effect is analysed, be reasonable.⁶ Nor may a new set of arrangements for providing service that have the effect of excluding most of the members of a disadvantaged group be reasonable, even if the main object of the providing authority is to reduce heavy losses.⁷ The imposer of the condition, such as in the course of restructuring a major enterprise, must have regard for the possibility of indirect discrimination occurring.⁸ Nonetheless, the question is not whether the decision to impose the requirement or condition is 'correct' but rather whether it is not shown to be objectively reasonable having regard to the circumstances of the case.⁹ The existence of a viable alternative which could ameliorate the disadvantage, while a relevant factor to consider in determining reasonableness, does not of itself render the requirement or condition unreasonable.¹⁰

In *Waters v Public Transport Corp*¹¹ it was noted that there are two views of the meaning of 'reasonable in the circumstances' — the 'strict' view and the 'broader' view.¹² The strict view would confine the assessment of reasonableness to the circumstances of the complainants only.¹³ The broader view would involve balancing the inconvenience to the complainants against the inconvenience to the respondents. The majority in *Waters* upheld the decision by the Victorian Supreme Court in applying the broader view.¹⁴ The cases are difficult to reconcile. It has been held that it is not reasonable for a child to be provided for while her mother attends aerobic classes,¹⁵ or for a lift to have to be installed by a municipal council or by the owner of a store.¹⁶ On the other hand, it has been held unreasonable for the Metropolitan Transport Authority to withdraw conductors from services and require the use of scratch tickets¹⁷ and for a spa owner to refuse access to the spa facilities for a wheelchair-confined person and an attendant,¹⁸ and for a club to require a man suffering from an anxiety disorder to keep his assistance dog on a leash inside the club.¹⁹ The imposition of a requirement that an employee attend a medical professional is often reasonable if to confirm fitness to undertake duties, as a matter of employer health and safety compliance.²⁰ Reasonableness in such circumstances imports considerations of privacy.²¹

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s 9(1A); (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2), 7B; (CTH) [Disability Discrimination Act 1992](#) ss 6, 11; (CTH) [Age Discrimination Act 2004](#) s 15. As to (CTH) [Disability Discrimination Act 1992](#) see *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#) at [\[126\]](#) per Spender and Emmett JJ (nothing unreasonable in requiring the approval of the management of the hospital before a dog was permitted entry into the relevant facility; trial judge erred in finding hospital policies regarding animals were unreasonable in applying discretionary criteria, but note (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) clarified (by changes to (CTH) [Disability Discrimination Act 1992](#) s 8) that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability, addressing the issues in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#)); *Rainsford v Victoria* (2008) 167 FCR 26 ; [100 ALD 483](#); [\[2008\] FCAFC 31](#); [BC200801493](#) (requiring an injured prisoner to obtain a medical certificate if wishing to use alternative transport was not unreasonable because of security risks and other practical considerations (decided before the 'proportionality test' in (CTH) [Disability Discrimination Act 1992](#) s 6 was replaced)).
- (ACT) [Discrimination Act 1991](#) s 8(2), 8(3)
- (NT) [Anti-Discrimination Act 1992](#) ss 31(3), 35, 37, 45, 49(1)(d)-(f), 55, 56(1)(a), 58(1), 58(2)
- (NSW) [Anti-Discrimination Act 1977](#) ss 7(1)(c), 24(1)(b), 38B(1)(b), 38B(1)(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b)
- (QLD) [Anti-Discrimination Act 1991](#) s 11(1)(c), 11(2)
- (SA) [Equal Opportunity Act 1984](#) ss 29(2), 29(2a), 29(3), 51, 66, 85A, 85T
- (TAS) [Anti-Discrimination Act 1998](#) s 15(1)
- (VIC) [Equal Opportunity Act 2010](#) s 9(1)-(3)
- (WA) [Equal Opportunity Act 1984](#) ss 8(2), 9(2), 10(2), 10A(2), 35AB(3), 35A(2), 35O(3), 36(2), 53(2), 66A(3), 66V(3).

(C) Discrimination

As to conditions or requirements see [80-270]. As to the first and second conditions see [80-275], [80-280].

- 2 *Waters v Public Transport Corp* (1991) 173 CLR 349  at 361; [103 ALR 513](#); [BC9102598](#) per Mason CJ and Gaudron J. See also *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  at 180, 181 per Deane and Gaudron JJ, at 184-91 per Dawson J; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#) (minority considered the requirement of 'last on first off' to be reasonable in the circumstances); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78  at 111 per Sackville J (with whom Beaumont and Davies JJ agreed); [150 ALR 1](#); [BC9706323](#).
- 3 *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46 ; [137 ALR 653](#); (1996) EOC ¶92-838; [BC9603088](#), Fed C of A, Full Court; *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78  at 111 per Sackville J (with whom Beaumont and Davies JJ agreed); [150 ALR 1](#); [BC9706323](#); *Clarke v Catholic Education Office* (2003) 76 ALD 84 ; [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) at [51] per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121  at [115] per Sackville and Stone JJ; [81 ALD 66](#); [2004] FCAFC 197; [BC200404916](#)). However, some Commonwealth legislation has reversed the burden of proof so that it lies on the person imposing the requirement or condition see (CTH) [Sex Discrimination Act 1984](#) s 7C; (CTH) [Age Discrimination Act 2004](#) s 15(2).
- 4 *Styles v Secretary, Dept of Foreign Affairs & Trade* (1988) 16 ALD 234 ; [84 ALR 408](#) at 427; (1988) EOC ¶92-239 at 77,239 per Wilcox J (quoting *Griggs v Duke Power Co* 401 US 424 (1971)). See also *Daghlian v Australian Postal Corp* (2003) EOC ¶93-287 ; [2003] FCA 759; [BC200303964](#) (the fact that the requirement for staff not to sit at retail counters was implemented as part of the employer's change of business 'image' did not make the requirement reasonable).
- 5 *Styles v Secretary, Dept of Foreign Affairs & Trade* (1988) 16 ALD 234 ; [84 ALR 408](#); (1988) EOC ¶92-239 at 421 per Wilcox J (overruled on another point but affirming decision relating to reasonableness *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265 at 77,636 per Bowen CJ and Gummow J, Fed C of A, Full Court). Compare *New South Wales v Amery* (2006) 230 CLR 174 ; [226 ALR 196](#); [2006] HCA 14; [BC200603095](#) at [22] per Gleeson CJ (with whom Callinan J agreed at [205] in obiter) and at [210] per Heydon J (practice of paying wages in accordance with industrial award found to be reasonable; removing the discrimination would have required Department of Education to make over-award payments to all casual teachers and possibly (in Gleeson CJ's view at [24]) to all teachers. Joint judgment of Gummow, Hayne and Crennan JJ did not consider question of reasonableness as their Honours found no requirement or condition has been imposed).
- 6 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#).
- 7 *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#).
- 8 *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC ¶92-889, HREOC.
- 9 *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 46  at 61, 62; [137 ALR 653](#); (1996) EOC ¶92-838; [BC9603088](#) per Heerey J; *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78  at 112, 113 per Sackville J; [150 ALR 1](#); [BC9706323](#); *Clarke v Catholic Education Office* (2003) 76 ALD 84 ; [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) at [51] per Madgwick J (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; [81 ALD 66](#); [2004] FCAFC 197; [BC200404916](#) at [15] per Sackville and Stone JJ).
- 10 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78  at 88, 89 per Davies J; [150 ALR 1](#); [BC9706323](#); *Victoria v Schou (No 2)* (2004) 8 VR 120 ; (2004) EOC ¶93-328; [2004] VSCA 71; [BC200402189](#).
- 11 *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#).
- 12 *Waters v Public Transport Corp* (1991) 173 CLR 349  at 365; [103 ALR 513](#); [BC9102598](#) per Mason CJ and Gaudron J.
- 13 *Waters v Public Transport Corp* (1991) 173 CLR 349  at 362-5; [103 ALR 513](#); [BC9102598](#) per Mason CJ and Gaudron J.

(C) Discrimination

- 14** *Waters v Public Transport Corp* (1991) 173 CLR 349  at 378-80 per Brennan J, at 393-5 per Dawson and Toohey JJ, at 408-411 per McHugh J; [103 ALR 513](#); [BC9102598](#). This approach had previously been taken by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265, affirming the test applied at first instance by Wilcox J in *Styles v Secretary, Dept of Foreign Affairs & Trade* ([1988](#)) [16 ALD 234](#) ; [84 ALR 408](#) at [429](#); (1988) EOC ¶92-239.
- 15** *Mosk v Re-Creation Health Sport and Fitness Club* (1990) EOC ¶92-317.
- 16** *Byham v Preston City Council (Vic)* (1991) EOC ¶92-377; *Blair v Venture Stores Retailers Pty Ltd* (1984) EOC ¶92-103. Compare *Cooper obo North Cost Dial Inc v Coffs Harbour City Council* (2000) EOC ¶93-089, HREOC (council found liable for approving a cinema redevelopment without wheelchair access).
- 17** *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#).
- 18** *McKenna v Re-Creation Pty Ltd* (1984) EOC ¶92-100.
- 19** *Sheehan v Tin Can Bay Country Club* (2002) EOC ¶93-240 ; [\[2002\] FMCA 95](#); [BC200202560](#).
- 20** *Varas v Fairfield City Council* [\[2009\] FCA 689](#) ; [BC200905497](#). Note also that an employee has a common law obligation to comply with a lawful and reasonable direction by the employer (*Thompson v IGT (Aust) Pty Ltd* (2008) 173 IR 395 ; [\[2008\] FCA 994](#); [BC200805151](#) at [\[48\]](#) per Goldberg J).
- 21** *Blackadder v Ramsay Butchering Services Pty Ltd* (2002) 118 FCR 395 ; 113 IR 461; [\[2002\] FCA 603](#); [BC200202318](#) at [\[69\]](#) per Madgwick J (citing the test of 'necessity' applied by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410  at 450; [131 ALR 422](#); 69 ALJR 797; 61 IR 32; [BC9506439](#)). As to genuine occupational qualification see also [80-440].

(III) Grounds or Attributes

(A) Introduction

[80-290] General

The paragraph below is current to **07 March 2018**

The Commonwealth has enacted anti-discrimination¹ legislation specific to the grounds of race, sex, disability and age.² Each State and Territory has enacted general anti-discrimination legislation.³ The grounds or attributes on which discrimination is made unlawful are not the same as the limited Commonwealth grounds and vary from State to State. The same is true of the contexts in which discrimination is rendered unlawful.⁴ Earlier style anti-discrimination legislation refers to a ground or status, for example sex or marital status, which is then made an unlawful basis for discriminatory action in defined areas. The more recent legislation defines the unacceptable ground or status as an attribute. In addition to dedicated anti-discrimination legislation some jurisdictions have enacted a charter of human rights which includes a guarantee of equal protection of the law and enjoyment of guaranteed rights without discrimination.⁵

The grounds or attributes of unlawful discrimination can be divided into seven groups:

- (1) sex and related grounds;⁶
- (2) race and related grounds;⁷
- (3) impairment or disability;⁸
- (4) opinion of various kinds;⁹

- (5) age;¹⁰
 - (6) association;¹¹ and
 - (7) other grounds.¹²
-

Notes

- 1 As to the meaning of 'discrimination' see [80-245]-[80-285].
- 2 (CTH) [Racial Discrimination Act 1975](#); (CTH) [Sex Discrimination Act 1984](#); (CTH) [Disability Discrimination Act 1992](#); (CTH) [Age Discrimination Act 2004](#).
- 3 (ACT) [Discrimination Act 1991](#)
(NT) [Anti-Discrimination Act 1992](#)
(NSW) [Anti-Discrimination Act 1977](#)
(QLD) [Anti-Discrimination Act 1991](#)
(SA) [Equal Opportunity Act 1984](#)
(TAS) [Anti-Discrimination Act 1998](#)
(VIC) [Equal Opportunity Act 2010](#)
(WA) [Equal Opportunity Act 1984](#).
- 4 For defined areas of discrimination see [80-405]-[80-590].
- 5 (ACT) [Human Rights Act 2004](#) s 8
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8. For the significance of charter-listed rights see [\[80-27\]](#) and [\[80-28\]](#).
- 6 See [80-300]-[80-325].
- 7 See [80-330]-[80-345].
- 8 See [80-350]-[80-365].
- 9 See [80-370], [80-375].
- 10 See [80-380].
- 11 See [80-385].
- 12 See [80-390]-[80-400].

[80-295] Interpretation of 'on the ground of'

The paragraph below is current to **07 March 2018**

The anti-discrimination legislation proscribes activity that, 'on the ground of' ('based on' or 'the basis of') a status or attribute in a defined area, has the purpose or effect of causing a person a specified disadvantage.¹ The phrase 'on the ground of' has been interpreted to require a causal connection between the action regarded as discriminatory and the disadvantage that is the origin of the complaint.² Judicial reference has been made to 'characterisation of the relevant causally operative factor resulting in the less favourable treatment'³ and to the ground needing to 'have a proximate bearing upon the act charged as discrimination', and to the attribute needing to have a causally operative effect upon the decision to commit, or the committing of, the act of discrimination.⁴ It has been suggested that the phrase

(C) Discrimination

'on the basis of' differs from the phrase 'on the ground of' in that it only requires a 'sufficient connection' rather than a causal nexus.⁵ In any event, it now appears settled that phrases such as 'by reason of', 'on the ground of' and 'because of' require an assessment of what the 'true basis' or 'real reason' was for the conduct that is alleged to be discriminatory.⁶ Events before the alleged discriminatory conduct may put the relevant conduct in context, even if not justifying the complaint.⁷

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s 9, Pt II; (CTH) [Sex Discrimination Act 1984](#) ss 5-7A, Pt II; (CTH) [Disability Discrimination Act 1992](#) ss 5-10, Pt 2; (CTH) [Age Discrimination Act 2004](#) ss 3, 5-7, Pts 3, 4; (ACT) [Discrimination Act 1991](#) ss 2, 4, 5AA-5A, Pts 2, 3, 5, 6.
(ACT) [Discrimination Act 1991](#) s 7
(NT) [Anti-Discrimination Act 1992](#) ss 3, 4, Pts 3, 4
(NSW) [Anti-Discrimination Act 1977](#) s 4, Pts 2-4G
(QLD) [Anti-Discrimination Act 1991](#) ss 4, Ch 2 Pts 1-4, 6, Chs 3-5A
(SA) [Equal Opportunity Act 1984](#) s 5, Pts III-VI; see also (SA) [Racial Vilification Act 1996](#) ss 3, 4
(TAS) [Anti-Discrimination Act 1998](#) s 3, Pt 4
(VIC) [Equal Opportunity Act 2010](#) s 4, Pts 2-4; see also (VIC) [Racial and Religious Tolerance Act 2001](#) s 3, Pt 2
(WA) [Equal Opportunity Act 1984](#) s 4, Pts II-V.

See also *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301  at 321, 322 per Lockhart J (with whom Black CJ agreed and Lee J generally agreed), at 334 per Lee J; [118 ALR 80](#); (1993) EOC ¶92-548; [BC9305085](#).
- 2 *Haines v Leves* (1987) 8 NSWLR 442 ; (1987) EOC ¶92-192 at 76,842 per Kirby P, CA(NSW); *Director-General of Education v Breen* (1982) 2 IR 93  per Street CJ. For other applications see *O'Neill v Borass* (1989) EOC ¶92-266, ADT(QLD); *Ferguson v Central Sydney Area Health Service* (1990) EOC ¶92-272; *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301  at 321, 322 per Lockhart J (with whom Black CJ agreed and Lee J generally agreed) and at 334 per Lee J; [118 ALR 80](#); (1993) EOC ¶92-548; [BC9305085](#).
- 3 *Haines v Leves* (1987) 8 NSWLR 442 ; (1987) EOC ¶92-192 at 76,842 per Kirby P, CA(NSW).

In the context of victimisation see *Penhall-Jones v New South Wales* [2007] FCA 925 ; [BC200705185](#) at [78], [79] per Buchanan J (observing that in *Morrison-Liddy v Director, Dept of Technical and Further Education* (1989) EOC ¶92-246, EOT(SA) the terms 'substantial and operative factor', 'substantial or operative factor' and 'substantial operative factor' were apparently used interchangeably but consistently so that any such factor need not be the sole factor but only one factor for the conduct impugned).
- 4 *Director-General of Education v Breen* (1982) 2 IR 93  per Street CJ, CA(NSW). For acts not wholly based on a discriminatory purpose or effect see [80-240].

See also *Baird v Queensland (No 1)* (2005) 224 ALR 541 ; [88 ALD 356](#); [2005] FCA 495; [BC200507070](#) at [48] per Allsop J; *Commonwealth v McEvoy* (1999) 94 FCR 341 ; [58 ALD 15](#); [1999] FCA 105; [BC9905749](#); *Obieta v New South Wales Dept of Education and Training* [2007] FCA 86 ; [BC200700398](#) at [63] per Cowdroy J (it is essential to determine a causal connection between race and the impugned act (citing *Aboriginal Legal Rights Movement Inc v South Australia (No 1)* (1995) 64 SASR 551  at 553; 183 LSJS 99; (1995) EOC ¶92-759 per Doyle CJ: '[t]he inquiry is into whether the racial distinction is a material factor in the making of the relevant decision or the performing of the relevant act')).
- 5 *Macedonian Teachers' Assn of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8  at 29-41 per Weinberg J; [160 ALR 489](#); [BC9806928](#) (agreed with by Full Federal Court on appeal *Victoria v Macedonian Teachers' Assn of Victoria Inc* (1999) 91 FCR 47 ; [1999] 56 ALD 333; [1999] FCA 1287; [BC9905952](#))

(C) Discrimination

(special leave to appeal to the High Court of Australia refused *Victoria v Macedonian Teachers Assn of Victoria Inc* (2000) 21(11) Leg Rep SL2a (C)). This interpretation has been applied in *Commonwealth v Stamatov* (1999) 94 FCR 341 (S); [58 ALD 15](#); [\[1999\] FCA 105](#); [BC9905749](#) at [\[26\]](#) per Von Doussa J and *Baird v Queensland (No 1)* (2005) 224 ALR 541 (S); [88 ALD 356](#); [\[2005\] FCA 495](#); [BC200507070](#) at [\[140\]](#) per Dowsett J; *Paramasivam v University of New South Wales* [\[2007\] FCA 875](#) (S); [BC200704669](#) at [\[15\]](#) per Tamberlin J (noting also a mere belief that there has been discrimination is insufficient) (affirmed *Paramasivam v University of New South Wales* [\[2007\] FCAFC 176](#) (S); [BC200710257](#)); *Bropho v Western Australia* (2008) 169 FCR 59 (S); [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#) at [\[71\]](#) per Ryan, Moore and Tamberlin JJ (the exclusion from a reserve was not 'based on' or 'by reason of' race but as a member of a dysfunctional community at risk of serious harm).

- 6 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 (S); [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[13\]](#), [\[14\]](#) per Gleeson CJ; at [\[166\]](#) per McHugh and Kirby JJ; at [\[236\]](#) per Gummow, Hayne and Heydon JJ; *Forbes v Australian Federal Police (Commonwealth of Australia)* [\[2004\] FCAFC 95](#) (S); [BC200402343](#) at [\[65\]-\[67\]](#); *Fetherston v Peninsula Health* (2004) EOC ¶93-331 (S); [\[2004\] FCA 485](#); [BC200402081](#). See also comments of New South Wales Court of Appeal in *Yallourn v Enron Australia (in liq)* (2006) Aust Contract R ¶90-229 (S); [\[2005\] NSWCA 326](#); [BC200507024](#) at [\[33\]-\[37\]](#) per Basten JA (with whom Giles JA and Campbell AJA agreed) noting the comments of the High Court of Australia in *Purvis* and emphasising that legal expressions such as 'based on' should not be limited to scientific concepts of causation.
- 7 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 (S); [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [\[60\]](#) per French and Jacobson JJ.

(B) Ground of Sex

[80-300] Sex

The paragraph below is current to **07 March 2018**

All jurisdictions cover discrimination on the ground of sex.¹ The (CTH) [Sex Discrimination Act 1984](#) is based on the Convention on the Elimination of All Forms of Discrimination against Women² and thus, under the external affairs power, is limited to discrimination against women.³ None of the anti-discrimination legislation defines 'sex', although some of the legislation defines 'woman' and 'man' as being a member of the female or male sex, respectively, regardless of age.⁴ Remedies are available, in all of the areas covered by the relevant legislation, for discrimination on the basis of sex.⁵ However, health factors such as the presence of lead may result in rules which appear discriminatory on grounds of sex but are considered valid as being based 'on health grounds'.⁶

Article 26 of the International Covenant on Civil and Political Rights (the 'ICCPR'), guarantees equality before the law and entitlement without discrimination to equal protection of the law, requiring the law to prohibit discrimination and to guarantee all persons equal protection against discrimination on various grounds including sex.⁷ Furthermore, Article 3 of the ICCPR guarantees the equal right of men and women to the enjoyment of all rights in the ICCPR.⁸

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 5
(ACT) [Discrimination Act 1991](#) s 7; see also (ACT) [Human Rights Act 2004](#) s 8
(NT) [Anti-Discrimination Act 1992](#) s 19
(NSW) [Anti-Discrimination Act 1977](#) s 24

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) s 7

(SA) [Equal Opportunity Act 1984](#) s 29(2)

(TAS) [Anti-Discrimination Act 1998](#) s 16

(VIC) [Equal Opportunity Act 2010](#) s 6; see also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8

(WA) [Equal Opportunity Act 1984](#) s 8.

As to sexuality and transsexuality see [80-315].

- 2 (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York; 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980)). Australia entered reservations concerning paid maternity leave and Defence Force policy excluding women from combat-related duties (the latter was withdrawn on 30 August 2000).

Note that (CTH) [Sex Discrimination Act 1984](#) also gives effect to aspects of the following instruments (see (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#)): (INT) Convention on the Elimination of All Forms of Discrimination Against Women (New York on 18 December 1979, 1983 Aust TS 1983 No 9; 19 ILM 33 (1980)) (a copy of the English text of which is set out in (CTH) [Sex Discrimination Act 1984](#) Sch); (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171); (INT) International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; Aust TS 1976 No 5; 993 UNTS 3); (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4); (INT) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Geneva, 29 June 1951; ILO Convention No 100; Aust TS 1975 No 45; 165 UNTS 303); (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; Aust TS 1974 No 12; 362 UNTS 31); (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31); (INT) Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, 23 June 1981; ILO Convention No 156; Aust TS 1991 No 7); (INT) Convention concerning Termination of Employment at the Initiative of the Employer (Geneva, 22 June 1982; ILO Convention No 158; Aust TS 1994 No 4) (the Termination of Employment Convention 1982).

Generally see FOREIGN RELATIONS [215-660].

- 3 *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1 ; 15 ALD 540; (1988) EOC ¶92-222 at 77, 091-3 per Spender J, Fed C of A. The 'external affairs' power is in s 51(xx) of the Commonwealth Constitution. However, (CTH) [Sex Discrimination Act 1984](#) s 9 invokes other heads of constitutional power see [80-225]. See also *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ; 97 ALD 548; [2007] FCAFC 140; BC200707248 per Kenny J (the Convention is concerned with the elimination of discrimination against women, not discrimination on the basis of gender per se (at [81]-[92]), and not with marital status discrimination per se (at [109])). See also *AB v Western Australia* [2011] HCATrans 87  (special leave to appeal granted by the High Court of Australia).

- 4 (ACT) [Discrimination Act 1991](#) s 2, Dictionary

(NSW) [Anti-Discrimination Act 1977](#) s 23

(NT) [Anti-Discrimination Act 1992](#) s 4

(WA) [Equal Opportunity Act 1984](#) s 4.

There are no equivalent provisions in the other jurisdictions.

- 5 For example, in employment, *Stoker v Kellogg (Aust) Pty Ltd* (1984) EOC ¶92-021 ; (1983) 5 IR 315 (direct discrimination); *Najdovska v Australian Iron & Steel Pty Ltd* (1985) EOC ¶92-140; 12 IR 250 (both direct and indirect discrimination); *Hickie v Hunt* (1998) EOC ¶92-910, HREOC (indirect discrimination); *Bree v Lupevo Pty Ltd* (2003) EOC ¶93-267 ; [2003] NSWADT 47 (direct discrimination); *Gulliver v Council of City of Sydney* (1987) EOC ¶92-185, HREOC (in the provision of goods and services); *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6 (where sexual harassment also found to be sex discrimination); *Tully v Ceridale* (1990) EOC ¶92-319 (entry charge to club); *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 ; BC201005221 (female employee in robust work environment). As to the areas in which discrimination is unlawful see [80-405]-[80-640].

- 6 *Mount Isa Mines Ltd v Marks* (1992) 35 FCR 96 ; 26 ALD 411; 106 ALR 702; (1991) EOC ¶92-420 at 78,999 per Davies J, Fed C of A (affirmed *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 ; 118 ALR 80; (1993) EOC ¶92-548; BC9305085). See, however, the contrary view expressed by the

(C) Discrimination

Supreme Court of the United States of America in relation to employment of women of child-bearing age in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v Johnson Controls Inc* 59 USLW 4209 (1991). There are also some express exemptions in anti-discrimination legislation linked to the physical differences between the sexes. See, for example, (CTH) [Sex Discrimination Act 1984](#) s 43 (exemption for discrimination against women on grounds of sex in connection with performance of combat duties in the Defence Force).

- 7 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 26. Note also ibid art 2. For authoritative interpretation of ibid art 26 by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, adopted at the Thirty-seventh Session, 10 November 1989 (available at <http://www.unhcr.org>). See also United Nations Human Rights Committee, *CCPR General Comment No 28: Equality of Rights Between Men and Women (Art 3)*, UN Doc CCPR/C/21/Rev 1/Add 10, 29 March 2000 (available at <http://www.unhcr.org>).
- 8 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 3.

[80-305] Marital status

The paragraph below is current to **07 March 2018**

All jurisdictions cover discrimination on the ground of marital or relationship status.¹ Marital or relationship status is defined by the (CTH) [Sex Discrimination Act 1984](#) as being the status of being single, married, married but living separately and apart from one's spouse, divorced, the de facto partner of another person, the de facto partner of another person but living separately and apart from that other person, or the former spouse or de facto partner of someone who has died.² A standard definition of 'de facto partner' was recently introduced in Commonwealth legislation as part of the reforms removing discrimination against same sex couples.³ State and Territory anti-discrimination legislation adopts a similar description of marital status (without the newly introduced Commonwealth interpretive changes), although South Australia⁴ the Australian Capital Territory⁵ and Victoria substitute for the de facto category 'domestic partner', and Tasmania omits the de facto category altogether.⁶ Queensland also includes 'registered partner' in the definition of 'relationship status'.⁷

In an early case it was held that failure to appoint a person to a position when that person was married to a person employed by a rival pharmaceutical firm did not involve discrimination on grounds of marital status because the decision was based on the actual identity or situation of her spouse and not on her marital status.⁸ That case was distinguished in a case where the suspected susceptibility of a wife to the 'corrupting' influence of a husband had prevented her from receiving a horse trainer's licence,⁹ and in a case where the suspected 'loyalty' of a wife to her husband prevented her from obtaining membership at a club from which her husband had been suspended.¹⁰ It was accepted that marital status discrimination applied not merely to marital status as a concept but also to the marital status of a particular person, where the complainant was deprived of the ability to work overtime because his employer had a dislike of his wife.¹¹ A narrow construction of 'status' led to a decision that single men in the Defence Force not paid a disturbance allowance available to married members of the Defence Force were not discriminated against because the discrimination was by reference to a characteristic of that (married) status, and not by reference to the (married) status itself.¹² In other cases indirect discrimination on the ground of marital status was found where married women, based on a discriminatory policy, had been retrenched or not permanently appointed.¹³ In areas outside employment, refusal of accommodation to an unmarried couple was held to be unlawful,¹⁴ as was a refusal to provide infertility treatment to a person because the person was unmarried,¹⁵ but not the decision of workers from a domestic violence crisis service to speak firstly to the wife rather than the husband upon arrival at the couple's home.¹⁶ Statutory provision for recording a transsexual as female in birth records, only if unmarried, was held to be valid.¹⁷

(C) Discrimination

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 4, 6 (marital or relationship status)
(ACT) [Discrimination Act 1991](#) ss 2, 7(1)(d), Dictionary (refers to 'relationship status' rather than 'marital status')
(NT) [Anti-Discrimination Act 1992](#) ss 4, 19(1)(e)
(NSW) [Anti-Discrimination Act 1977](#) ss 4, 39 (refers to 'marital or domestic status', which includes de facto relationship (with the same meaning as in (NSW) [Property \(Relationships\) Act 1984](#)))
(QLD) [Anti-Discrimination Act 1991](#) ss 4 (dictionary in Schedule), 7(b) (refers to 'relationship status' rather than 'marital status')
(SA) [Equal Opportunity Act 1984](#) ss 5 (refers to 'marital or domestic partnership status'), 85T(1)
(TAS) [Anti-Discrimination Act 1998](#) ss 3, 16(f), 16(fa) (marital and relationship status)
(VIC) [Equal Opportunity Act 2010](#) ss 4, 6(h)
(WA) [Equal Opportunity Act 1984](#) ss 4, 9.
- 2 (CTH) [Sex Discrimination Act 1984](#) s 4.
- 3 (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 inserted a definition of 'de facto partner' into (CTH) [Sex Discrimination Act 1984](#) corresponding with that in (CTH) [Acts Interpretation Act 1901](#) (ibid s 2D contains the key definition of 'de facto partner' which refers to the associated definitions of 'registered relationships' (ibid s 2E) and 'de facto relationships' (ibid s 2F)).
- 4 (SA) [Equal Opportunity Act 1984](#) s 5.
- 5 (ACT) [Discrimination Act 1991](#) s 2, Sch Dictionary. See also 'relationship status' definition which includes reference to domestic partner and civil partnership; (ACT) [Legislation Act 2001](#) s 169 (interpretation of references to 'domestic partner' and 'domestic partnership')
(VIC) [Equal Opportunity Act 2010](#) ss 4, 6(h)
- 6 (TAS) [Anti-Discrimination Act 1998](#) s 3.
- 7 (QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary.
- 8 *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 ; (1984) EOC ¶92-108, CA(NSW) (overruling *Reddrop v Boehringer Ingelheim Pty Ltd* (1982) EOC ¶92-031, EOT(NSW))(decision not to appoint was related to the possibility that secrets could be passed to the rival firm).
- 9 *Waterhouse v Bell* (1991) 25 NSWLR 99 ; (1991) EOC ¶92-376; 41 IR 435, CA(NSW).
- 10 *Ciemcioch v Echuca-Moama RSL Citizens Club Ltd* (1994) EOC ¶92-657, HREOC.
- 11 *Liseo v Canterbury City Council* (2000) EOC ¶93-097.
- 12 *Commonwealth v Human Rights & Equal Opportunity Commission* (1995) 63 FCR 74 ; 41 ALD 27; 133 ALR 629; BC9501589 per Lockhart J, Fed C of A (refers to the previous Federal Court of Australia proceeding in *Commonwealth v Human Rights & Equal Opportunity Commission* (1991) 32 FCR 468 ; 25 ALD 467; 109 ALR 490; BC9103526). This case was remitted on three separate occasions: *Sullivan v Dept of Defence* (1991) EOC ¶92-366, HREOC; *Commonwealth v Human Rights & Equal Opportunity Commission* (1991) 32 FCR 468 ; 25 ALD 467; 109 ALR 490; BC9103526, Fed C of A, remitted *Sullivan v Dept of Defence* (1992) EOC ¶92-421, HREOC, heard again *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191 ; 119 ALR 133; (1994) ¶EOC 92-566; BC9305166, Fed C of A, Full Court, remitted *Dopking v Department of Defence* (1995) EOC ¶92-669 and finally returned *Commonwealth v Human Rights & Equal Opportunity Commission* (1995) 63 FCR 74 ; 41 ALD 27; 133 ALR 629; BC9501589, Fed C of A, Full Court.
- 13 *Lamberti v TRW Carr Pty Ltd* (1984) EOC ¶92-114; *Hall v Ministry of Education* (1989) EOC ¶92-269, SC(WA) (on the facts the 'breadwinner' policy, which was found to be discriminatory, was not operative at the relevant time, but was regarded as still influential and thus as giving rise to discrimination).
- 14 *Burke v Tralagga* (1986) EOC ¶92-161, EOT(NSW).
- 15 *MW, DD, TA & AB v Royal Women's Hospital* (1997) EOC ¶92-886, HREOC; *McBain v Victoria* (2000) 99 FCR 116 ; 177 ALR 320; [2000] FCA 1009; BC200004187 (appeal to High Court of Australia dismissed without

(C) Discrimination

consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#)).

16 *Kowalski v Domestic Violence Crisis Service* [\[2005\] FCA 12](#) ; [BC200500069](#).

17 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ; [97 ALD 548](#); [\[2007\] FCAFC 140](#); [BC200707248](#) at [\[93\]-\[115\]](#) per Kenny J ((CTH) [Sex Discrimination Act 1984](#) s [22](#) made it unlawful for a person to refuse to provide a service to another on the ground of the latter's sex, marital status, pregnancy or potential pregnancy but *ibid* s 9(10) limited *ibid* s 22 to the extent that *ibid* s 22 gave effect to the (INT) Convention on the Elimination of All Forms of Discrimination Against Women (New York on 18 December 1979, 1983 Aust TS 1983 No 9; 19 ILM 33 (1980)) (the 'Convention') (a copy of the English text of which is set out in (CTH) [Sex Discrimination Act 1984](#) Sch), thus *ibid* s 22 gives effect to the Convention and the operation of (CTH) [Sex Discrimination Act 1984](#) s [22](#) is confined to discrimination against women and (VIC) [Births, Deaths and Marriages Registration Act 1996](#) (which provides for recording a transsexual as female in birth records, only if unmarried) is not inconsistent with (CTH) [Sex Discrimination Act 1984](#) s [22](#) in its application to married persons of either gender and not to discrimination against women). See also *AB v Western Australia* [2011] HCATrans 87  (special leave to appeal granted by the High Court of Australia).

(CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#) s 62 added a new (CTH) [Sex Discrimination Act 1984](#) s [40\(4\)](#) that states that nothing in *ibid* Div 2 renders it unlawful to refuse to make, issue or alter an 'official record of a person's sex' if a law of a State or Territory requires the refusal because the person is married.

By virtue of (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#) s 24 the former (CTH) [Sex Discrimination Act 1984](#) s [9\(10\)](#), 9(10A) have been replaced with a new *ibid* s 9(10) which states 'The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect to the extent that the provisions give effect to a relevant international instrument'. *Ibid* s 11(3), 11(4)(a), 11(5)(a) also now refer to those instruments. See further [80-300].

[80-310] Pregnancy

The paragraph below is current to **07 March 2018**

All jurisdictions cover pregnancy as a separate ground of discrimination,¹ although the New South Wales legislation provides that the fact that a woman is or may become pregnant is 'a characteristic that appertains generally to women'.² Most jurisdictions include provisions which in effect render the applicable condition or requirement unlawful if not reasonable in the circumstances.³ Accommodation to the special needs of a pregnant person is required.⁴ Most jurisdictions have provided an extension to the ground of pregnancy to cover family responsibilities, which relate to the care of dependent children or other immediate family members.⁵ Questioning an applicant about parenthood and child care in an employment interview may be discriminatory,⁶ as will demoting or refusing to reinstate an employee upon return from a period of maternity leave.⁷ Anti-discrimination legislation in several jurisdictions provides that special rights or privileges granted to women in connection with pregnancy or childbirth do not constitute unlawful discrimination.⁸ Even where no express provision exists, it would seem that such special rights or privileges would be covered by the general exemption for arrangements put in place for the benefit of a group with special needs.⁹ Pregnancy has been held to be a characteristic of sex,¹⁰ justifying non-inclusion of the ground in some States. Pregnancy may not be a reasonable cause for dismissal, retrenchment or failure to confirm appointment,¹¹ nor is the possibility that it may occur a valid basis for non-appointment.¹² The decision by a hospital and drug company to exclude a lesbian woman from an HIV drug trial because she possessed child-bearing potential was found to be discrimination on the ground of sex.¹³

(C) Discrimination

- 1 (CTH) [Sex Discrimination Act 1984](#) s 7 (discrimination on the ground of pregnancy or potential pregnancy). The 'Pregnancy Guidelines' by the Commonwealth Sex Discrimination Commissioner provide practical assistance to employers (www.humanrights.gov.au).
(ACT) [Discrimination Act 1991](#) ss 2, [7\(1\)\(f\)](#)
(NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(f\)](#)
(NSW) [Anti-Discrimination Act 1977](#) s 24(1A), 24(1B)
(QLD) [Anti-Discrimination Act 1991](#) s 7(b)
(SA) [Equal Opportunity Act 1984](#) ss [29\(2\)\(c\)](#), [85T\(4\)](#)
(TAS) [Anti-Discrimination Act 1998](#) s 16(g)
(VIC) [Equal Opportunity Act 2010](#) s 6(1)
(WA) [Equal Opportunity Act 1984](#) s 10.
- 2 (NSW) [Anti-Discrimination Act 1977](#) s 24(1B).
- 3 (CTH) [Sex Discrimination Act 1984](#) ss 7, [7B](#) (indirect discrimination)
(ACT) [Discrimination Act 1991](#) ss 7, [8\(3\)](#) (for all attributes a number of matters need to be taken into account in determining whether a condition or requirement is reasonable in the circumstances)
(NSW) [Anti-Discrimination Act 1977](#) ss 25(1A), 25(1)(B) (employment offers and dismissal where employee already pregnant at time of engagement)
(QLD) [Anti-Discrimination Act 1991](#) ss 9-11
(SA) [Equal Opportunity Act 1984](#) s [29\(2\)\(b\)\(iii\)](#) (indirect discrimination)
(TAS) [Anti-Discrimination Act 1998](#) s 15 (indirect discrimination)
(VIC) [Equal Opportunity Act 2010](#) s 9 (indirect discrimination)
(WA) [Equal Opportunity Act 1984](#) s 10 (direct discrimination is not unlawful if 'reasonable in the circumstances').
The (NT) [Anti-Discrimination Act 1992](#) does not include such a provision.
- 4 *Windler v McDermott* (1996) EOC ¶92-842, A-DC(NT) (accommodation required relating to occasional need to lift heavy weights); *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 ; (2004) EOC ¶93-359; [\[2004\] FMCA 242](#) (pregnant airline employee required to be allowed to access sick leave when no longer able to work in the air); *Jordan v North Coast Area Health Service (No 2)* (2006) EOC ¶93-421 ; [2005] NSWADT 258 (accommodation required real consideration of alternative duties or roles before requiring employee to use sick leave when no longer able to perform normal duties due to pregnancy).
- 5 (CTH) [Sex Discrimination Act 1984](#) ss ss 3(ba), [4A](#), [7A](#) (family responsibilities), [7AA](#) (breastfeeding), 14(3A).
(ACT) [Discrimination Act 1991](#) s [7\(1\)\(e\)](#) (status as parent or carer), [7\(1\)\(g\)](#) (breastfeeding)
(NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(g\)](#) (parenthood), [19\(1\)\(h\)](#) (breastfeeding)
(NSW) [Anti-Discrimination Act 1977](#) ss 24(1C) (breastfeeding a characteristic pertaining to women), 49S, 49T (responsibilities as carer)
(QLD) [Anti-Discrimination Act 1991](#) s 7(d) (parental status), 7(e) (breastfeeding), 7(o) (family responsibilities).
(SA) [Equal Opportunity Act 1984](#) s [85T\(1\)\(e\)](#) (caring responsibilities)
(TAS) [Anti-Discrimination Act 1998](#) s 16(h) (breastfeeding), 16(i) (parental status), 16(j) (family responsibilities)
(VIC) [Equal Opportunity Act 2010](#) s 6(b) (breastfeeding), 6(i) (status as parent or carer)
(WA) [Equal Opportunity Act 1984](#) ss 10A (breastfeeding), 35A (family responsibility or status).
There are no equivalent provisions in the Northern Territory related to family responsibilities.
- 6 *Ballarat University College v Bridges* (1994) EOC ¶92-627 ; [BC9304179](#), SC(VIC).

(C) Discrimination

- 7 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#); *Rispoli v Merck Sharpe & Dohme* (2003) EOC ¶93-304 ; [\[2003\] FMCA 160](#) (maternity leave a characteristic of women who are pregnant); *Sterling Commerce (Aust) Pty Ltd v Iliff* (2008) EOC ¶93-496 ; (2008) 173 IR 378; [\[2008\] FCA 702](#); [BC200803650](#) (in context of a refusal to reinstate after maternity leave, refusal to make payments in lieu of notice unless a release was signed).
- 8 (CTH) [Sex Discrimination Act 1984](#) s 31
(ACT) [Discrimination Act 1991](#) s 37
(NT) [Anti-Discrimination Act 1992](#) s 54
(NSW) [Anti-Discrimination Act 1977](#) s 35
(QLD) [Anti-Discrimination Act 1991](#) s 104 (general exemption for acts done to benefit person whose welfare the Act seeks to protect)
(SA) [Equal Opportunity Act 1984](#) s 47
(TAS) [Anti-Discrimination Act 1998](#) s 25 (special needs)
(VIC) [Equal Opportunity Act 2010](#) s 86(2)
(WA) [Equal Opportunity Act 1984](#) s 28.
- 9 See [80-600]. In *Cahill v Tasmania* (2004) EOC ¶93-350 ; [2004] TASADT 5, a man challenged his employer's policy of providing paid maternity leave only to women who gave birth on the basis that it was discriminated against him on the grounds of sex, parental status or family responsibilities. The Tribunal found that the purpose of the paid maternity leave was not to benefit the child but rather the physiological health of the woman (hence, it was still available where the birth was not live and was not available in instances of adoption). The Tribunal concluded that it was an arrangement to benefit a group with 'special needs' because of pregnancy and fell within the exemption in the (TAS) [Anti-Discrimination Act 1998](#) s 25.
- 10 *Bear v Norwood Private Nursing Home* (1984) EOC ¶92-019 (South Australia); *Marshall v Marshall White and Co Pty Ltd* (1990) EOC ¶92-304 (Victoria).
- 11 *Erbs v Overseas Corp Pty Ltd* (1986) EOC ¶92-181, HREOC; *Cook v Lancet Pty Ltd* (1989) EOC ¶92-257, EOT(WA); *Allegretta v Prime Holdings Pty Ltd (t/as Phoenix Hotel)* (1991) EOC ¶92-364, EOT(WA); *Duggan v Shore Inn Pty Ltd* (1992) EOC ¶92-457, EOT(NSW); *Harrison v Tong Sen & Co Pty Ltd* (1996) EOC ¶92-847, HREOC (failure to confirm offer of employment); *Du Bois-Hammond v Raging Thunder Pty Ltd* (2004) EOC ¶93-341 ; [2004] QADT 27 (selection for redundancy); *Dare v Hurley* (2005) EOC ¶93-405 ; [\[2005\] FMCA 844](#); [BC200505928](#) (dismissal after informing employer of pregnancy); *Cincotta v Sunnyhaven Ltd* [\[2012\] FMCA 110](#) ; [BC201201056](#) (poor treatment upon return from maternity leave leading to constructive dismissal).
- 12 *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC ¶92-002, EOB(VIC). For the special exemption or exception relating to pregnancy in employment see [80-460].
- 13 *Abbott Australasia Pty Ltd v Human Rights and Equal Opportunity Commission* [\(1998\) 161 ALR 287](#) ; [\(1998\) 55 ALD 169](#); [BC9807413](#) See also *Gardner v All Australia Netball Assn Ltd* [\(2003\) 197 ALR 28](#) , 174 FLR 452; (2003) EOC ¶93-277; [\[2003\] FMCA 81](#) (discrimination pursuant to (CTH) [Sex Discrimination Act 1984](#) ss 7, 22 by preventing pregnant elite player from participating in trophy netball matches); Pregnancy Discrimination and Sport: National Pregnancy in Sport Guidelines for the Australian Sporting Industry (www.humanrights.gov.au).

[80-315] Sexuality

The paragraph below is current to **07 March 2018**

The Commonwealth Same Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 introduced major reforms removing discrimination against same sex couples and discrimination against their families and children in various aspects of Commonwealth legislation.¹ Also more recently initiative has been taken by the Australian Human Rights Commission to address sexual orientation and sex and/or gender identity discrimination.² All jurisdictions, except New South Wales, have provided for sexuality generally as an unlawful basis of discrimination, including presumed sexuality

(C) Discrimination

or a presumed characteristic generally imputed to persons of that sexuality.³ Generally, 'sexuality' or 'sexual orientation' is defined to include heterosexuality, homosexuality and bisexuality,⁴ but New South Wales only provides for the ground of homosexuality rather than sexuality generally.⁵ However, Northern Territory also includes transsexuality in the definition of sexuality.⁶ Queensland, Tasmania and Victoria also include 'lawful sexual activity' as a protected ground of discrimination.⁷

The ground of homosexuality has extended to prevent refusal of a booking at an adventure resort,⁸ refusal of service at a licensed club,⁹ but does not extend to surgical treatment without AIDS testing in a hospital for a person who was an active homosexual male living in Sydney.¹⁰ Harassment because of perceived homosexuality will amount to unlawful discrimination,¹¹ as will refusal to extend concessional rates for health insurance to a same sex couple, but not a requirement by a life insurance company that applicants answer questionnaires regarding their sexual practices and drug use.¹² The protection in Victoria for 'private life' has been held in some circumstances to cover activity of a political nature on behalf of a gay rights organisation.¹⁴ In Tasmania, a lesbian employed by a women's shelter was not discriminated against when the shelter imposed a policy requiring her not to disclose her sexuality to clients because it was not related to their needs, although the woman claimed it was in the interests of combating homophobia in the community.¹⁵

It has been held that there is no relevant difference between discrimination based a person's sexual orientation and discrimination based on an affirmation that a person's sexual orientation was normal and natural.¹⁶

Notes

- 1 (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 (the 'Act') introduced major reforms removing discrimination against same sex couples and discrimination against their families and children in various aspects of Commonwealth legislation. It introduced a standard definition of 'de facto' partner, gave recognition to a child in a same-sex family, gave recognition to registered relationships, removed certain laws treating people in the same circumstances differently depending on marital status, it also addressed marital status discrimination in relation to stepchildren, step-parents, widowers and widows, and introduced a tracing rule to allow relationships referred to in the Act to include those traced through the child-parent relationship (see second reading speech by Robert McClelland, Commonwealth Attorney-General, 4 Sept 2008, House of Representatives, p 7148). See also (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Bill 2008; (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) (Child Support) Regulations 2009; (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) (Veterans' Affairs) Regulations 2009 (the latter correcting the position giving rise to a finding of violation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 26 on the basis of sexual orientation in *Young v Australia*, Communication No 941/2000, CCPR/C/78/D/941/2000 (2003) (violation in refusal to grant a pension on the ground that applicant not within the definition of 'dependant under (CTH) Veterans' Entitlements Act 1986 as a veteran's dependant, for having been in a same-sex relationship with the veteran)).
- 2 *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity in Australia*, Consultation report, Australian Human Rights Commission April 2011.
- 3 (CTH) [Sex Discrimination Act 1984](#) s [5A \(sexual orientation\)](#)
(ACT) [Discrimination Act 1991](#) s [7\(1\)\(b\)](#) (sexuality). Note that ibid s 10(3), 10(4) mean an employer discriminates if it denies an employee access to a benefit associated with employment (for example, parental leave) because the employee is in a same-sex relationship.
(NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(c\)](#) (sexuality)
(QLD) [Anti-Discrimination Act 1991](#) s 7(n) (sexuality)
(SA) [Equal Opportunity Act 1984](#) ss [5](#) (definition of sexuality), [29\(3\)](#) (discrimination on the ground of sex or sexual orientation now includes unfavourable treatment because of the sex or sexuality of a relative or associate or the person's past sex or past sexuality)

(C) Discrimination

- (TAS) [Anti-Discrimination Act 1998](#) s 16(c) (sexual orientation)
- (VIC) [Equal Opportunity Act 2010](#) s 6(p) (sexual orientation)
- (WA) [Equal Opportunity Act 1984](#) s 35O (sexual orientation).
- 4 (CTH) [Sex Discrimination Act 1984](#) s 4 ('sexual orientation' means a person's sexual orientation towards persons of the same sex, a different sex, or both). See also *Bunning v Centacare* (2015) 293 FLR 37; [\[2015\] FCCA 280](#); [BC201500559](#) at [\[39\]-\[43\]](#) per Vasta J (sexual orientation under Commonwealth law covers attractions, not behaviours, and consequently 'polyamory' is not a sexual orientation).
- (ACT) [Discrimination Act 1991](#) Dictionary ('sexuality' means heterosexuality, homosexuality (including lesbianism) or bisexuality)
- (NT) [Anti-Discrimination Act 1992](#) s 4 ('sexuality' means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality)
- (QLD) [Anti-Discrimination Act 1991](#) Sch Dictionary ('sexuality' means heterosexuality, homosexuality or bisexuality)
- (SA) [Equal Opportunity Act 1984](#) s 5 ('sexuality' means heterosexuality, homosexuality or bisexuality)
- (TAS) [Anti-Discrimination Act 1998](#) s 3 ('sexual orientation' includes heterosexuality, homosexuality or bisexuality)
- (VIC) [Equal Opportunity Act 2010](#) s 4 ('sexual orientation' means homosexuality (including lesbianism), bisexuality or heterosexuality)
- (WA) [Equal Opportunity Act 1984](#) s 4 ('sexual orientation' means heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person).
- 5 (NSW) [Anti-Discrimination Act 1977](#) Pt 4C (covers discrimination on grounds of homosexuality). These grounds include a reference to a person who is thought to be a homosexual person: *ibid* s 49ZF. It may be possible for a bisexual person to claim discrimination on the ground of homosexuality as bisexuality includes an attraction to persons of the same sex: see *Owen v Menzies* [\[2013\] 2 Qd R 327](#); [\(2012\) 293 ALR 571](#); [\[2012\] QCA 170](#); [BC201204479](#) at [\[86\]](#) per McMurdo P (a bisexual person had standing to bring a complaint about vilification of homosexuals).
- 6 (NT) [Anti-Discrimination Act 1992](#) s 4.
- 7 (QLD) [Anti-Discrimination Act 1991](#) s 7(l)
- (TAS) [Anti-Discrimination Act 1998](#) s 16(d)
- (VIC) [Equal Opportunity Act 2010](#) s 6(g).
- 8 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [\(2014\) 308 ALR 615](#); [\[2014\] VSCA 75](#); [BC201402714](#) (refusal to accept adventure resort booking for purposes of suicide prevention project for same sex attracted young people) decided under predecessor (VIC) Equal Opportunity Act 1995 (repealed).
- 9 *Morrison v Gallipoli Legion Club Newcastle Ltd* (1985) EOC ¶92-144; 14 IR 183, EOT(NSW). For a failed claim by bisexual sports trainer for discrimination see *Campagnolo v Benalla & District Football League Inc* [\[2009\] VSC 228](#); [BC200905010](#) (contract terminated in view of what parents of young players would think).
- 10 *Ferguson v Central Sydney Area Health Service* (1990) EOC ¶92-272, EOT(NSW) (decision held by the tribunal to be on grounds of medical status and not homosexuality). See also *G v L* (1995) EOC ¶92-712, EOT(NSW) (refusal to treat because of absence of HIV/AIDS test).
- 11 *Daniels v Hunter Water Board* (1994) EOC ¶92-626, EOT(NSW).
- 12 *Hope v NIB Health Funds Ltd* (1995) 8 ANZ Ins Cas 61-269; (1995) EOC ¶92-716, EOT(NSW).
- 13 *Lombardo v Tower Life Australia Ltd* (2000) EOC ¶93-088, VCAT.
- 14 *Thorne v R* (1986) EOC ¶92-182. The Equal Opportunity Board of Victoria found the transfer of a teacher because of political activities to be discrimination on the ground of 'private life' under the (VIC) Equal Opportunity Act 1995 (repealed) s 17(1). The two relevant grounds are political belief or activity ((VIC) [Equal Opportunity Act 2010](#) s 6(k)) and religious belief or activity: *ibid* s 6(n); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 14.
- 15 *Bock v Launceston Women's Shelter Inc* (2005) EOC ¶93-390; [\[2005\] TASSC 23](#); [BC200502191](#).
- 16 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [\(2014\) 308 ALR 615](#); [\[2014\] VSCA 75](#); [BC201402714](#) at [\[62\]-\[66\]](#) per Maxwell P.

[80-317] Gender Identity and Intersex

The paragraph below is current to **07 March 2018**

All jurisdictions, except the Northern Territory, now include protection from discrimination on the ground of gender identity or transgenderism, or intersex status, although these terms are defined slightly differently across jurisdictions.¹ Most jurisdictions require a person to adopt physical characteristics of the chosen sex or gender before they are classified as having the protected characteristic of transgenderism or gender identity, but Tasmania defines transgenderism purely in terms of identification.²

The Commonwealth and Tasmania are the only jurisdictions that explicitly protects against discrimination for those with an intersex condition.³ Under other Acts, intersex individuals are only protected if they fit within the definition of 'gender identity' or 'transgender' by identifying as and adopting the characteristics of a particular sex. The High Court has recognised that a person's sex may be indeterminate and should be recorded as such by the Registrar of Births, Deaths and Marriages.⁴

In relation to the ground of transsexuality, early English decisions took a relatively technical biologically-based approach, making it difficult for the transsexual to claim discrimination on the basis of the changed sex.⁵ However, this approach has not been followed in Australia in the context of marriage decisions in the Family Court, at least where the reassignment is complete.⁶ Note, however, that statutory provision for recording a transsexual as female in birth records, only if unmarried, was held to be valid.⁷

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 4 ('gender identity' is defined as the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth), [5B](#) (gender identity), [5C](#) (intersex status).
(ACT) [Discrimination Act 1991](#) s 7(1)(c), Dictionary ('gender identity' is defined as the genuine identification of a person of one sex as another sex or a person of indeterminate sex as a person of a particular sex, carried out by assuming the characteristics of the chosen sex or by living or seeking to live as a member of the chosen sex)
(NSW) [Anti-Discrimination Act 1977](#) Pt 3A (discrimination on transgender grounds), s 38A (transgenderism is defined as a person of a particular or indeterminate sex who lives or seeks to live as a member of the opposite or a particular sex)
(QLD) [Anti-Discrimination Act 1991](#) s 7(m) (gender identity), Sch Dictionary ('gender identity' is defined as a person of a particular or an indeterminate sex who identifies as a member of the opposite sex or a particular sex by seeking to live as a member of that sex)
(SA) [Equal Opportunity Act 1984](#) s 29(2a) (gender identity)
(TAS) [Anti-Discrimination Act 1998](#) ss 3 (defines 'intersex' as the status of having physical, hormonal or genetic features that are outside the male-female categories, and defines 'transgender' as a person who does not identify with the gender identity assigned to them at birth, 16(ea) (gender identity), 16(eb) (intersex)
(VIC) [Equal Opportunity Act 2010](#) ss 4 ('gender identity' is defined as the bona fide identification of a person of one sex as another sex or a person of indeterminate sex as a person of a particular sex, carried out by assuming the characteristics of the chosen sex or by living or seeking to live as a member of the chosen sex), 6(d) (gender identity)
(WA) [Equal Opportunity Act 1984](#) ss 35AA (a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex), 35AB (gender history grounds)
See also (NT) [Anti-Discrimination Act 1992](#) s 4 (transsexuality included in definition of sexuality). See [80-315].

(C) Discrimination

- 2 (TAS) [Anti-Discrimination Act 1998](#) s 3 ('gender identity' is defined by identity, appearance and mannerisms and also includes transsexualism and transgenderism).
- 3 (CTH) [Sex Discrimination Act 1984](#) s 5C
(TAS) [Anti-Discrimination Act 1998](#) s 16(eb).
- 4 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 ; [306 ALR 585](#); [\[2014\] HCA 11](#); [BC201402184](#).
- 5 See *Corbett v Corbett* [\[1953\] P 205](#)  ; [\[1971\] P 83](#) ; [\[1970\] 2 All ER 33](#); [\[1970\] 2 WLR 1306](#) . The Corbett decision was applied in *In the Marriage of C and D (falsely called C)* [\(1979\) 28 ALR 524](#) ; 35 FLR 340; [5 Fam LR 636](#); (1979) FLC ¶90-636, but may not have been applied correctly, see Otlowski M, 'The Legal Status of a Sexually Reassigned Transsexual: R v Harris and McGuinness and Beyond' (1990) 64 ALJ 67 at 69.
- 6 *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 ; [30 Fam LR 1](#); (2003) EOC ¶93-265; [\[2003\] FamCA 94](#) (a female to male post-operative transsexual was found to be a 'man' at the time of marriage to his female partner, thereby rendering the marriage lawful within the meaning of the (CTH) [Marriage Act 1961](#), where 'marriage' means 'the union of a man and woman'. The Court was not required, nor did it seek, to address the position of a pre-operative transsexual. The New Zealand High Court also declined to follow the *Corbett v Corbett* [\[1953\] P 205](#)  ; [\[1971\] P 83](#) ; [\[1970\] 2 All ER 33](#); [\[1970\] 2 WLR 1306](#)  in *Attorney-General v Otahuhu Family Court* (1994) 12 FRNZ 643 ; [\[1995\] 1 NZLR 603](#) at 607; [\[1995\] NZFLR 57](#) per Ellis J. See also *R v Harris* [\(1988\) 17 NSWLR 158](#) ; 35 A Crim R 146, CCA(NSW).
- 7 (CTH) [Sex Discrimination Act 1984](#) s 40(4). See *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ; [97 ALD 548](#); [\[2007\] FCAFC 140](#); [BC200707248](#). For a case on transgender discrimination in the provision of services see *Farmer v Dorena Pty Ltd t/as Kyle Management* (2002) EOC ¶93-213, NSWATA (recruitment agency treated complainant less favourably by taking no action to put forward her application for positions for which she was qualified). See also [80-305].

[80-320] Breastfeeding

The paragraph below is current to **07 March 2018**

The Commonwealth has made specific provision prohibiting discrimination on the ground of breastfeeding (as a separate ground of discrimination, not simply a subset of sex discrimination) through less favourable treatment by reason of: the aggrieved woman's breastfeeding, a characteristic that appertains generally to women who are breastfeeding, or a characteristic generally imputed to women who are breastfeeding.¹ The Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria and Western Australia have legislated to provide that breastfeeding is an attribute on the ground of which discrimination is proscribed.² New South Wales has expressly legislated to provide that discrimination on the grounds of breastfeeding amounts to discrimination on the basis of sex by providing that the fact that a woman is breastfeeding or may breastfeed (including the act of expressing milk) is a characteristic that appertains generally to women.³ The same is likely to be implied in those jurisdictions where this is not explicit. Prior to introduction of this statutory provision in Victoria, a mother who breastfed her child in a hotel and was refused service was held to have been discriminated against on the ground of parenthood because of her status as a nursing mother.⁴ In the Australian Capital Territory, the legislation expressly provides that special rights or privileges granted to women in connection with breastfeeding do not constitute unlawful discrimination.⁵ Most jurisdictions provide that special rights or privileges granted to women in connection with pregnancy or childbirth do not constitute unlawful discrimination.⁶

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 7AA.

(C) Discrimination

- 2 (ACT) [Discrimination Act 1991](#) s 7(1)(g)
(NT) [Anti-Discrimination Act 1992](#) s 19(1)(h)
(QLD) [Anti-Discrimination Act 1991](#) s 7(e)
(SA) [Equal Opportunity Act 1984](#) s 85T(5) (see also *ibid* s 87B (student breastfeeding infant))
(TAS) [Anti-Discrimination Act 1998](#) s 16(h)
(VIC) [Equal Opportunity Act 2010](#) s 6(b)
(WA) [Equal Opportunity Act 1984](#) s 10A (discrimination on ground of breastfeeding).
- 3 (NSW) [Anti-Discrimination Act 1977](#) s 24(1C).
- 4 *Whitehead v Criterion Hotel, Geelong* (1985) EOC ¶92-129, EOB(VIC).
- 5 (ACT) [Discrimination Act 1991](#) s 37.
- 6 (CTH) Sex Discrimination Act 1984 s 31
(ACT) [Discrimination Act 1991](#) s 37
(NT) [Anti-Discrimination Act 1992](#) s 54
(NSW) [Anti-Discrimination Act 1977](#) s 35
(SA) [Equal Opportunity Act 1984](#) s 47
(TAS) [Anti-Discrimination Act 1998](#) s 25 (special needs)
(VIC) [Equal Opportunity Act 2010](#) s 86(2)
(WA) [Equal Opportunity Act 1984](#) s 28.

[80-325] Family, parent or carer status

The paragraph below is current to **07 March 2018**

All jurisdictions have included the ground of family status or responsibilities, or status as parent, carer or relative among those on which discrimination in the prescribed areas is unlawful.¹ The protection accorded to a carer or other person of similar status varies considerably across jurisdictions. Under the (CTH) [Sex Discrimination Act 1984](#), discrimination on the ground of family responsibilities is only unlawful if it is direct discrimination in employment,² but does in the other jurisdictions, discrimination can be indirect and has occurred, for example, where an employer imposed a requirement that an employee work in a different geographical location for 5 days per fortnight,³ and where an employer required the employee to work full time.⁴

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 7A (family responsibilities: employment). See *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 ; (2004) EOC ¶93-359; [\[2004\] FMCA 242](#) at [\[115\]](#) per Driver FM (acknowledgment that women remain the dominant care givers of young children); *Thompson v Big Bert Pty Ltd t/as Charles Hotel* (2007) 168 IR 309 ; [\[2007\] FCA 1978](#); [BC200711029](#) (no finding of indirect sex discrimination by a requirement to work an irregular shift pattern as barmaid, as circumstances of caring for children were not distinguished from that of other single parents)
- (ACT) [Discrimination Act 1991](#) s 7(1)(e) (parent or carer: all areas)
- (NT) [Anti-Discrimination Act 1992](#) s 19(1)(g) (parenthood: all areas)
- (NSW) [Anti-Discrimination Act 1977](#) ss 49S-49ZC (responsibilities of carer (specified family relationships): work)

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) s 7(d), 7(o) (parental status, family responsibilities: all areas)

(SA) [Equal Opportunity Act 1984](#) ss [5\(3\)](#), [85T\(1\)\(e\)](#) (caring responsibilities: all areas). The Act also provides for discrimination if a person treats another unfavourably because of an attribute of or a circumstance affecting a relative or associate of the other: *ibid* s 29(2)(d).

(TAS) [Anti-Discrimination Act 1998](#) s 16(i), 16(j) (parental status, family responsibilities: all areas). *Ibid* s 3 defines 'parent' to include surrogate parents.

(VIC) [Equal Opportunity Act 2010](#) s 6(i) (parental or carer status: all areas)

(WA) [Equal Opportunity Act 1984](#) s 35A (family responsibility or family status: work, education). 'Family status' would appear to encompass what is covered by 'marital status' in other jurisdictions: see, for example, *Bridson v Kalgoorlie Taxi Car Owners' Assn Inc* (1996) EOC ¶92-843, EOT(WA) (female taxi driver received compensation for dismissal following separation from her husband and his disruption, as a fellow employee, of the operations of the taxi service, on the ground of family status discrimination). It is not limited to relationships in which the person has care of or responsibility for another person who is directly or indirectly related, see, for example, *Hautlieu Pty Ltd t/as Russell Pathology v McIntosh* (2000) EOC ¶93-096 ; [\[2000\] WASCA 146](#); [BC200002808](#) (employer discriminated against an employee on ground of family status because the employee's sister, who had also worked for that employer, resigned and went to work for a competitor).

- 2 (CTH) [Sex Discrimination Act 1984](#) s [7A](#). See *Song v Ainsworth Game Technology Pty Ltd* (2002) EOC ¶93-194 ; [2002] FMCA 31 (employer unilaterally changing employee's position to part-time — purportedly to allow her to meet family responsibilities — rather than allowing her to take a later lunch break in her full-time role amounted to constructive dismissal); *Evans v National Crime Authority* (2003) EOC ¶93-298 ; [2003] FMCA 375 (affirmed on appeal on this point *Commonwealth v Evans* [\(2004\) 81 ALD 402](#) ; (2004) EOC ¶93-335; [\[2004\] FCA 654](#); [BC200402934](#)) (not long after manager expressed concerns about employee's use of personal leave, including carer's leave, employee was informed that contract would not be renewed and so left before contract ended). See also *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 ; (2008) EOC ¶93-483; [\[2007\] FCA 1903](#); [BC200711032](#) (dismissal not to do with family responsibilities, or any characteristic attributed to a working mother but non-observance of agreed hours by senior employee)).
- 3 *Gardiner v New South Wales WorkCover Authority* (2003) EOC ¶93-291 ; [2003] NSWADT 184 (affirmed on appeal *Gardiner v WorkCover Authority of New South Wales* (2004) EOC ¶93-314 ; [2004] NSWADTAP 1) (however, while the requirement indirectly discriminated against the employee on the basis of her carer's responsibilities it was found in the circumstances to be reasonable).
- 4 *Bogle v Metropolitan Health Service Board* (2000) EOC ¶93-069, EOT(WA) (requirement to work full time was a requirement with which a substantially higher proportion of people without family responsibilities could comply and was not reasonable in the circumstances).

(c) Ground of Race

[80-330] Commonwealth definition of race

The paragraph below is current to **07 March 2018**

Race is an unlawful ground of discrimination in Commonwealth legislation and in the legislation of all States and Territories.¹ The coverage in each case is broadly (though not precisely) the same. The (CTH) [Racial Discrimination Act 1975](#) (the 'Act') was enacted following ratification of the International Convention on the Elimination of all Forms of Racial Discrimination (the 'Convention').² The Act specifies, in each provision making it unlawful to discriminate in specific areas in public life on the grounds of race,³ which category, such as race, colour, descent and national or ethnic origin, is covered.⁴ The Act both prohibits acts involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin with the requisite purpose or effect⁵ and operates to correct the unequal enjoyment of rights that are or should be conferred in Commonwealth, State and Territory laws irrespective of race, colour or national or ethnic origin.⁶ Legal entities, not simply individuals, may have standing if relevantly affected on racial grounds.⁷ 'Discrimination' is defined as acting in a way that 'has

(C) Discrimination

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 any other field of public life'.⁸ Thus it is a broad definition and, in its reference to rights and freedoms, is considered to refer not only to article 5 of the Convention,⁹ but also to any other fundamental human rights or freedoms, such as may be included in the International Covenant on Civil and Political Rights.¹⁰ However, it has been emphasised that the protection extends only to rights that are 'fundamental' or 'basic' to a person's existence as a human being, not to every possible right that a person might have under municipal law.¹¹

Article 26 of the International Covenant on Civil and Political Rights, guarantees equality before the law and entitlement without discrimination to equal protection of the law, requiring the law to prohibit discrimination and to guarantee all persons equal protection against discrimination on various grounds including race.¹²

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#). For consideration of the term 'based on race' in *ibid* s 9 see *Aboriginal Legal Rights Movement Inc v South Australia (No 1)* (1995) 64 SASR 551; 183 LSJS 99; (1995) EOC ¶92-759 at 53 per Doyle CJ (Bollen J concurring).
(ACT) [Discrimination Act 1991](#) ss 2, 7(1)(h), Pt 3, Dictionary; see also (ACT) [Human Rights Act 2004](#) s 8
(NT) [Anti-Discrimination Act 1992](#) ss 4, 19(1)(a), Pt 4
(NSW) [Anti-Discrimination Act 1977](#) s 4, Pt 2
(QLD) [Anti-Discrimination Act 1991](#) ss 4, 7(g), Ch 2 Pts 3, 4
(SA) [Equal Opportunity Act 1984](#) s 5, Pt 4 (note *ibid* s 51 (criteria for establishing discrimination on ground of race) extends to unfavourable treatment because of the race of a relative of the other person)
(TAS) [Anti-Discrimination Act 1998](#) ss 3, 16(a), Pt 4 (includes an immigrant)
(VIC) [Equal Opportunity Act 2010](#) ss 4, 6(m), Pts 2, 3; see also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8
(WA) [Equal Opportunity Act 1984](#) s 4, Pt III.
- 2 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195). The Convention became effective for Australia on 30 October 1975. The Convention is implemented by the (CTH) [Racial Discrimination Act 1975](#) and is scheduled within it. On ratification Australia entered a declaration of its inability to treat as offences all the matters covered by the Convention art 4(a) (dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement) noting acts of that kind are punishable only to the extent provided by the existing **criminal** law dealing with public order, public mischief, assault, riot, **criminal** libel, conspiracy and attempts). Australia also declared the competence of the Committee on the Elimination of Racial Discrimination to receive communications from individuals or groups claiming to be victims of a violation of Convention obligations.
- 3 See generally (CTH) [Racial Discrimination Act 1975](#) ss 10-16.
- 4 Note that (CTH) [Racial Discrimination Act 1975](#) ss 10-15, which prescribe specific areas in public life in which racial discrimination will be unlawful, do not refer to 'descent' even though it is listed as a ground in the general prohibition of racial discrimination in *ibid* s 9.
- 5 *Ibid* s 9.
- 6 *Ibid* s 10. Given the terms of the (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195), the operation of (CTH) [Racial Discrimination Act 1975](#) s 10 is not confined to laws whose purpose can be identified as discriminatory: *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355 at [105] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536; 237 FLR 369; [2010] QCA 037; BC201001015; *Reynolds v Tasmanian Heritage Council* [2011] TASSC 6; BC201100663 at [25]-[28]; *R v Woods* (2010) 246 FLR 4; [2010] NTSC 69;

(C) Discrimination

- [BC201009534](#) at [\[27\]-\[35\]](#); *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#). Not every human right is protected, only those rights and freedoms with which the Convention is concerned: *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455  at [477](#); (1995) EOC ¶92-709; [BC9507642](#) (applied *Morton v Queensland Police Service* (2010) 271 ALR 112 ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#) at [\[75\]](#) per Chesterman JA (rights which may not be withheld by (CTH) *Racial Discrimination Act 1975* s 10 are rights of the kind described in the Convention and called for convenience, human rights and fundamental freedoms). Note also at [85], [86] per Chesterman J (there is a human right not to be discriminated against at all on the ground of race), distinguishing *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[240\]-\[242\]](#) Philippides J (when applying (CTH) *Racial Discrimination Act 1975* s 10 more broadly). Where human rights and fundamental freedoms compete, the court's jurisdiction in enforcing (CTH) *Racial Discrimination Act 1975* s 10 is limited to cases of manifest unreasonableness (without substituting a more reasonable balance) *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[156\]-\[169\]](#) per Keane JA) (applying *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#)). See also *James (on behalf of the Martu People) v Western Australia* (2010) 184 FCR 582 ; [269 ALR 323](#); [\[2010\] FCAFC 77](#); [BC201004428](#); *Reynolds v Tasmanian Heritage Council* [\[2011\] TASSC 6](#) ; [BC201100663](#) per Tennent J at [36]-[38] (Tasmanian Heritage Council declined to enter the Lower Jordan River levy area in the Heritage Register as it did not have historic cultural heritage significance other than its association with Aboriginal history and tradition and Aboriginal traditional use which was not a human right or fundamental freedom (given to some but denied to others) sufficient to engage (CTH) *Racial Discrimination Act 1975* s 10).
- 7 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168  at 236; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#) per Mason J; *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[38\]](#) per McMurdo P.
 - 8 (CTH) *Racial Discrimination Act 1975* s 9. As to the definition of 'discrimination' generally see [80-245]-[80-285]. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168  at 207; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#) per Gibbs CJ (dissenting)(this section would 'allow the Commonwealth ... to enact a bill of rights entirely domestic in its effect').
 - 9 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5 lists in comprehensive form in five paragraphs a whole range of civil, political, social, economic and cultural rights as well as some clearly aimed at apartheid, for example article 5(f) of the Convention. The scope of the provision was referred to in *Mabo v Queensland* (1988) 166 CLR 186  at 217-9; [83 ALR 14](#) at [32-4](#); 66 ALJR 408; [BC8802641](#) per Brennan, Toohey and Gaudron JJ. See also *Secretary, Department of Veteran's Affairs v P* (1998) 79 FCR 594  at 599, 600; [160 ALR 421](#); [BC9800227](#).
 - 10 As to the International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) see FOREIGN RELATIONS [\[215-635\]](#).
 - 11 See, for example, *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455  at [476-7](#); (1995) EOC ¶92-709; [BC9507642](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[133\]-\[155\]](#), [\[184\]-\[187\]](#), [\[255\]-\[278\]](#) per Keane JA and Philippides J (denial of access to alcohol service not sufficient); *Secretary, Department of Veteran's Affairs v P* (1998) 79 FCR 594 ; [160 ALR 421](#); [BC9800227](#) (right to war veteran's benefit found not to be a fundamental right or freedom within meaning of Act); *Australian Medical Council v Wilson* (1996) 68 FCR 46  at 59, 60; [137 ALR 653](#); [BC9603088](#) (Heerey J doubted there was a fundamental right to practise medicine on an unrestricted basis); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [\[2000\] FCA 1615](#) ; [BC200006905](#) (affirmed on appeal *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56 ; (2001) EOC ¶93-141; [\[2001\] FCA 123](#); [BC200100446](#); refused special leave to appeal to the High Court of Australia: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2002) 23(6) Leg Rep SL1  (sign at athletics oval referring to the 'Nigger Brown' stand did not impair complainant's enjoyment of a fundamental freedom but merely affected his personal sensitivities).
 - 12 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171). See also *ibid* art 2. For authoritative interpretation of *ibid* art 26 by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, adopted at the Thirty-seventh Session, 10 November 1989 (available at <http://www.unhcr.org>).

[80-335] State and Territory definitions of race

The paragraph below is current to **07 March 2018**

In general, State and Territory definitions follow those of the Commonwealth, and thus international usage, although they generally add to them.¹ Nationality is added as a ground of discrimination in all States and Territories.² Ancestry is added as a ground in the Northern Territory, Queensland, South Australia and Victoria.³ The status of being, or having been, an immigrant is added as a ground in the Northern Territory and Tasmania,⁴ while ethno-religious origin is included as a ground in New South Wales and Tasmania.⁵

Notes

- 1** As to the Commonwealth definition see [80-330].
- 2** (ACT) [Discrimination Act 1991](#) s 2, Dictionary (additionally includes nationality)
(NT) [Anti-Discrimination Act 1992](#) s 4 (additionally includes nationality, ancestry and immigrant status)
(NSW) [Anti-Discrimination Act 1977](#) s 4(1) (additionally includes nationality, ethno-religious origin)
(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary (additionally includes ancestry and nationality)
(SA) [Equal Opportunity Act 1984](#) s 5 (includes only nationality, country of origin, colour or ancestry)
(TAS) [Anti-Discrimination Act 1998](#) s 3 (additionally includes nationality, ethno-religious origin and immigrant status)
(VIC) [Equal Opportunity Act 2010](#) s 4(1) (additionally includes nationality and ancestry)
(WA) [Equal Opportunity Act 1984](#) s 4 (additionally includes nationality).
- 3** (NT) [Anti-Discrimination Act 1992](#) s 4
(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
(SA) [Equal Opportunity Act 1984](#) s 5 (includes a person with whom the person of race 'resides or associates')
(VIC) [Equal Opportunity Act 2010](#) s 4.
- 4** (NT) [Anti-Discrimination Act 1992](#) s 4
(TAS) [Anti-Discrimination Act 1998](#) s 3.
- 5** (NSW) [Anti-Discrimination Act 1977](#) s 4(1)
(TAS) [Anti-Discrimination Act 1998](#) s 3.

[80-340] National origin and nationality

The paragraph below is current to **07 March 2018**

There is a distinction between discrimination on grounds of national origin and discrimination on grounds of nationality.¹ National origin is normally a status acquired and fixed at birth and incapable of change, whereas a person may acquire a number of different nationalities over the course of a lifetime.² The absence of a provision making discrimination on the ground of nationality unlawful can result in a lawful distinction between aliens and citizens, for example in the provision of benefits such as housing,³ education⁴ or employment in certain public service positions for which a security clearance is required.⁵

Notes

- 1 All jurisdictions with anti-discrimination legislation, except South Australia ('country of origin') cover national origin, and while all State and Territory jurisdictions include nationality, the Commonwealth does not: see [80-335] note 2. For asserted discrimination on the ground of race on the basis of Scottish background, in the context of a general attitude of bullying, victimisation and harassment see *South Australia v McDonald* [2009] SASC 219 ; [BC200906741](#).
- 2 See *Australian Medical Council v Wilson* (1996) 68 FCR 46  at 75; [137 ALR 653](#); [BC9603088](#) per Sackville J; *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202  at 211, 212; [159 ALR 465](#); [52 ALD 8](#); [BC9806871](#) (refused special leave to appeal to the High Court of Australia: *Macabenta v Minister for Immigration and Multicultural Affairs* (1999) 13 Leg Rep SL3b ). Both cases expressly affirmed the distinction drawn between 'national origin' and 'nationality' by the House of Lords in *Ealing London Borough Council v Race Relations Board* [1972] AC 342   at 359  per Viscount Dilhorne, at 354, 355 per Lord Donovan, at 365, 366 per Lord Cross, at 363 per Lord Simon; [1972] 1 All ER 105; [1972] 2 WLR 71  (person of Polish nationality (and origin) was discriminated against by a housing authority because of his nationality and not because of his national origins, that is, because he was not a British citizen. Lord Simon referred to the definition of race as 'rubbery and elusive' and commented that if it had been desired to include nationality, 'it could have been used expressly in the list of grounds, leaving no room for doubt' ((AC) at 362)).
- 3 *Ealing London Borough Council v Race Relations Board* [1972] AC 342  ; [1972] 1 All ER 105; [1972] 2 WLR 71 . See also *Miller v Mieson* (1991) EOC ¶92-341, EOB(VIC) (discrimination on ground of actual or perceived nationality).
- 4 *AB v Minister for Education and Training (NSW)* [2003] FMCA 16 ; [BC200300113](#); *AB v New South Wales* (2005) [226 ALR 322](#) ; 194 FLR 156; [2005] FMCA 1113; [BC200506737](#).
- 5 *Commonwealth v Stamatov* (1999) 94 FCR 341 ; [58 ALD 15](#); [1999] FCA 105; [BC9905749](#).

[80-345] Other issues

The paragraph below is current to **07 March 2018**

Racial discrimination may be direct, as in the case of the determination of government policy in relation to Aboriginal ownership of land,¹ the exclusion of persons from Aboriginal land² or in the conditions of employment provided at a workplace,³ or indirect.⁴ Racial discrimination has frequently been found in the provision of goods and services,⁵ but was found not to be the dominant element, or to impair the right to education, in the closure of a school predominantly used by Aboriginal children.⁶ Similarly, the closing of a Samoan language church was held not to constitute racial discrimination.⁷

'Ethnic origin' has been held to include Jews in Australia⁸ and New Zealand,⁹ and Sikhs¹⁰ and Gypsies¹¹ in the United Kingdom. Multiple Tribunal decisions have held that Muslims are not a race.¹² 'Descent' does not apply to persons refused permanent residence in Norfolk Island.¹³ 'Race' has been recognised to include, in addition to physical characteristics, personal attributes such as abstention from alcohol by persons of Egyptian origin,¹⁴ but was doubted to include the personality trait of being socially reserved.¹⁵ It has been held that a corporation has no 'race, colour, national or ethnic origin' and therefore cannot suffer unlawful discrimination on the grounds of race within the scope of anti-discrimination legislation.¹⁶

Notes

(C) Discrimination

- 1 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#) (government policy). A grant of land under the (CTH) [Aboriginal Land Rights \(Northern Territory\) Act 1976](#) is not discriminatory as it does not extinguish title but is a special measure: *Pareroultja v Tickner* (1993) 42 FCR 32 ; [117 ALR 206](#), Fed C of A, Full Court.
- 2 *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 56 ALJR 625; 59 ALJR 311; [BC8501115](#) (while discriminatory, the South Australian law permitting the exclusion of persons from Aboriginal land was found to be a special measure within the meaning of (CTH) [Racial Discrimination Act 1975](#) s [8\(1\)](#)). See also *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 ; 161 LGERA 344; [\[2008\] HCA 20](#); [BC200803417](#); *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#); *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* (2009) 181 FCR 201 ; [113 ALD 286](#); [\[2009\] FCA 1397](#); [BC200910645](#); *Morton v Queensland Police Service* [\(2010\) 271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#); *James (on behalf of the Martu People) v Western Australia* (2010) 184 FCR 582 ; [269 ALR 323](#); [\[2010\] FCAFC 77](#); [BC201004428](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#).
- 3 *Kordos v Plumrose (Aust) Ltd* (1989) EOC ¶92-256 VIC CC; *Ardeshirian v Robe River Iron Associates* (1990) EOC ¶92-299 HREOC; *Dutt v Central Coast Area Health Service* (2002) EOC ¶93-228, NSWADT (employment). Compare *Schulze Tuinaphiang v The Western Australian Mint* (2003) EOC ¶93-255 (requirement that staff speak in English not racially discriminatory as all staff were able to comply and was imposed to resolve workplace disputes); *Badke v Orchid Key No 2 Pty Ltd* [2004] QIRComm 5 (dismissal from employment for inability to speak Japanese was not unlawfully discriminatory as it was based on a genuine job requirement); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) (racial taunts by fellow employees). See also *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* (2009) 181 FCR 201 ; [113 ALD 286](#); [\[2009\] FCA 1397](#); [BC200910645](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#); *Morton v Queensland Police Service* [\(2010\) 271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#).
- 4 A claim to indirect discrimination based on (CTH) [Racial Discrimination Act 1975](#) s [9\(1A\)](#) was upheld where a resident of Australia was not allowed the concessional arrangements available to overseas players at a casino (*Tocigl v AITCO Pty Ltd* ('Adelaide Casino') (1996) EOC ¶92-775 HREOC) but a similar claim was not allowed for an overseas taxpayer: *Ellenbogen v FCT* (1988) 88 ATC 2012 ; 19 ATR 736; (1988) EOC ¶92-219. Another claim of indirect racial discrimination under that section failed where the complainant sought to allege that a requirement to sit an exam and be ranked within a quota in order to obtain unrestricted registration to practice medicine was indirectly discriminatory on the grounds of national origin: *Australian Medical Council v Wilson* (1996) 68 FCR 46 ; [137 ALR 653](#); [BC9603088](#).
- 5 See, for example, *Maynard v Neilson* [\(1988\) 15 ALD 364](#) ; (1988) EOC ¶92-226, Fed C of A (and *Maynard v Neilson* (1987) EOC ¶92-199, HREOC); *Coe v Bobilak* (1984) EOC ¶92-026, EOT(NSW); *Saunders v Long* (1989) EOC ¶92-260, EOB(VIC); *Holmes v Donhardt* (1989) EOC ¶92-270, EOT(SA). *Samuels Real Estate v Lamb* (1998) EOC ¶92-923 ; [BC9800277](#); *Sheather v Daley* (2003) EOC ¶93-278 ; [2003] NSWADT 51. See also [80-520]-[80-530].
- 6 *Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC ¶92-415, HREOC. Compare *Sinnapan v Victoria* (1993) EOC ¶92-498, EOB(VIC) (later cases are *Sinnapan v Victoria* (1994) EOC ¶92-611 ; [BC9401194](#), SC(VIC) (confirming discrimination but requiring different orders, which led to *Victoria v Sinnapan (No 2)* (1995) EOC ¶92-663 ; [BC9503214](#), SC(VIC); *Victoria v Sinnapan (No 3)* (1995) EOC ¶92-698, EOB(VIC); *Victoria v Sinnapan (No 4)* (1995) EOC ¶92-699, EOB(VIC).
- 7 *Iliafi v Church of Jesus Christ of Latter-day Saints Australia* (2014) 221 FCR 86 ; [140 ALD 36](#); [\[2014\] FCAFC 26](#); [BC201402070](#).
- 8 *Miller v Wertheim* (2002) EOC ¶93-223 ; [\[2002\] FCAFC 156](#); [BC200202722](#), citing with approval *King-Ansell v Police* [\[1979\] 2 NZLR 531](#) , CA(NZ) (however the Court found that the group of people were criticised not because of their Jewish ethnicity but because of their allegedly divisive and destructive activities). Compare *Goldberg v G Korsunski Carmel School* (2000) EOC ¶93-074 (Non-Orthodox Jews not a race for the purposes of the (WA) [Equal Opportunity Act 1984](#)).
- 9 *King-Ansell v Police* [\[1979\] 2 NZLR 531](#) , CA(NZ).
- 10 *Mandla (Sewa Singh) v Dowell Lee* [\[1983\] 2 AC 548](#) ; 1 All ER 1062; 2 WLR 620.

(C) Discrimination

- 11 *Commission for Racial Equality v Dutton* [\[1989\] IRLR 8](#).
- 12 *Alchin v Rail Corp NSW* (2012) 225 IR 171; [\[2012\] NSWADT 142](#); [BC201255091](#). See also *Khan v Cmr, Dept of Corrective Services* [2002] NSWADT 131; *Toll Pty Ltd t/as Toll Express v Abdulrahman* (2008) EOC ¶93-482; [\[2007\] NSWADTAP 70](#).
- 13 *Lewis v Trebilco* [\(1984\) 53 ALR 581](#); (1984) EOC ¶92-106, Fed C of A.
- 14 *Metwally v University of Wollongong* (1984) EOC ¶92-030, EOB(NSW). See also *Kwa v Secretary for Local Government* (1987) EOC ¶92-213.
- 15 *Kapoor v Monash University* [\(2001\) 4 VR 483](#); (2002) EOC ¶93-188; [\[2001\] VSCA 247](#); [BC200108171](#) (in obiter, Victorian Court of Appeal doubted whether personality trait of being socially reserved was established as a 'characteristic' of Indian Hindus of Brahmin caste).
- 16 *Durham Holdings Pty Ltd v New South Wales* [\(1999\) 47 NSWLR 340](#); [166 ALR 500](#); [\[1999\] NSWCA 324](#); [BC9905667](#) (affirmed *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; 120 LGRA 120; [\[2001\] HCA 7](#); [BC200100263](#) at [\[25\]](#) per Gaudron, McHugh, Gummow and Hayne JJ). For the standing of legal entities, not simply individuals, if relevantly affected on racial grounds see *Koowarta v Bjelke-Petersen*, (1982) 153 CLR 168 at 236; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#) per Mason J; *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#); 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[38\]](#) per McMurdo P.

(D) Ground of Impairment or Disability

[80-350] Definition

The paragraph below is current to **07 March 2018**

Australia is party to the United Nations Convention on the Rights of Persons with Disabilities.¹ All jurisdictions have now provided that discrimination on grounds of impairment or disability is unlawful.² Current legislation in all jurisdictions includes in the definition of impairment or disability:³

- (1) total or partial loss of a person's bodily functions, including the loss of a part of the body; and
- (2) the malfunction, malformation or disfigurement of a part of the body.

Recent changes to Commonwealth legislation extend direct discrimination to the failure to make reasonable adjustments for a person with a disability, where the effect is less favourable treatment than a person without the disability, and extend indirect discrimination to cover situations where the relevant requirement or condition could be complied with if the discriminator made reasonable adjustments but fails to do so.⁴

The alleged disability must be identified with precision.⁵ Divergence exists between jurisdictions in the remainder of the definition of impairment or disability. All jurisdictions except the Australian Capital Territory, South Australia and Western Australia include in the definition a condition or malfunction that results in a person learning more slowly or differently than a person without the condition or malfunction.⁶ However, a similar concept would seem to be covered in the Australian Capital Territory definition which includes an intellectual disability or developmental delay,⁷ and in the Western Australian definition which includes any defect or disturbance in the normal structure or functioning of a person's brain.⁸

All jurisdictions include in the definition of disability or impairment a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.⁹ The High Court of Australia has held that this extends not just to the underlying

disorder suffered by a person, but also to the behavioural manifestations of that disorder.¹⁰ Except in Western Australia, the definitions of disability or impairment expressly include the presence in the body of organisms capable of causing illness or disease as part of the definition of disability or impairment.¹¹ However, this would seem to be covered by the general part of the definition common to all jurisdictions which refers to loss of bodily functions or the malfunction of a part of the body.

In Northern Territory, Queensland and Tasmania, the definitions of disability and impairment include reliance on a guide-dog, wheelchair or other therapeutic device.¹² In the other jurisdictions, guide dogs, therapeutic devices and other assistants are not included in the definition of impairment or disability itself but are, to varying extents, expressly covered in the description of discrimination on the grounds of impairment or disability.¹³

Victorian legislation includes 'physical features' and 'impairment' as separate grounds of discrimination.¹⁴ 'Physical features' are defined to mean a person's height, weight, size or other bodily characteristics. 'Impairment' is comparable to the definition of 'disability' or 'impairment' in other jurisdictions but includes an impairment that may exist in the future (including because of a genetic predisposition to that impairment) and, to avoid doubt, behaviour that is a symptom or manifestation of an impairment.¹⁵

The Commonwealth legislation enables disability standards to be formulated on any matter covered by the Act, removing an early limitation to employment, education, accommodation, public transport, the administration of Commonwealth laws and programs and public access and use of premises.¹⁶

Notes

- 1 (INT) Convention on the Rights of Persons with Disabilities (New York, 30 March 2007; GA Res 61/106 of 13 December 2006; Aust TS 2008 No 12) entry into force 3 May 2008 (generally) (ratification by Australia 17 July 2008, entry into force in Australia: 16 August 2008). On ratification Australia entered a declaration concerning decisions to be made on behalf of a person with a disability, compulsory assistance or treatment, and not entering or remaining when not a national, in certain circumstances. The Optional Protocol to the (INT) United Nations Convention on the Rights of Persons with Disabilities (New York, 13 December 2006, Aust TS 2009 19) came into force for Australia on 20 September 2009. (See *Nicholson v Knaggs* [2009] VSC 64 ; [BC200900993](#) at [75] per Vickery J noting that the effect the (INT) Convention on the Rights of Persons with Disabilities (New York, 30 March 2007; GA Res 61/106 of 13 December 2006; Aust TS 2008 No 12) art 12(2) is to provide for an obligation on Australia to recognise that persons with disabilities enjoy the exercise of the right to freedom of testamentary disposition on an equal basis with all others).
- 2 (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) s 17 amending (CTH) [Disability Discrimination Act 1992](#) ss 5-6.

In all jurisdictions except the Commonwealth, disability or impairment is one of the grounds or attributes covered by the anti-discrimination or equal opportunity legislation. For the Commonwealth there is separate legislation, the (CTH) [Disability Discrimination Act 1992](#). As to the Constitutional validity see [80-225].
- 3 (CTH) [Disability Discrimination Act 1992](#) s 4(1) ('disability') (refers to bodily functions). Ibid s 4(1)(j) now covers a genetic predisposition to a disability and the definition includes behaviour that is a symptom or manifestation of a disability as part of the disability, formalising the High Court of Australia decision in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#).

(ACT) [Discrimination Act 1991](#) s 5AA (disability) (refers to bodily or mental functions)
(NT) [Anti-Discrimination Act 1992](#) s 4 (impairment)
(NSW) [Anti-Discrimination Act 1977](#) s 4(1) (disability) (refers to bodily or mental functions)
(QLD) [Anti-Discrimination Act 1991](#) s 4, Dictionary (impairment)
(SA) [Equal Opportunity Act 1984](#) s 5 (disability). Ibid s 5 was amended by (SA) [Equal Opportunity \(Miscellaneous\) Amendment Act 2009](#) to mirror the definition of disability in the (CTH) [Disability Discrimination Act 1992](#)

(C) Discrimination

- (TAS) [Anti-Discrimination Act 1998](#) s 3 (disability)
- (VIC) [Equal Opportunity Act 2010](#) s 4 (impairment). See *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; [BC201004776](#) at [91] per Emerton J (no finding of discrimination in denying a prisoner access to IVF on the basis of 'infertility impairment' (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8, but note 'discrimination' defined by reference to the (VIC) [Equal Opportunity Act 2010](#)) on the basis that fertile prisoners are allowed conjugal visits and may fall pregnant as a result. The basic requirement that prisoners remain in prison for the term of their imprisonment does not discriminate between fertile and infertile prisoners).
- (WA) [Equal Opportunity Act 1984](#) s 4(1) (impairment).
- 4 (CTH) [Disability Discrimination Act 1992](#) ss 5, 6 (as amended by (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#)). See also (VIC) [Equal Opportunity Act 2010](#) s 20 (employer must make reasonable adjustments for person offered employment or employee with an impairment in order for them to perform the genuine and reasonable requirements of the employment). Ibid s 20 was amended by (VIC) [Equal Opportunity Amendment Act 2011](#) to clarify that employers are not required to make a reasonable adjustment where compliant or exempt under (CTH) [Disability Discrimination Act 1992](#). As to less favourable treatment see also [80-255].
- 5 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [91]; *Stevenson v Murdoch Community Services Inc* [\[2010\] FCA 648](#) ; [BC201004301](#) at [87] per Gordon J (for an alleged thyroid condition no evidence was adduced concerning how the condition manifested itself or the effect it had).
- 6 (CTH) [Disability Discrimination Act 1992](#) s 4(1) (disability)
- (NT) [Anti-Discrimination Act 1992](#) s 4 (impairment)
- (NSW) [Anti-Discrimination Act 1977](#) s 4(1) (disability)
- (QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
- (SA) [Equal Opportunity Act 1984](#) s 5
- (TAS) [Anti-Discrimination Act 1998](#) s 3 (impairment)
- (VIC) [Equal Opportunity Act 2010](#) s 4 (impairment).
- 7 (ACT) [Discrimination Act 1991](#) s 5AA.
- 8 (WA) [Equal Opportunity Act 1984](#) s 4(1) (impairment).
- 9 (CTH) [Disability Discrimination Act 1992](#) s 4(1)
- (ACT) [Discrimination Act 1991](#) s 5AA
- (NT) [Anti-Discrimination Act 1992](#) s 4
- (NSW) [Anti-Discrimination Act 1977](#) s 4(1)
- (QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
- (SA) [Equal Opportunity Act 1984](#) s 5
- (TAS) [Anti-Discrimination Act 1998](#) s 3
- (VIC) [Equal Opportunity Act 2010](#) s 4
- (WA) [Equal Opportunity Act 1984](#) s 4(1).
- 10 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [11] per Gleeson CJ, at [80] per McHugh and Kirby JJ, at [211]-[212] per Gummow, Hayne and Heydon JJ. Gummow, Hayne and Heydon JJ (at [210]) stated that the various paragraphs in the definition of 'disability' under the (CTH) [Disability Discrimination Act 1992](#) should not be read as 'mutually exclusive categories' but should be seen as having an 'overlapping operation'. See also *Walker v Victoria* [\[2011\] FCA 258](#) ; [BC201101493](#) (learning disabilities, dyslexia, attention deficit hyperactivity disorder and Asperger's syndrome).
- 11 (CTH) [Disability Discrimination Act 1992](#) s 4(1)
- (ACT) [Discrimination Act 1991](#) s 5AA
- (NT) [Anti-Discrimination Act 1992](#) s 4 (also includes a condition which may impede the capacity of the body to combat disease)

(C) Discrimination

- (NSW) [Anti-Discrimination Act 1977](#) s 4(1)
- (QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
- (SA) [Equal Opportunity Act 1984](#) s 5. 'Assistance animal' is defined to mean an accredited guide dog, hearing dog or disability dog under (SA) [Dog and Cat Management Act 1995](#) or as prescribed by regulation.
- (TAS) [Anti-Discrimination Act 1998](#) s 3
- (VIC) [Equal Opportunity Act 2010](#) s 4.
- 12** (NT) [Anti-Discrimination Act 1992](#) s 4
- (QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
- (TAS) [Anti-Discrimination Act 1998](#) s 3.
- 13** (CTH) [Disability Discrimination Act 1992](#) ss 7-9(carers, assistants, assistance animals and disability aids). Ibid s 8 clarifies that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability, addressing the issues in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#).
- (ACT) [Discrimination Act 1991](#) s 9 (guide dog, hearing dog, assistance animal or other aid)
- (NT) [Anti-Discrimination Act 1992](#) s 4. See also s 21(guide dog)
- (NSW) [Anti-Discrimination Act 1977](#) ss 49B(3) (guide dog), 49B(3A) (palliative or therapeutic device, interpreter, reader, assistant or carer)
- (QLD) [Guide, Hearing and Assistance Dogs Act 2009](#); (QLD) [Anti-Discrimination Act 1991](#) s 85
- (SA) [Equal Opportunity Act 1984](#) ss 66(e) (assistance animal), [88](#) (refusal of accommodation on the grounds of keeping a therapeutic animal)
- (VIC) [Equal Opportunity Act 2010](#) s 54 (refusal of accommodation because of assistance dog)
- (WA) [Equal Opportunity Act 1984](#) s 66A(4) (guide dog or hearing dog).
- 14** (VIC) [Equal Opportunity Act 2010](#) s 6(e), 6(j).
- See *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; [BC201004776](#) (claim for discrimination on the basis of age-related infertility as 'impairment' under (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8 (equality)).
- 15** (VIC) [Equal Opportunity Act 2010](#) s 4 (definition of 'physical features'). It is possible that this ground would have some overlap with impairment, to the extent that impairment includes malformation or disfigurement of a part of a body or where a particular disease has a direct effect on the weight or size of a person.
- 16** (CTH) [Disability Discrimination Act 1992](#) s 31 (disability standards are legislative instruments). On the construction of (CTH) Disability Standards for Accessible Public Transport 2002 and their application to accessible taxis see *Killeen v Combined Communications Network Pty Ltd* (2011) 192 FCR 98 ; [\[2011\] FCA 27](#); [BC201100161](#).

[80-355] Mental illness

The paragraph below is current to **07 March 2018**

Discrimination on grounds of mental illness is not expressly stated to be unlawful in any of the legislating jurisdictions,¹ although it is in effect covered by the definitions which refer to malfunction of a part of the body, or to disorder or disease affecting a person's thought processes, or to intellectual impairment. 'Psychological problems' and 'serious psychological problems' fall within the definition of 'disability'.² A person not employed as a guide in scenic caves because of his epilepsy was held to have fallen within the New South Wales definition of intellectual impairment, with the requirement of a defect in both structure and functioning being satisfied,³ and a person suffering from paranoid schizophrenia was awarded compensation for dismissal.⁴ Similarly, a man who was effectively suspended from work due to his bipolar affective disorder was granted compensation for loss of income and an apology from his

employer for unlawful discrimination on the grounds of disability under the Queensland legislation.⁵ A depressive illness was accepted as falling within the meaning of disability under Commonwealth legislation, although the failure to renew the complainant's employment contract was found not to have been based on the depressive illness but on the fact that the relationship with her employer had irrevocably broken down.⁶ A person who had his membership revoked by a cricket club after engaging in aggressive behaviour which resulted from his psychological disability was found not to have been discriminated against because the club treated him no differently than it would have treated a person without that disability but who behaved in a similarly aggressive manner.⁷

Notes

- 1 See [80-350].
- 2 *Zhang v University of Tasmania* (2009) 174 FCR 366 ; [2009] FCAFC 35; BC200901761 at [16] per Gray J.
- 3 *Kitt v Tourism Commission* (1987) EOC ¶92-196, EOT(NSW).
- 4 *X v McHugh, Auditor General for Tasmania* (1994) EOC ¶92-623; 56 IR 248, HREOC. See also *Steven Berry v Murray Goulburn Co-operative Ltd* (unreported, Australian Industrial Relations Commission, No U2004/6443, 21 April 2005, AIRC PR957500) (employer dismissed a worker harshly, unjustly and unreasonably following his first episode of schizophrenia at work and was ordered to reinstate him).
- 5 *Bellamy v McTavish & Pine Rivers Shire Council* (2004) EOC ¶93-311 ; [2003] QADT 15.
- 6 *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95 ; BC200402343. Contrast *Ware v OAMPS Insurance Brokers Ltd* (2005) EOC ¶93-402 ; [2005] FMCA 664 (employee with Attention Deficit Disorder and depression found to have been unlawfully discriminated against because demotion and dismissal occurred by reference to his disabilities and not to performance criteria against which employer said he would be assessed).
- 7 *Tate v Rafin* (2001) EOC ¶93-125 ; [2000] FCA 1582; BC200006864.

[80-360] AIDS

The paragraph below is current to **07 March 2018**

None of the anti-discrimination legislation directly provides for discrimination to be unlawful if based on the ground of suffering from Acquired Immune Deficiency Syndrome ('AIDS') or of the presence of the Human Immunodeficiency Virus ('HIV'). However, the HIV positive condition is now covered by the inclusion in the definition of impairment or disability in all legislating jurisdictions except Western Australia of a condition involving 'the presence ... of organisms capable of causing illness or disease'.¹ In Western Australia it was held that a person who was HIV positive but had not yet developed AIDS had an impairment within the meaning of the legislation.² The use of provisions making discrimination on grounds of sexuality unlawful (on the basis that homosexual males are a group at high risk of HIV or AIDS) may not extend to refusal of a hospital surgery service when a person is reasonably suspected of being potentially HIV positive,³ but prisoners treated unfavourably because they are HIV positive have been awarded compensation.⁴

As with other grounds of discrimination, it is clear that discrimination on the grounds of HIV or AIDS status will not be unlawful where it is reasonable in the circumstances. It was held that a soldier who was discharged from the Army upon being diagnosed as HIV positive was discriminated against but not unlawfully, because the ability to 'bleed safely' without risk of transmission to others in the event of injury during training or combat was an inherent requirement of his job.⁵ In the provision of goods and services, it was found to be reasonable for a life insurance company to have a policy of excluding claims made on the basis of HIV or AIDS given the statistical information and actuarial advice available.⁶

The Australian Capital Territory and New South Wales have legislated specifically to make it unlawful to vilify persons who are, or are thought to be, HIV or AIDS infected.⁷

Notes

- 1 (CTH) [Disability Discrimination Act 1992](#) s 4(1)
(ACT) [Discrimination Act 1991](#) s 5AA(1)(e)
(NT) [Anti-Discrimination Act 1992](#) s 4(1) (also includes 'the presence ... of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease' which would seem to be directly relevant to HIV or AIDS)
(NSW) [Anti-Discrimination Act 1977](#) s 4(1)
(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary
(SA) [Equal Opportunity Act 1984](#) s 5
(TAS) [Anti-Discrimination Act 1998](#) s 3
(VIC) [Equal Opportunity Act 2010](#) s 4(1).
There are no equivalent provisions in Western Australia. See, however, (WA) [Equal Opportunity Act 1984](#) s 4(1) (definition of 'impairment'). As to discrimination on the ground of an imputed characteristic see [80-260].
- 2 *Hoddy v Executive Director Dept of Corrective Services* (1992) EOC ¶92-397 (HIV positive status indicated a disturbance in the normal functioning of the body).
- 3 *Ferguson v Central Sydney Area Health Service* (1990) EOC ¶92-272.
- 4 *Complainant v Western Australia* (1994) EOC ¶92-610, EOT(WA); *X v Western Australia* (1997) EOC ¶92-878, HREOC; *NC v Queensland Corrective Services Commission* (1998) EOC ¶92-940 (forms of segregation of prisoners involved in all three cases).
- 5 *X v Commonwealth* (1999) 200 CLR 177 ; [167 ALR 529](#); [\[1999\] HCA 63](#); [BC9907850](#).
- 6 *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433 ; (2001) EOC ¶93-143; [2001] FMCA 15.
- 7 (ACT) [Discrimination Act 1991](#) Pt 6
(NSW) [Anti-Discrimination Act 1977](#) Pt 4F.

[80-365] Other issues

The paragraph below is current to **07 March 2018**

Discrimination on grounds of impairment may be direct or indirect, and has occurred in the employment field, in the provision of services and in education.¹ There are numerous examples of cases of direct discrimination in the employment area resulting in a successful complaint. These include circumstances involving the following situations:

- (1) refusal to engage a person with a probable long-term disability as an apprentice;²
- (2) the withdrawal of an offer of employment (made subject to a condition of fitness to work) on discovery of hypertension;³

(C) Discrimination

- (3) loss of sight in one eye;⁴
- (4) visual impairment in a doctor being regarded as a physical handicap;⁵
- (5) colour-blindness;⁶
- (6) poor vision in a child carer;⁷
- (7) failure to take adequate steps to assist a person with a hearing impairment;⁸
- (8) failure to reinstate a person with insulin-controlled diabetes;⁹
- (9) placing an employee with sickle cell trait on restricted duties;¹⁰
- (10) dismissal of a trainee with a dyslexic learning difficulty;¹¹
- (11) terms of redundancy offered to an employee with Hepatitis C;¹² and
- (12) methadone addiction.¹³

'Essential hypertension' has been found to be a ground for discrimination on the basis of imputed characteristic,¹⁴ and the tendency to undergo bypass surgery has been found to be a ground for discrimination as a characteristic of persons suffering coronary disease.¹⁵ However, obesity has been found not to be an impairment,¹⁶ and a person with night blindness was found not to have been discriminated against, because of the lack of reinstatement effort by the complainant and availability of alternative jobs.¹⁷ No error of law was found where a tribunal ordered employment of an applicant although he had failed the fire service's standard.¹⁸ Indirect discrimination in employment has been found where an employer imposed a policy that employees must not sit down while serving at the retail counter with which an employee suffering from osteoarthritis could not comply.¹⁹ Indirect discrimination was found when a test that included intellectual skills test was applied to determine wages of workers in Australian Disability Enterprises, as persons with an intellectual disability were less likely to perform well.²⁰

In the provision of goods and services, indirect discrimination has been found in changing the method of providing tram services so as to require purchase of scratch tickets rather than using conductors to sell tickets.²¹ Findings of unlawful discrimination have been found where persons with guide dogs or hearing dogs have been refused access to services.²² A woman who was told that she would not receive the 'care at home' service from a hospital because of her previous intravenous drug use was nevertheless unsuccessful in her disability discrimination claim because the 'service' was found not to exist due to a staffing shortage.²³ It has been doubted whether a 'service' within the meaning of the (CTH) [Disability Discrimination Act 1992](#) would extend to illegal activities.²⁴

There has been a number of disability discrimination cases in education. In two cases where students were expelled due to the disruptive behaviour resulting from their disabilities there was found to be no less favourable treatment because the schools would have treated students without those disabilities but who behaved in a similarly disruptive manner in the same way.²⁵ A school offering admission to a deaf student on condition that the method of classroom instruction did not include the provision of Australian Sign Language interpretive assistance was found to be unlawfully discriminatory because the condition was not reasonable and feasible alternatives were available.²⁶ Similarly, a requirement that students in a particular class use toilets located in another building was found to be unlawfully discriminatory against a student who had a disability which caused incontinence.²⁷

In some jurisdictions, there is an exemption for discriminatory acts done to protect public health generally or to protect public health where the impairment or disability is an infectious disease.²⁸

(C) Discrimination

Notes

- 1 (CTH) [Disability Discrimination Act 1992](#) s 6 replaced a 'proportionality test' for indirect discrimination with the test of whether a requirement or condition disadvantages the person with disability and shifts the burden of proof of the 'reasonableness' element, thereby aligning it with (CTH) [Sex Discrimination Act 1984](#) ss 5(2), 6(2), 7(2) and (CTH) [Age Discrimination Act 2004](#) s 15(1). (CTH) [Disability Discrimination Act 1992](#) s 6 also defines indirect discrimination to cover incidences where the discriminator 'proposes to require' and (consistent with the (CTH) [Sex Discrimination Act 1984](#) and (CTH) [Age Discrimination Act](#) 6(4)) places the burden of proving the reasonableness of a requirement or condition on the person imposing it.
- 2 *Cooper v Ford Motor Co of Australia Ltd* (1987) EOC ¶92-191; *Garton v Hillcrest Hospital Inc* (1984) EOC ¶92-101 (blind applicant not promoted to a switchboard job because it was assumed he could not perform the function).
- 3 *Gordon v Commonwealth* (2008) EOC ¶93-495; [2008] FCA 603; BC200803167 (hypertension as a 'disability' defined in (CTH) [Disability Discrimination Act 1992](#) s 4 including a disability that is imputed to a person).
- 4 *Bogie v University of Western Sydney* (1990) EOC ¶92-313; *Zraika v Cmr of Police, NSW Police* (2004) EOC ¶93-334; [2004] NSWADT 67 (error of law found on appeal but did not alter NSWADT decision *Commissioner of Police, NSW Police v Zraika* (2005) EOC ¶93-368; [2005] NSWADTAP 1).
- 5 *Jamal v Dept of Health* (1986) EOC ¶92-162. Contrast *Fetherston v Peninsula Health* (2004) EOC ¶93-331; [2004] FCA 485; BC200402081 (doctor with deteriorating eyesight not unlawfully discriminated against when dismissed after he attended an eye specialist at the request of his employer but refused to let the specialist provide a report).
- 6 *Clinch v Cmr of Police* (1987) EOC ¶92-203; *Bugden v State Rail Authority of New South Wales* (1991) EOC ¶92-360; *Smith v St John Ambulance Australia (SA) Inc* (1992) EOC ¶92-448, SC(SA); *Browne v NSW Ambulance Service* (2004) EOC ¶93-345; [2004] NSWADT 192.
- 7 *Melvin v Northside Community Service Inc* (1996) EOC ¶91-830.
- 8 *Vanderhorn v VYMP International Pty Ltd (t/as Artflo Design)* (1992) EOC ¶92-402. Compare *Commonwealth v Humphries* (1998) 86 FCR 324; 54 ALD 395; BC9804337 in which Kiefel J found that, while in a particular case refusal to provide assistance to a disabled employee may amount to unlawful discrimination, the (CTH) [Disability Discrimination Act 1992](#) did not go so far as to impose a general obligation on all employers to take steps necessary to enable disabled employees to perform their duties. See also comments of the High Court of Australia in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; 202 ALR 133; [2003] HCA 62; BC200306678 at [104] per McHugh and Kirby JJ; at [217]-[218] per Gummow, Hayne and Heydon JJ. The extent of this obligation depends on the statutory context: *Lyons v Queensland* (2016) 335 ALR 28; 90 ALJR 1107; [2016] HCA 38; BC201608463 (jury service).
- 9 *Holdaway v Qantas Airways Ltd* (1992) EOC ¶92-395. Contrast *Commonwealth v Williams* (2002) 125 FCR 229; 72 ALD 369; [2002] FCAFC 435; BC200207958 (employee discharged from RAAF on ground of insulin dependent diabetes not unlawfully discriminatory as within the defence force exemption in (CTH) [Disability Discrimination Act 1992](#) s 53(1)).
- 10 *Trindall v NSW Cmr of Police* [2005] FMCA 2; BC200500200.
- 11 *Randell v Consolidated Bearing Co (SA) Pty Ltd* (2002) EOC ¶93-216; [2002] FMCA 44; BC200201466.
- 12 *Nesci v TAFE Commission of NSW (No 2)* (2005) EOC ¶93-404; [2005] NSWADT 183.
- 13 *Carr v Botany Bay Council* (2003) EOC ¶93-297; [2003] NSWADT 209. Note that (NSW) [Anti-Discrimination Act 1977](#) s 49PA contains an exemption from unlawful discrimination in employment on grounds of disability where the disability relates to addiction to a prohibited drug. A 'prohibited drug' is that defined by the (NSW) [Drug Misuse and Trafficking Act 1985](#) s 3, Sch 1 but does not include methadone or buprenorphine.
- 14 *Hurley v Electricity Commission of New South Wales* (1992) EOC ¶92-438. As to discrimination on the grounds of an imputed characteristic see [80-260]. See also *Gordon v Commonwealth* (2008) EOC ¶93-495; [2008] FCA 603; BC200803167.
- 15 *State Transit Authority v Sloey* [1999] NSWSC 47; BC9900892.

(C) Discrimination

- 16 *Cox v Public Transport Corp* (1992) EOC ¶92-401 (obesity per se does not come within the definition of an impairment unless it causes total or partial loss of a part of the body or malformation or disfigurement). However, comments about a person's weight may give rise to unlawful discrimination on the ground of physical features under (VIC) [Equal Opportunity Act 2010](#) s 6(j). See, for example, *Hill v Canterbury Road Lodge Pty Ltd* (2004) EOC ¶93-340 ; [2004] VCAT 1365.
- 17 *Ramirez v Amalgamated Royal Melbourne Hospital* (1992) EOC ¶92-432. As to the lack of an alternative job see also *Reilly v Roads Corp* (1992) EOC ¶92-407. See also (CTH) [Disability Discrimination Act 1992](#) ss 5, 6 (as amended by the (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#)).
- 18 *Commissioner of Fire Service v Seaton* (1996) EOC ¶92-839, SC(QLD).
- 19 *Daghlian v Australian Postal Corp* (2003) EOC ¶93-287 ; [\[2003\] FCA 759](#); [BC200303964](#).
- 20 *Nojin v Commonwealth* (2012) 208 FCR 1 ; [298 ALR 410](#); [\[2012\] FCAFC 192](#).
- 21 *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#).
- 22 See, for example, *Jennings v Lee* (1996) EOC ¶92-866, HREOC; *Brown v Birss Nominees Pty Ltd* [1997] HREOCA 54; *Grovenor v Eldridge* [\[2000\] FCA 1574](#) ; [BC200006684](#). (compare *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#)); *Haar v Maldon Nominees Pty Ltd* [\[2000\] 184 ALR 83](#) ; [2000] FMCA 5; *Sheehan v Tin Can Bay Country Club* (2002) EOC ¶93-240 ; [\[2002\] FMCA 95](#); [BC200202560](#) (although the Federal Disability Discrimination Commissioner has commented that this case creates an unsustainable position and that a different approach could be taken in future cases).
- 23 *Wood v Calvary Hospital* (2005) EOC ¶93-392 ; [\[2005\] FMCA 799](#); [BC200504301](#).
- 24 *Ball v Morgan* [\[2001\] FMCA 127](#) ; [BC200108534](#).
- 25 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) (anti-social and violent behaviour resulting from severe brain injury sustained by pupil during infancy); *Minns v New South Wales (Dept of Education and Training)* [\[2002\] FMCA 60](#)  (pupil with Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder). Compare *Tyler v Kesser Torah College* (2006) EOC ¶93-425 ; [\[2006\] FMCA 1](#); [BC200600169](#) (no constructive expulsion as parents voluntarily withdrew child from school).
- 26 *Clarke v Catholic Education Office* [\(2003\) 76 ALD 84](#) ; [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) (upheld on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121 ; [81 ALD 66](#); [\[2004\] FCAFC 197](#); [BC200404916](#)). See also *Hurst v Education Queensland* (2005) EOC ¶93-386 ; [\[2005\] FCA 405](#); [BC200502074](#) (failure to assess deaf student's needs prior to making decision on whether to include Auslan in education methods was unreasonable; inability to achieve full potential, in educational terms, can amount to serious disadvantage); *Walker v Victoria* [\[2011\] FCA 258](#) ; [BC201101493](#).
- 27 *Travers v New South Wales* (2001) 163 FLR 99 ; [2001] FMCA 18.
- 28 (CTH) [Disability Discrimination Act 1992](#) s 48 (disability is infectious disease and discrimination necessary to protect public health)
 (ACT) [Discrimination Act 1991](#) s 56 (discrimination on ground of disability necessary to protect public health)
 (NT) [Anti-Discrimination Act 1992](#) s 55 (discrimination on ground of impairment necessary to protect public health)
 (NSW) [Anti-Discrimination Act 1977](#) s 49P (disability is infectious disease and discrimination necessary to protect public health)
 (QLD) [Anti-Discrimination Act 1991](#) ss 107 (protection of public health), 108 (workplace health and safety)
 (SA) [Equal Opportunity Act 1984](#) s 79A
 (TAS) [Anti-Discrimination Act 1998](#) s 47 (disability is infectious disease and discrimination necessary to protect public health)
 (VIC) [Equal Opportunity Act 2010](#) s 86 (protection of health, safety and property)

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) s 66U (Governor may make Regulations exempting discrimination where impairment is infectious disease).

As to prevention and control of human disease generally see PUBLIC HEALTH [\[350-3001\]-\[350-3110\]](#). As to the general exemption on the ground of public health see [80-610].

(E) Ground of Political or Religious Belief or Activity

[80-370] Belief

The paragraph below is current to **07 March 2018**

Some jurisdictions have legislated to make discrimination on the grounds of political or religious belief unlawful.¹ In the Australian Capital Territory and Western Australia the proscribed ground is 'religious or political conviction'.² In Queensland, the attributes are 'religious belief or religious activity' 'political belief or activity' and 'trade union activity'.³ while in Victoria, the attributes are 'political belief or activity', and 'religious belief or activity'.⁴ Victoria has also enacted separate legislation prohibiting vilification on the ground of religious belief or activity.⁵ In the Northern Territory, the relevant attributes are 'religious belief or activity', 'political opinion, affiliation or activity' and 'trade union or employer association activity'.⁶ South Australia renders unlawful discrimination on the ground of religious appearance or dress, but not for belief in itself.⁷ In Tasmania, the relevant attributes are 'political belief or affiliation', 'political activity', 'religious belief or affiliation' and 'religious activity'.⁸ The Australian Human Rights Commission is empowered to inquire into any Commonwealth act or practice, including a systemic one, inconsistent with or contrary to any human right (including freedom of thought, conscience and religion in article 18 of the International Covenant on Civil and Political Rights (the 'ICCPR'))⁹ or that may constitute discrimination, with a view to conciliation or reporting to the responsible Minister.¹⁰ The Commonwealth has included provisions in workplace legislation addressing discrimination on various grounds including religion or political opinion or trade union membership or non-membership.¹¹

There is no specific anti-discrimination protection in the New South Wales legislation for religious or political belief or activity, although the definition of 'race' includes 'ethno-religious origin' for the purposes of discrimination on the ground of race (and exemptions are available for religious bodies).¹² There are no provisions in the South Australian anti-discrimination legislation addressing religious or political belief or activity (except in relation to exemptions for religious bodies).¹³

Included in each of the human rights charters of the ACT and Victoria, is a guarantee of freedom of thought, conscience and religion.¹⁴

Article 18 of the ICCPR contains the guarantee of religion or belief, supplemented in the context of discrimination by article 26 of the ICCPR, which guarantees equality before the law and entitlement without discrimination to equal protection of the law, and requires the law to prohibit discrimination and to guarantee all persons equal protection against discrimination on various grounds including religion, political or other opinion.¹⁵

Notes

- ¹ As to grounds or attributes see [80-290], [80-295]. As to freedom of thought, conscience and religion see also [\[80-1445\]-\[80-1535\]](#).
- ² (ACT) [Discrimination Act 1991](#) s [7\(1\)\(i\)](#), [Pt 3](#); see also (ACT) [Human Rights Act 2004](#) s [14](#) (freedom of thought, conscience and religion).

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) s 53, [Pt IV](#).

- 3 (QLD) [Anti-Discrimination Act 1991](#) Ch 2 Pt 3, ss 4, 7(i), 7(j), 7(k), Sch Dictionary (religious belief defined to mean holding or not holding a religious belief and religious activity defined to mean engaging in, not engaging in or refusing to engage in a lawful religious activity).
- 4 (VIC) [Equal Opportunity Act 2010](#) ss [4\(1\)](#), 6(k), 6(n) (political or religious belief or activity defined to mean holding or not holding a lawful political or religious belief or view or engaging in, not engaging in, or refusing to engage in a lawful political or religious activity); see also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [14](#) (freedom of thought, conscience and religion).
- 5 (VIC) [Racial and Religious Tolerance Act 2001](#).
- 6 (NT) [Anti-Discrimination Act 1992](#) s (19)(1)(k), [19\(1\)\(m\)](#), [19\(1\)\(n\)](#).
- 7 (SA) [Equal Opportunity Act 1984](#) s [85T](#).
- 8 (TAS) [Anti-Discrimination Act 1998](#) ss [3](#), 16(m), 16(n), 16(o), 16(p) (religious or political belief or affiliation defined to mean holding or not holding a religious or political belief or view and religious or political activity defined to mean engaging, not engaging or refusing to engage in a religious or political activity).
- 9 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18.
- 10 (CTH) [Australian Human Rights Commission Act 1986](#) ss [3\(1\)](#), [11\(1\)\(f\)](#), 31(b). See also (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) art 1(a) (religion, political opinion) (contained in (CTH) [Australian Human Rights Commission Act 1986 Sch 1](#)); (CTH) Australian Human Rights Commission Regulations 1989 reg 4(a)(x) (trade union activity). Note also (CTH) [Australian Human Rights Commission Act 1986](#) s [4](#) (Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act).
- 11 (CTH) [Fair Work Act 2009](#) ss [153](#), [195](#), [351](#), [578](#), [772](#). See *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 ; [\[2010\] FCA 284](#); [BC201001699](#) for interpretation of (CTH) [Fair Work Act 2009](#) s [346](#) (adverse action for engaging in industrial activity); *Carr v Blade Repairs Australia Pty Ltd (No 2)* [\[2010\] FCA 688](#) ; [BC201004629](#) (in the context of (CTH) [Workplace Relations Act 1996](#) s 659 (age discrimination) (now the (CTH) [Fair Work Act 2009](#))); *Sterling Commerce (Aust) Pty Ltd v Iloff* (2008) EOC ¶93-496 ; (2008) 173 IR 378; [\[2008\] FCA 702](#); [BC200803650](#) (refusal to reinstate after maternity leave in breach of (CTH) [Workplace Relations Act 1996](#) Sch 1A (now the (CTH) [Fair Work Act 2009](#))).
- 12 (NSW) [Anti-Discrimination Act 1977](#) s 4. However, in *A v Dept of School Education* (2000) EOC ¶93-039, the NSWADT considered that 'ethno-religious origin' operated to qualify certain ethno-religious groups as races rather than extend the scope of the legislation to discrimination on the ground of religion.
- 13 As to exemptions for religious bodies see RELIGION [\[365-335\]](#), [\[365-425\]](#), VOLUNTARY ASSOCIATIONS [\[435-60\]](#).
- 14 (ACT) [Human Rights Act 2004](#) s [14](#)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [14](#). For the significance of charter-listed rights see [\[80-27\]](#) and [\[80-28\]](#).
- 15 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18 states:
 - (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
 - (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'

For authoritative interpretation of art 18 of the Convention by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 22: The right to freedom of thought, conscience and religion (Art 18)*, CCPR/C/21/Rev 1 Add 4, 30 July 1993 (available at <http://www.unhcr.org>). For interpretation of (INT) International Covenant on Civil and Political Rights 1966 art 26 by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, adopted at the Thirty-seventh Session, 10 November 1989 (available at <http://www.unhcr.org>).

For the significance of treaty ratification in the context of to practise and manifest religion see *Cheedy obh Yindjibarndi People v Western Australia* [2010] FCA 690 ; *BC201004571* at [100]-[106] per Mckerracher J), upheld in *Cheedy obh Yindjibarndi People v Western Australia* (2011) 194 FCR 562 ; [2011] FCAFC 100; *BC201106027* at [97]-[110].

[80-375] Definition of ground of belief

The paragraph below is current to **07 March 2018**

The interpretation of the term 'political' has been different in the tribunal decisions in Victoria and Western Australia. In Victoria, 'political' has been construed along the lines of dictionary definitions, as the relevant matter or activity which essentially involves the state and 'bears on government'.¹ 'Political belief' was distinguished from beliefs basic to the structure of society such as honesty² and must be related to the 'mores of society'.³ Public expression by a teacher of views about the age of consent may be 'political'.⁴ A club could not exclude a person because of her (anti-feminist) views.⁵ In Western Australia a rather broader definition of 'political' was adopted by the Equal Opportunity Tribunal so that 'political' includes beliefs and opinions concerning the distribution and utilisation of economic, social and cultural power in a society.⁶ However, the narrower interpretation of the phrase given by the Victorian Supreme Court was endorsed by Justice Anderson of the Western Australian Supreme Court.⁷ If an employer is unaware of the political belief of a dismissed employee, discrimination on that ground is less likely to be involved.⁸ In Queensland, the State government was found to have unlawfully discriminated against an employee on the ground of political belief or activity when it terminated her employment principally because of her affiliation with the Australian Labor Party (the 'ALP'). The Tribunal rejected the government's argument that it could not have trust and confidence in the employee because of her association with the ALP and that this was an inherent requirement of her job.⁹

'Political activity' has also been the subject of consideration by the tribunals and courts. It means more than 'capable of being political',¹⁰ but can relate to deeply held political views manifested in refusal to support certain union action of a political nature.¹¹ Dismissal of a builder's labourer after rejoining a deregistered union was found not to be discrimination on the ground of 'political activity' because there was no evidence that the employer had the employee dismissed for engaging in political activity as defined, or that his failure to present a financial clear card was political.¹² In the provision of goods and services, failure to allow a municipal hall to be used by protesters against a United States base, when it had been made available to supporters, was held to be discriminatory on grounds of political belief and activity.¹³

The interpretation of 'religious opinion or belief' has been extended to find unlawful the segregation of a union member refusing to make a welfare payment on account of his religious belief.¹⁴ It would also include 'Nature Philosophy'.¹⁵ A case of indirect discrimination arose from the adoption of a rule by a public transport corporation about the availability of travel concessions that had the effect of discriminating against the children of people teaching them at home because of their religious beliefs.¹⁶ Discrimination has been found in not providing fresh Halal meat to a Muslim prisoner who requested it.¹⁷ A case of direct discrimination in employment arose where an employee was pressured to attend church and was treated in her employment differently from the way that an employee who conformed to the employer's lifestyle and religious practices would have been treated.¹⁸ Similarly, a woman was unlawfully discriminated against when she was dismissed from her employment with the Baptist Church for having no religious belief, although she had been a Christian at the time of appointment.¹⁹ Being Jewish appertains to race, for the purposes of discrimination legislation.²⁰ In Victoria, specific legislation passed to prohibit religious vilification was the subject of a claim that a seminar conducted by an evangelical church which was hostile, derogatory and demeaning to the Islamic faith and therefore likely to incite religious hatred.²¹

(C) Discrimination

Notes

- 1 *Hein v Jacques Ltd* [\[1990\] VR 805](#) ; (1987) EOC ¶92-188; [BC8900498](#), EOB (followed in this respect *Nestle Australia Ltd v Equal Opportunity Board* [\[1990\] VR 805](#) ; (1990) EOC ¶92-281 per Vincent J); *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [\[1991\] 2 VR 107](#) ; (1991) EOC ¶92-332 at 78,290 per Marks J.
- 2 *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [\[1991\] 2 VR 107](#) ; (1991) EOC ¶92-332 at 78,290 per Marks J. (further, the fact that one of the complainants had discussed the issue with a politician did not make it 'political activity').
- 3 *Jolly v Director-General of Corrections (Vic)* (1985) EOC ¶92-124.
- 4 *Thorne v R* (1986) EOC ¶92-182.
- 5 *Oldham v Women's Information and Referral Exchange* (1986) EOC ¶92-158.
- 6 *Croatian Brotherhood Union of WA (Inc) v Yugoslav Clubs & Community Assns of WA (Inc)* (1987) EOC ¶92-190, EOT(WA). The Board used a definition propounded in a report commissioned by the Anti-Discrimination Board of New South Wales.
- 7 *Ralph M Lee Pty Ltd v Fort* (1991) 4 WAR 176 ; (1991) EOC ¶92-357.
- 8 *Duse v Victoria* (1987) EOC ¶92-208; 24 IR 1.
- 9 *Byrne v Queensland* (1999) EOC ¶93-010; [1998] QADT 20.
- 10 *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [\[1991\] 2 VR 107](#) ; (1991) EOC ¶92-332 per Marks J at 78,291.
- 11 *Hein v Jacques Ltd* [\[1990\] VR 805](#) ; (1987) EOC ¶92-188; [BC8900498](#).
- 12 *Duggan v South Yarra Constructions Pty Ltd* (1988) EOC ¶92-220; 25 IR 367.
- 13 *Williams v Council of the Shire of Exmouth* (1990) EOC ¶92-296. As to the provision of goods and services as an area of unlawful discrimination see [80-520]-[80-530].
- 14 *Marett v Petroleum Refineries (Aust) Pty Ltd* (1987) EOC ¶92-206; 24 IR 101, EOB(VIC); *Petroleum Refineries (Aust) Pty Ltd v Marett* [\[1989\] VR 789](#) ; (1988) EOC ¶92-237, SC(VIC).
- 15 *Hanes v Human Rights and Equal Opportunity Commission* [\(2007\) 98 ALD 544](#) ; [\[2007\] FCA 751](#); [BC200704143](#) (practising neo-pagan doctor used plant salvia divinorum for purposes of facilitating ability to experience deep communion with nature and spirit of earth and claimed restrictions on possession, use and supply of plant manifested restriction on applicant's belief. It was not in dispute that the 'Nature Philosophy' could be considered a belief (without considering whether it was a religion) and the use of the plant 'to facilitate a communion with Nature and the Spirit of the Earth' constituted a manifestation of his religion or belief).
- 16 *Christian Family Schools Assn of Australia v Public Transport Corp* (1990) EOC ¶92-300.
- 17 *Queensland v Mahommed* (2007) EOC ¶93-452 ; [\[2007\] QSC 018](#); [BC200700466](#) (finding of direct and indirect discrimination upheld on appeal in unreasonable term requiring Muslim prisoner to eat general prison diet).
- 18 *Ciciulla v Curwen-Walker* (1998) EOC ¶92-934; [1998] VADT 20.
- 19 *Dixon v Anti-Discrimination Cmr of Queensland* [\[2005\] 1 Qd R 33](#) ; (2004) EOC ¶93-327; [\[2004\] QSC 058](#); [BC200401342](#).
- 20 *Phillips v Aboriginal Legal Service* (1993) EOC ¶95-502, EOT(NSW) (following *King-Ansell v Police* [\[1979\] 2 NZLR 531](#) ; *Mandla (Sewa Singh) v Dowell Lee* [\[1983\] 2 AC 548](#)  ; 1 All ER 1062; 2 WLR 620). See also *Miller v Wertheim* (2002) EOC ¶93-223 ; [\[2002\] FCAFC 156](#); [BC200202722](#) at [13] (although Court found that group of people were criticised not because of their Jewish ethnicity but because of their allegedly divisive and destructive activities). Compare *Goldberg v G Korsunski Carmel School* (2000) EOC ¶93-074 (non-Orthodox Jews not a race for the purposes of the (WA) [Equal Opportunity Act 1984](#)).

21 *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2005) EOC ¶93-377 ; [2004] VCAT 2510 (under (VIC) [Racial and Religious Tolerance Act 2001](#); appeal allowed in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 206 FLR 56 ; [235 ALR 750](#); [\[2006\] VSCA 284](#); [BC200610408](#) (matter discontinued)).

(F) Ground of Age

[80-380] Definition

The paragraph below is current to **07 March 2018**

All jurisdictions have now legislated to make it unlawful to discriminate on the ground of age. The Commonwealth legislation (which has been amended to establish the position of an Age Discrimination Commissioner)¹ follows a similar scheme and structure to the federal sex and disability discrimination legislation by setting out descriptions of direct and indirect age discrimination and the areas of public life in which it is unlawful.² One notable difference between the other federal discrimination legislation and the (CTH) [Age Discrimination Act 2004](#) once was that the latter required that where an act was done for two or more reasons, it would only be taken to be done 'for the reason of age' if age was the 'dominant reason' for doing the act. Now discrimination occurs if an act is done for two or more reasons and one of those reasons is the age of the person, or because of characteristics that appertain or are generally imputed to persons of the age of a person.³ It defines age as including 'age group',⁴ and expressly prevents an overlap with disability discrimination legislation by providing that a reference to discrimination on the ground of age is taken not to include a reference to discrimination on the ground of disability within the meaning of the (CTH) [Disability Discrimination Act 1992](#).⁵ There is also protection against age discrimination under federal industrial relations legislation.⁶ In the other jurisdictions age is listed as a prohibited basis for discrimination⁷ and in each case the areas in which it is applicable are those laid down for other grounds,⁸ and specific age-related exemptions are provided.⁹ In New South Wales, there is specific protection from compulsory retirement on the basis of age.¹⁰

A butcher who was claimed to be slow at work and was transferred has been held to have been discriminated against on the ground of age,¹¹ and likewise an employee whose employment was terminated at age 53.¹² Reducing the number of credit points in determining eligibility for appointment by reference to the age of the applicant has been held to be unlawful systemic discrimination.¹³ Less favourable treatment in the selection of airline cabin staff than the younger applicants as a result of flawed selection process was found to be discriminatory.¹⁴ A finding of unlawful age discrimination was made when an employer placed a job advertisement seeking a person to fill a position in a 'young team' and then pressed an older applicant on the issue of his age.¹⁵ However, a job advertisement seeking 'recent graduates' to fill places on a professional engineer development program was found not to impose an unreasonable requirement and was not unlawful discrimination on the ground of age.¹⁶ The meaning of engaging in conduct 'with a view to causing an employee to retire', and thus constituting unlawful discrimination, was considered and held inapplicable in relation to an anaesthetist who had no relationship as employee to the hospital in which he practised.¹⁷ An international airline pilot was held not to have been unlawfully dismissed upon turning 60 years of age because being under 60 was an inherent requirement of the position, given the terms of an international airline convention which prevented pilots aged 60 years and over from flying over or landing aircraft in various countries.¹⁸

The United Nations Human Rights Committee found no violation in compulsory retirement age for pilots.¹⁹

Unlawful compulsory retirement on age grounds can lead to damages for loss of dignity as well as of earnings, and to reinstatement.²⁰ In the provision of goods and services, re-zoning land by a council to ensure occupation by older citizens has been held unlikely to be unlawful because of the likely availability of an exemption.²¹ Refusal to provide a child with legal aid assistance, while reasonable if the child was

(C) Discrimination

not mature enough to provide instructions, was unlawfully discriminatory where there had been no proper objective assessment of the child's maturity.²²

Notes

- 1 (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#) added sections 53A-53H to (CTH) [Age Discrimination Act 2004](#) to establish the Age Discrimination Commissioner within the Australian Human Rights Commission.
- 2 See *ibid* ss 14 (direct), 15 (indirect), Pt 4 (areas).
- 3 *Ibid* s 16 (note that the (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) which introduced the change does not apply retrospectively). Similarly the (CTH) [Racial Discrimination Act 1975](#) s 18; (CTH) [Sex Discrimination Act 1984](#) s 8 and (CTH) [Disability Discrimination Act 1992](#) s 10 only require the discriminatory reason to be one of the reasons for doing the act, whether or not it was the dominant or substantial reason.
- 4 (CTH) [Age Discrimination Act 2004](#) s 5.
- 5 *Ibid* s 6.
- 6 (CTH) [Fair Work Act 2009](#) ss 153, 195, 351, 578, 772 (see *Carr v Blade Repairs Australia Pty Ltd (No 2)* [2010] FCA 688; [BC201004629](#) in the context of (CTH) [Workplace Relations Act 1996](#) s 659 (age discrimination) (now the (CTH) [Fair Work Act 2009](#))).
- 7 (ACT) [Discrimination Act 1991](#) s 7(1)(l), Pt 2
(NT) [Anti-Discrimination Act 1992](#) s 19(1)(d), Pt 3
(NSW) [Anti-Discrimination Act 1977](#) Pt 4G (discrimination on the grounds of a person's age or the age of a relative or associate)
(QLD) [Anti-Discrimination Act 1991](#) s 7(f), Ch 2 Pts 2, 3
(SA) [Equal Opportunity Act 1984](#) s 85A (includes unfavourable treatment because of the age of a relative or associate)
(TAS) [Anti-Discrimination Act 1998](#) s 16(b), Pt 4 Div 1
(VIC) [Equal Opportunity Act 2010](#) s 6(a), Pt 2
(WA) [Equal Opportunity Act 1984](#) s 66V.
- 8 (ACT) [Discrimination Act 1991](#) Pt 3
(NT) [Anti-Discrimination Act 1992](#) Pt 4
(NSW) [Anti-Discrimination Act 1977](#) ss 49ZYB-49ZYH (work), 49ZYL-49ZYP (other areas)
(QLD) [Anti-Discrimination Act 1991](#) Ch 2 Pt 4
(SA) [Equal Opportunity Act 1984](#) ss 85B-85E, 85G-85L
(TAS) [Anti-Discrimination Act 1998](#) Pt 4 Div 3
(VIC) [Equal Opportunity Act 2010](#) Pt 4
(WA) [Equal Opportunity Act 1984](#) Pt IVB Divs 2, 3.
As to the areas in which discrimination is prohibited see [80-405]-[80-590].
- 9 (ACT) [Discrimination Act 1991](#) Pt 4 Div 4.6
(NT) [Anti-Discrimination Act 1992](#) ss 36, 44, 45, 47(2)
(NSW) [Anti-Discrimination Act 1977](#) ss 49ZYI-49ZYK, 49ZYQ-49ZYX
(QLD) [Anti-Discrimination Act 1991](#) ss 32, 33, 43, 49, 50, 60-63, 74, 75, 106A
(SA) [Equal Opportunity Act 1984](#) ss 85F, 85M-85R

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) Pt 5 Div 3

(VIC) [Equal Opportunity Act 2010](#) ss [79](#), [85](#), [87](#), [88](#)

(WA) [Equal Opportunity Act 1984](#) Pt IVB Div 4.

- 10** (NSW) [Anti-Discrimination Act 1977](#) ss 49ZU-49ZX. Specific exemptions apply: *ibid* s 49ZX. See also *White v University of Sydney* (1992) EOC ¶92-473; *Christley v University of Newcastle* (1992) EOC ¶92-474 (complaint against compulsory retirement sustained in both cases).

There are no equivalent provisions in the other jurisdictions.

- 11** *Gilshenen v PD Mulligan (Newcastle) Pty Ltd* (1996) EOC ¶92-781.
- 12** *Goodworth v Marsden Motors Pty Ltd* (1996) EOC ¶92-837.
- 13** *Blatchford v Qantas Airways Ltd* (1997) EOC ¶92-888, EOT(NSW) (direct discrimination found, so tribunal did not consider it necessary to consider indirect discrimination).
- 14** *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC ¶93-457 ; [\[2007\] QSC 075](#); [BC200702388](#).
- 15** *Gardener v Norcott* [2004] QADT 39.
- 16** *Dewan v Main Roads WA* (2005) EOC ¶93-362.
- 17** *Lorang v Mater Misericordiae Hospital* (1994) EOC ¶92-602; [BC9402654](#) per Kirby P dissenting, CA(NSW).
- 18** *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 ; [152 ALR 365](#); [\[1998\] HCA 18](#); [BC9800685](#).
- 19** *John K. Love et al. v Australia*, Communication No 983/2001, CCPR/C/77/D/983/2001 (2003) at [8.2]-[8.3] (although age is not an enumerated ground of prohibited discrimination in (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 26, a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of 'other status'; not clear that mandatory retirement age would generally constitute age discrimination. No violation as the aim of maximising safety in flight travel was a legitimate aim of retirement age for pilots).
- 20** *Alcock v Sheppard* (1995) EOC ¶92-691, EOT(NSW); *Kinley v East Sydney Area Health Service* (1994) EOC ¶92-559.
- 21** *Re Secrana Pty Ltd and Beaudesert Shire Council* (1996) EOC ¶92-779, ADT(QLD). This exemption is available under (QLD) [Anti-Discrimination Act 1991](#) s [104](#) ('welfare measures'). See also *Wright v City of Brighton* (1991) EOC ¶92-389, SASC (low-cost cottages for retired and elderly people exempted as a benefit for persons of a particular age).
- 22** *G v Victoria Legal Aid* (2000) EOC ¶93-060.

(G) Ground of Association

[80-385] Definition

The paragraph below is current to **07 March 2018**

Association with a person having a specified status or attribute has been established as a ground of discrimination under anti-discrimination legislation in most jurisdictions. The broadest protection is of association itself, when linked to a person with any of the other unlawful attributes — this applies in the Australian Capital Territory, the Northern Territory, New South Wales, Queensland, Tasmania and Victoria.¹

In South Australia, protection is provided against discrimination on the basis of association relating to sexuality, race, age, marital or domestic partner status, pregnancy, association with a child, caring responsibilities and religious appearance or dress affecting a relative or associate and keeping a therapeutic animal.²

In Western Australia, protection is provided against discrimination on the basis of the sexual orientation, race, impairment or age of any relative or associate of a person, but not in respect of the other prohibited grounds.³

In relation to disability, the Commonwealth has provided that it is unlawful to discriminate against a person on the basis of a disability of any of the person's associates.⁴ In addition, a person with a disability is unlawfully discriminated against if the less favourable treatment arises from the presence of an interpreter, a reader, an assistant or a carer, or of a guide dog or other assisting animal.⁵ Also under the Commonwealth jurisdiction, discrimination based on association which is related to the race of a person constitutes an unlawful act in relation to race.⁶ There are no equivalent provisions relating to association in the federal sex or age discrimination legislation. In addition to the ground of association with a person having any of the relevant attributes, certain specific attributes inherently involve association.

In the Australian Capital Territory and Victoria these include parental status' or 'status as a carer',⁷ in the Northern Territory 'parenthood',⁸ in New South Wales 'responsibilities as a carer',⁹ in Tasmania and Queensland 'parental status',¹⁰ and Western Australia 'family responsibilities or family status'.¹¹

To discriminate against a person breastfeeding her baby in a hotel dining room was held unlawful on grounds of parent (nursing mother) status.¹² However, a mother was not able to claim unlawful discrimination when a child was not allowed to wait at a gymnasium while she was attending aerobics classes.¹³ Refusal to employ owing to inability to work the hours required, even if because of parental responsibilities, may not be discriminatory where the only available ground is 'status as a parent'.¹⁴ The position may be different in Victoria, where the attribute is 'parental status' or 'status as a carer',¹⁵ and possibly different under the Northern Territory, Tasmania and Queensland legislation, where 'parenthood'¹⁶ and 'parental status'¹⁷ are the attributes. In Western Australia, 'family status' has been held not to be limited to association with a relative for whom the person has care or responsibility, as where an employer was found to have unlawfully discriminated against an employee because the employee's sister, who had also worked for that employer, resigned and went to work for a competitor.¹⁸

In New South Wales, race, transgender, homosexuality and HIV/AIDS vilification is prohibited, and in the Australian Capital Territory, racial, sexuality and HIV/AIDS vilification is prohibited involving promoting hatred, contempt or ridicule of members of the relevant group.¹⁹ The grounds of vilification in Queensland are race, religion, sexuality or gender identity,²⁰ and in South Australia, race.²¹ In the Northern Territory, the only related provisions concern trade union or employer association activity and political affiliation, which are attributes in relation to which discrimination is unlawful.²² Tasmania also makes 'political affiliation' and 'religious affiliation' prohibited grounds of discrimination.²³

The person with whom the complainant is associated had to have been alive at the time of the discrimination.²⁴

Notes

- 1 (ACT) [Discrimination Act 1991](#) s 7(1)(n)
(NT) [Anti-Discrimination Act 1992](#) s 19(1)(r)
(NSW) [Anti-Discrimination Act 1977](#) ss 7(1), 24(1), 38B(1), 39(1), 49B(1), 49ZG(1), 49ZYA(1) (except for responsibilities as a carer, but this ground in itself involves the concept of association)
(QLD) [Anti-Discrimination Act 1991](#) s 7(p)
(TAS) [Anti-Discrimination Act 1998](#) s 16(s)
(VIC) [Equal Opportunity Act 2010](#) s 6(q).
- 2 (SA) [Equal Opportunity Act 1984](#) ss 29(2)(d), 51(d), [85A\(d\)](#), [87A](#), [87B](#), [88A](#), [Pt 5B](#).

(C) Discrimination

- 3 (WA) [Equal Opportunity Act 1984](#) ss 35O(2), 36(1a), 49D, 66(1a), 66V(2).
- 4 (CTH) [Disability Discrimination Act 1992](#) ss [7\(1\)](#), 15-29, 45. Ibid s 8 applies the Act in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability, correcting deficiencies raised by the Full Federal Court in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#) at [\[48\]](#). The types of discrimination in (CTH) [Disability Discrimination Act 1992](#) ss [7-9](#) also constitute discrimination on the ground of disability. Note in particular ibid s 9 ('carer', 'assistant', 'assistance animal' and 'disability aid' definitions). See also *Stevenson v Murdoch Community Services Inc* [\[2010\] FCA 648](#) ; [BC201004301](#) (claim failed as the nexus was not proved between the relationship with disabled sister and detriment suffered in allegations of unsatisfactory work performance following sister's car accident near applicant's work).
- 5 (CTH) [Disability Discrimination Act 1992](#) ss [7](#) (discrimination in relation to associates), [8](#) (discrimination in relation to carers, assistants, interpreter, reader; assistance animals and disability aids), [9](#) (definitions). See *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532 ; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#).
- Discrimination on the ground of impairment because a person has a guide dog or other assistance is specifically catered for in some jurisdictions:
- (ACT) [Discrimination Act 1991](#) s 9 (guide dog, hearing dog, assistance animal or other aid)
- (NT) [Anti-Discrimination Act 1992](#) ss [4\(1\)](#) (definition of impairment), [21](#)
- (NSW) [Anti-Discrimination Act 1977](#) ss 49B(3) (guide dog), 49B(3A) (palliative or therapeutic device, interpreter, reader, assistant or carer)
- (QLD) [Anti-Discrimination Act 1991](#) s [4](#), Sch Dictionary; see also ibid s 85 (discrimination by refusing to allow accommodation because of guide, hearing or assistance dog)
- (SA) [Equal Opportunity Act 1984](#) s 66(e) (guide dog); see also ibid s 88 (separate offence of separating a guide dog from a person who is blind or deaf)
- (TAS) [Anti-Discrimination Act 1998](#) s [3](#) (definition of 'disability' includes reliance in a guide dog, wheelchair or other remedial or therapeutic device).
- (VIC) [Equal Opportunity Act 2010](#) s [54](#) (refusal to provide a person with an impairment accommodation because that person has an assistance dog)
- (WA) [Equal Opportunity Act 1984](#) s 66A(4) (guide dog or hearing dog).
- 6 (CTH) [Racial Discrimination Act 1975](#) ss 11-13, [15](#) where it is unlawful to discriminate against a person by reason of being a 'relative or associate' of a person of a particular race (as defined) or a 'relative or associate' of a person is or has been an immigrant. As to the Commonwealth definition of 'race' see [80-330].
- 7 (ACT) [Discrimination Act 1991](#) s [7\(1\)\(e\)](#)
- (VIC) [Equal Opportunity Act 2010](#) s 6(i).
- 8 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(g\)](#).
- 9 (NSW) [Anti-Discrimination Act 1977](#) s 49T (area of work only).
- 10 (QLD) [Anti-Discrimination Act 1991](#) s 7(d)
- (TAS) [Anti-Discrimination Act 1998](#) s 16(i).
- 11 (WA) [Equal Opportunity Act 1984](#) s 35A (areas of work, education only).
- 12 *Whitehead v Criterion Hotel, Geelong* (1985) EOC ¶92-129, EOB(VIC). As to breastfeeding see [80-320].
- 13 *Mosk v Re-Creation Health Sport and Fitness Club* (1990) EOC ¶92-317.
- 14 *Sedgman v Fenwick Software Pty Ltd* (1991) EOC ¶92-338, EOB(Vic). See also *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 ; (2008) EOC ¶93-483; [\[2007\] FCA 1903](#); [BC200711032](#) (dismissal not to do with family responsibilities, or any characteristic attributed to a working mother but non-observance of agreed hours by senior employee).
- 15 (VIC) [Equal Opportunity Act 2010](#) s 6(i).
- 16 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(g\)](#), [19\(1\)\(r\)](#) (parenthood).
- 17 (QLD) [Anti-Discrimination Act 1991](#) s 7(d), 7(p) (parental status)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) s 16(i) (parental status), 16(j) (family responsibilities).

18 *Hautlieu Pty Ltd t/as Russell Pathology v McIntosh* (2000) EOC ¶93-096 ; [\[2000\] WASCA 146](#); [BC200002808](#).

19 (ACT) [Discrimination Act 1991](#) ss 65-67

(NSW) [Anti-Discrimination Act 1977](#) ss 20C, 20D, 38S, 38T, 49ZT, 49ZTA, 49ZXB, 49ZXC. As to the vilification provisions see [80-700]-[80-710].

20 (QLD) [Anti-Discrimination Act 1991](#) ss [124A](#), [131A](#).

21 (SA) [Racial Vilification Act 1996](#) s 4.

22 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(k\)](#), [19\(1\)\(n\)](#). See further [80-395].

23 (TAS) [Anti-Discrimination Act 1998](#) ss 16(m), 16(o). See further [80-370], [80-375].

24 *Sydney Local Health Network v QY and QZ* [\(2011\) 83 NSWLR 321](#) ; [\[2011\] NSWCA 412](#); [BC201110351](#) at [\[51\]-\[54\]](#) per Campbell JA, at [76] per Macfarlan JA, at [143], [145] per Young JA.

(H) Other Grounds

[80-390] Medical records

The paragraph below is current to **07 March 2018**

It is possible that under the Australian Human Rights Commission legislation, a complaint may be made of discrimination in employment on the basis of medical record.¹ Irrelevant medical record is a specific ground of unlawful discrimination in the Northern Territory and Tasmania.² The other jurisdictions do not include provisions addressing discrimination on the ground of medical records. The (CTH) [Disability Discrimination Act 1992](#) prohibits information requests where not required from someone without a disability, if sought for the purposes of discrimination. This includes blanket requests for the same information where the purpose is to elicit information on disability.³ Employers may not request or require genetic information from a job applicant or employee, except reasonably required to satisfy inherent requirements.⁴ The onus is on the one seeking the information to show it is not for unlawful discrimination, a reversal of the usual burden on the complainant. In the case of assistance animals evidence may still be requested that the animal is accredited as such or otherwise trained to an acceptable standard.⁵

Notes

1 (CTH) [Australian Human Rights Commission Act 1986](#) ss 31(b), [33](#) relying on (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) art 1(b) which is in (CTH) [Australian Human Rights Commission Act 1986 Sch 1](#); (CTH) Australian Human Rights Commission Regulations 1989 reg 4(a)(ii). Note also (CTH) [Australian Human Rights Commission Act 1986](#) s [4](#) (the Act is not intended to exclude or limit the operation of State or Territory law capable of operating concurrently).

2 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(p\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s 16(r), [Pt 4](#).

3 (CTH) [Disability Discrimination Act 1992](#) s [30](#).

4 Ibid s 30(3).

5 Ibid s 54A(5).

[80-395] Trade union or employer association activity

The paragraph below is current to **07 March 2018**

In the Australian Capital Territory, trade union or employer association activity, and membership or non-membership of an association of employers or employees is a prohibited ground of discrimination.¹ In the Northern Territory and Queensland it is unlawful to discriminate on the attribute of trade union activity,² and in the Northern Territory this is extended to include employer association activity.³ In Tasmania and Victoria the somewhat broader ground of 'industrial activity' is a prohibited basis of discrimination.⁴ At the Commonwealth level, under the Australian Human Rights Commission legislation, a complaint may be made of discrimination in employment on the basis of trade union activity.⁵ In addition, it is unlawful for an employer to terminate the employment of an employee for the reason of (or for reasons that include) trade union membership or participation in trade union activities, non-membership of a trade union, or acting as a representative of employees.⁶

There are no equivalent provisions in the discrimination legislation of the other jurisdictions.

Notes

- 1 (ACT) [Discrimination Act 1991](#) s 7(k). 'Profession, trade, occupation, or calling' is a further attribute included in the legislation: *ibid* s 7(1)(m) See definitions of 'industrial activity', 'industrial association' and 'industrial organisation' (the term 'industrial activity' brings the (ACT) [Discrimination Act 1991](#) in line with (CTH) [Fair Work Act 2009](#) following (ACT) Human Rights Commission Legislation Amendment Act 2010 (repealed)).
- 2 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(k\)](#)
(QLD) [Anti-Discrimination Act 1991](#) s 7(k).
- 3 (NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(k\)](#).
- 4 (TAS) [Anti-Discrimination Act 1998](#) s 16(l), [Pt 4](#)
(VIC) [Equal Opportunity Act 2010](#) ss [4](#), 6(f).

Both Acts define 'industrial activity' to include being, not being, or refusing to be a member of an industrial organisation or participating in, not participating in, or refusing to participate in a lawful activity organised or promoted by an industrial organisation: See:
(TAS) [Anti-Discrimination Act 1998](#) s [3](#)
(VIC) [Equal Opportunity Act 2010](#) s [4](#).
- 5 (CTH) [Australian Human Rights Commission Act 1986](#) ss 31(b), [33](#); (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) art 1(b). The Convention is Scheduled in (CTH) [Australian Human Rights Commission Act 1986 Sch 1](#). See also (CTH) Australian Human Rights Commission Regulations 1989 reg 4(a)(x). As to the Discrimination (Employment and Occupation) Convention see [80-740].
- 6 (CTH) [Fair Work Act 2009](#) s [772](#). See also *ibid* Pt 16 (freedom of association).

[80-400] Criminal record and spent convictions

The paragraph below is current to **07 March 2018**

There is provision in five jurisdictions for making complaints relating to discrimination on the ground of criminal record. Under the Commonwealth legislation, criminal record is a ground for complaint in the

area of employment.¹ In the Northern Territory and Tasmania, it is unlawful to discriminate in all the legislated areas of activity on the ground of 'irrelevant **criminal** record',² and in the Australian Capital Territory on the ground of spent conviction within the meaning of the (ACT) [Spent Convictions Act 2000](#).³ In Western Australia, discrimination in employment, direct or indirect, based on the ground of spent conviction may be the subject of complaint under the (WA) [Equal Opportunity Act 1984](#).⁴ In Victoria, discrimination on the basis of an expunged homosexual conviction is unlawful.⁵

There is provision in seven jurisdictions for spent convictions. This is achieved, either by specific legislation⁶ or in general crimes legislation.⁷ The legislation provides that specified convictions are not to be taken into account or disclosed, after a period that is usually 10 years and dates from the date of conviction.⁸ There are usually exemptions from the lapsing provisions where the crime is serious, normally measured by reference to the maximum penalty for the offence for the relevant conviction, and in some cases where the offence may render a person unsuitable for a particular job.⁹ In relation to the expungement of Commonwealth offences, a complaint may be made to the Information Commissioner if a Commonwealth or State agency is thought to have breached the arrangements.¹⁰ Similar arrangements apply to the Western Australian Equal Opportunity Commissioner if a person wishes to complain of discrimination on account of spent convictions.¹¹

Two jurisdictions have provide for the expungement of historical homosexual offence convictions.¹²

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) ss 31(b), 33, Sch 1; (CTH) Australian Human Rights Commission Regulations 1989 reg 4(a)(iii). Note also (CTH) [Australian Human Rights Commission Act 1986](#) s 4 (nothing in the Act is intended to exclude or limit the operation of a State or Territory law that furthers the objects of the Act).
- 2 (NT) [Anti-Discrimination Act 1992](#) s 19(1)(g), 19(1)(ga) (discrimination unlawful on the attribute of the person's details being published under the (NT) [Fines and Penalties \(Recovery\) Act 2001](#) s 66M)
- (TAS) [Anti-Discrimination Act 1998](#) s 16(q). As to the areas of activity see [80-405]-[80-590]. See *Von Stalheim v Anti Discrimination Tribunal (Tas)* [2009] TASSC 6 ; [BC200900691](#) (finding by Commissioner that being a convicted paedophile may fall within the attribute of (imputed) irrelevant **criminal** record and applying for a position is an activity in connection with employment hence a failure to gain employment may be unfavourable treatment, but such failure was not on the basis of the (imputed) irrelevant **criminal** record: there was insufficient evidence to establish KPMG had knowledge of the (imputed) irrelevant **criminal** record).
- 3 (ACT) [Discrimination Act 1991](#) s 7(1)(o).
- 4 (WA) [Spent Convictions Act 1988](#) ss 17-23, 24, 29. Ibid s 29 applies (WA) [Equal Opportunity Act 1984](#) ss 83(1), 83(2), 155, 159, 160-163 to discrimination on the ground of a spent conviction.
- (WA) [Spent Convictions Act 1988](#) s 8, Sch 2 extend to spent convictions for Commonwealth offences and those in New South Wales and Queensland. On spent conviction orders see *McClelland v A-G (WA)* [2009] WASC 345 ; [BC200910536](#) ((WA) [Spent Convictions Act 1988](#) does not apply to honorary office of JP); *Surdy v Bowyer* [2009] WASC 286 ; [BC200908764](#) (convictions to be taken into consideration when determining whether to grant pilot's licence). For principles relating to the granting of spent conviction orders see *Riggall v Western Australia* (2008) 37 WAR 211 ; (2008) 182 A Crim R 517; [2008] WASCA 69; [BC200801954](#). As to discretionary nature of spent conviction orders see *R v Tognini* (2000) 22 WAR 291 ; 109 A Crim R 411; [2000] WASCA 31; [BC200000413](#) at [27], [28] per Murray J.
- 5 (VIC) [Equal Opportunity Act 2010](#) s 6(pa).
- 6 (ACT) [Spent Convictions Act 2000](#)
- (NT) [Criminal Records \(Spent Convictions\) Act 1992](#)
- (NSW) [Criminal Records Act 1991](#)

(C) Discrimination

(QLD) [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#)

(SA) [Spent Convictions Act 2009](#)

(TAS) [Annulled Convictions Act 2003](#)

(WA) [Spent Convictions Act 1988](#).

There are no equivalent provisions in the other jurisdictions.

7 (CTH) [Crimes Act 1914](#) Pt VIIC Div 3.

8 Ibid s 85ZL (definition of 'waiting period' 5 years for juvenile offenders, 10 years for any other offence)

(ACT) [Spent Convictions Act 2000](#) ss [7](#), 11-13 (5 years for offences not dealt with as an adult, 10 years in any other case)

(NT) [Criminal Records \(Spent Convictions\) Act 1992](#) Pt 2 (5 years for convictions from the Juvenile Court, 10 years in any other case)

(NSW) [Criminal Records Act 1991](#) ss 9 (10 years other than Children's Court), 10 (3 years for orders of the Children's Court)

(QLD) [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#) ss [3](#), [6](#) (5 years for a person dealt with as a child, 10 years for a person dealt with as an adult)

(SA) [Spent Convictions Act 2009](#) s [7](#) (other than where the person was dealt with as an adult, five years; in any other case, 10 consecutive years)

(WA) [Spent Convictions Act 1988](#) ss [6](#), [7](#), 9-11 (10 years, and then after order of judge for serious convictions and after issue of certificate by Commissioner of Police for lesser convictions)

(TAS) [Annulled Convictions Act 2003](#) s [6\(1\)](#), [6\(2\)](#) (5 years for offences not dealt with as an adult, 10 years in any other case).

9 (CTH) [Crimes Act 1914](#) Pt VIIC Divs 3, 6, s 85ZM

(ACT) [Spent Convictions Act 2000](#) s [19](#) (exclusions)

(NT) [Criminal Records \(Spent Convictions\) Act 1992](#) ss 11-14, 15-15A (exclusions)

(NSW) [Criminal Records Act 1991](#) s 15 (employment exemptions)

(QLD) [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#) ss [6-9A](#)

(SA) [Spent Convictions Act 2009](#) s [13](#), Sch 1 (exclusions)

(WA) [Spent Convictions Act 1988](#) Pt 3.

10 (CTH) [Crimes Act 1914](#) Pt VIIC Div 5. As to privacy see [\[80-1230\]-\[80-1290\]](#).

11 (WA) [Spent Convictions Act 1988](#) s [29](#).

12 (ACT) [Spent Convictions Act 2000](#) s 3(b) (as amended by (ACT) Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (repealed) s 5)

(VIC) [Sentencing Act 1991](#) Pt 8 (inserted by the (VIC) [Sentencing Amendment \(Historical Homosexual Convictions Expungement\) Act 2014](#) s [3](#)).

(iv) Areas of Unlawful Discriminatory Activity

(A) Introduction

[80-405] General

The paragraph below is current to **07 March 2018**

Anti-discrimination legislation operates by identifying grounds (or attributes)¹ on the basis of which discrimination is unlawful² but only if it occurs in certain 'areas' of public life, for example, employment and the provision of goods and services. Thus each applicable discriminatory 'ground' or attribute must be matched against the relevant 'area' of defined activity to determine whether discrimination is unlawful when based on that ground or attribute.³ In this section, the various areas of unlawful discriminatory action are described and related issues are considered.⁴ In addition, there are numerous exceptions (or exemptions) from the areas defined, and these are noted after each area has been reviewed.⁵ General exemptions are also discussed.⁶

Notes

- 1 As to the difference between 'grounds' and 'attributes' see [80-290], [80-295].
- 2 See [80-290]-[80-400].
- 3 Where the legislation refers to attributes, discrimination on the basis of that attribute may be prohibited:
(ACT) [Discrimination Act 1991](#) s 7 (refers to discrimination on the ground of any of the listed attributes)
(NT) [Anti-Discrimination Act 1992](#) s 19
(QLD) [Anti-Discrimination Act 1991](#) s 7
(TAS) [Anti-Discrimination Act 1998](#) s 16
(VIC) [Equal Opportunity Act 2010](#) s 6.

The other jurisdictions do not refer to attributes (although in South Australia the term 'attribute' is included in the criteria for discrimination on various grounds: see (SA) [Equal Opportunity Act 1984](#)).

- 4 See [80-410]-[80-430] (work), [80-485]-[80-500] (education), [80-520]-[80-530] (provision of goods and services, dealings in land and access to premises or public places), [80-550] (accommodation), [80-570], [80-575] (clubs and voluntary societies), [80-590] (government programs).
- 5 The Commonwealth, Northern Territory, Queensland and South Australian legislation refers to 'exemptions', the Australian Capital Territory, New South Wales, Tasmanian (refers to 'exceptions' and 'exemptions'), Victorian and Western Australian legislation to 'exceptions', but there is no significance in the terminology, which here will follow the Commonwealth practice.
- 6 See [80-595]-[80-640].

(B) Work

[80-410] Definitions

The paragraph below is current to **07 March 2018**

With the exception of the Commonwealth human rights and equal opportunity and racial discrimination legislation,¹ all the legislation defines discrimination in the area of work to include:

- (1) offers of employment as well as terms and conditions of employment;²
- (2) the engagement of commission agents and terms and conditions of appointment;³
- (3) terms on which contract workers are allowed to work;⁴
- (4) partnerships (who should be invited and partnership terms);⁵

(C) Discrimination

- (5) qualifying bodies, in refusing or failing to confer qualifications;⁶
- (6) trade union and employer agencies (and in some cases, associations);⁷ and
- (7) employment agencies (refusing to supply services, terms on which they are offered or manner in which they are provided).⁸

Notes

- 1** (CTH) [Racial Discrimination Act 1975](#) s [15](#) (refers to employment, employment agencies, and organisations of employers and employees); (CTH) [Australian Human Rights Commission Act 1986](#) Pt II Div 4 (refers to employment and occupation, drawing on terminology from (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31)). As to this convention see [80-740].
- 2** (CTH) [Sex Discrimination Act 1984](#) s [14](#); (CTH) [Disability Discrimination Act 1992](#) s [15](#); (CTH) [Age Discrimination Act 2004](#) s [18](#)
(ACT) [Discrimination Act 1991](#) s [10](#)
(NT) [Anti-Discrimination Act 1992](#) s [31\(1\)](#)
(NSW) [Anti-Discrimination Act 1977](#) ss 8, 25, 38C, 40, 49D, 49V, 49ZH, 49ZYB
(QLD) [Anti-Discrimination Act 1991](#) ss [14](#), [15](#)
(SA) [Equal Opportunity Act 1984](#) ss [30](#), [52](#), [67](#), [85B](#)
(TAS) [Anti-Discrimination Act 1998](#) s [22\(1\)\(a\)](#) (refers only to employment, but any activity in connection with employment is covered)
(VIC) [Equal Opportunity Act 2010](#) ss [16](#), [18](#)
(WA) [Equal Opportunity Act 1984](#) ss 11, 35AC, 35B, 35P, 37, 54, 66B, 66W.
- 3** (CTH) [Sex Discrimination Act 1984](#) s [15](#); (CTH) [Disability Discrimination Act 1992](#) s [16](#); (CTH) [Age Discrimination Act 2004](#) s [19](#)
(ACT) [Discrimination Act 1991](#) s [12](#)
(NT) [Anti-Discrimination Act 1992](#) ss [4](#), [31](#) (no specific reference but definition of 'work' para (c) refers to work remunerated in whole or part on commission basis)
(NSW) [Anti-Discrimination Act 1977](#) ss 9, 26, 38D, 41, 49E, 49W, 49ZI, 49ZYC
(QLD) [Anti-Discrimination Act 1991](#) ss [4](#), [14](#), [15](#), Sch Dictionary (definition of 'work' para (c))
(SA) [Equal Opportunity Act 1984](#) ss [31](#), [53](#), [68](#), [85C](#)
(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of employment para (e) refers to 'engagement of commission agents'), [22\(1\)\(a\)](#) (refers to 'employment' and 'activity in connection with' employment)
(VIC) [Equal Opportunity Act 2010](#) s [4](#) (definition of 'employee', para (d))
(WA) [Equal Opportunity Act 1984](#) ss 12, 35AD, 35C, 35Q, 38, 55, 66C, 66X.
- 4** (CTH) [Sex Discrimination Act 1984](#) s [16](#); (CTH) [Disability Discrimination Act 1992](#) s [17](#); (CTH) [Age Discrimination Act 2004](#) s [20](#)
(ACT) [Discrimination Act 1991](#) s [13](#)
(NT) [Anti-Discrimination Act 1992](#) ss [4](#), [31](#) (no specific reference but definition of 'work' para (b) refers to work under a contract for services)
(NSW) [Anti-Discrimination Act 1977](#) ss 10, 27, 38E, 42, 49F, 49X, 49ZJ, 49ZD
(QLD) [Anti-Discrimination Act 1991](#) s s 4, Ch 2 Pt 4 Div 2, Sch Dictionary (definition of 'work' para (b))

(C) Discrimination

(SA) [Equal Opportunity Act 1984](#) ss [32](#), [54](#), [69](#), [85D](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of 'employment' para (g) refers to 'engagement under a contract for services'), [22\(1\)\(a\)](#) (refers to 'employment')

(VIC) [Equal Opportunity Act 2010](#) s [4](#) (definition of 'employee' para (c) includes engagement under a contract for services)

(WA) [Equal Opportunity Act 1984](#) ss 13, 35AE, 35D, 35R, 39, 56, 66D, 66Y.

- 5 (CTH) [Sex Discrimination Act 1984](#) s [17](#) (see *Reading v Partnership of Western Diagnostic Pathology* [2008] FCA 1381 ; [BC200807953](#) (claim that 'differential remuneration' policy involved more favourable remuneration for partners and discriminatory work hours and rosters coupled with denial of part-time option); *Rich v Harrington* (2007) 245 ALR 106 ; [2007] FCA 1987; [BC200710886](#)); (CTH) [Disability Discrimination Act 1992](#) s [18](#); (CTH) [Age Discrimination Act 2004](#) s [21](#)

(ACT) [Discrimination Act 1991](#) s [14](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 10A, 27A, 38F, 42A, 49G, 49Y, 49ZK, 49ZYE

(QLD) [Anti-Discrimination Act 1991](#) ss [16-18](#) (including proposed partnerships (ibid s 16) and discrimination in the pre-partnership and existing partnership areas (ss 17, 18))

(SA) [Equal Opportunity Act 1984](#) ss [33](#), [55](#), [70](#), [85E](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of 'employment' para (b) refers to 'membership of partnerships'), [22\(1\)\(a\)](#) (refers to 'employment')

(VIC) [Equal Opportunity Act 2010](#) ss [30](#), [31](#)

(WA) [Equal Opportunity Act 1984](#) ss 14, 35AF, 35E, 35S, 40, 57, 66E, 66Z.

There are no equivalent provisions in the Northern Territory.

- 6 (CTH) [Sex Discrimination Act 1984](#) s [18](#); (CTH) [Disability Discrimination Act 1992](#) s [19](#); (CTH) [Age Discrimination Act 2004](#) s [22](#)

(ACT) [Discrimination Act 1991](#) s [16](#)

(NT) [Anti-Discrimination Act 1992](#) s [33](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 12, 29, 38I, 44, 49J, 49ZB, 49ZM, 49ZYG

(QLD) [Anti-Discrimination Act 1991](#) ss [21](#), [22](#) (includes pre-qualification and qualification areas)

(SA) [Equal Opportunity Act 1984](#) s [36](#), [58](#), [73](#), [85H](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of 'employment' para (d) refers to 'registration or recognition by qualifying bodies'), [22\(1\)\(a\)](#) (refers to 'employment')

(VIC) [Equal Opportunity Act 2010](#) ss [4](#) (definition of 'qualifying body'), [36](#)

(WA) [Equal Opportunity Act 1984](#) ss 16, 35AH, 35G, 35U, 42, 59, 66G, 66ZB.

- 7 (CTH) [Racial Discrimination Act 1975](#) s [14](#) (relating to joining trade unions); (CTH) [Sex Discrimination Act 1984](#) s [19](#) (registered organisations); (CTH) [Disability Discrimination Act 1992](#) s [20](#) (registered organisations under the (CTH) [Fair Work \(Registered Organisations\) Act 2009](#)); (CTH) [Age Discrimination Act 2004](#) s [23](#) (registered organisations under the (CTH) [Fair Work \(Registered Organisations\) Act 2009](#))

(ACT) [Discrimination Act 1991](#) s [15](#) (association or organisation of employers or employees)

(NT) [Anti-Discrimination Act 1992](#) s [32](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 11, 28, 38H, 43, 49I, 49ZA, 49ZYF (industrial organisations)

(QLD) [Anti-Discrimination Act 1991](#) ss [19](#), [20](#) (including professional associations and applies to the pre-membership and membership areas)

(SA) [Equal Opportunity Act 1984](#) ss [35](#), [57](#), [72](#), [85G](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of 'employment' para (c) refers to 'registration or recognition by, or membership of, professional and trade organisations'), [22\(1\)\(a\)](#) (refers to 'employment')

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) ss [4](#) (definition of 'industrial organisation'), [35](#)

(WA) [Equal Opportunity Act 1984](#) ss 15, 35AG, 35F, 35T, 41, 58, 66F, 66ZA.

8 (CTH) [Sex Discrimination Act 1984](#) s [20](#); (CTH) [Disability Discrimination Act 1992](#) s [21](#); (CTH) [Age Discrimination Act 2004](#) s [24](#)

(ACT) [Discrimination Act 1991](#) s [17](#)

(NT) [Anti-Discrimination Act 1992](#) s [34](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 13, 30, 38J, 45, 49K, 49ZC, 49ZN, 49ZYH

(QLD) [Anti-Discrimination Act 1991](#) s [23](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (definition of 'employment' para (f) refers to 'registration or placement by employment agencies'), [22\(1\)\(a\)](#) (refers to 'employment'))

(WA) [Equal Opportunity Act 1984](#) ss 17, 35AI, 35H, 35V, 43, 60, 66H, 66ZC.

There are no equivalent provisions in South Australia and Victoria. However, both refer to 'employment agencies' in the context of provision of services:

(SA) [Equal Opportunity Act 1984](#) s [5](#) (definition of 'employment agency'; definition of 'services to which this Act applies' includes services provided by an employment agency)

(VIC) [Equal Opportunity Act 2010](#) s [4](#) (definition of 'employment agent'; definition of 'services' includes services of an employment agent).

[80-415] Vicarious *liability* of employers

The paragraph below is current to **07 March 2018**

The individual employer is directly answerable for discriminatory actions he or she has committed, and so may be an individual person in a managerial or supervisory position, as in the case of the manager of a hotel.¹ In cases against government agencies there is often difficulty in determining who the respondent should be.² Subject to the applicable legislation an employer will be held responsible if there was knowledge of,³ authorisation of, or failure to stop the discriminatory act.⁴ The anti-discrimination legislation makes the employer vicariously liable, without removing the *liability* of an individual employee, although there is exemption for employers who have taken steps to avoid discriminatory acts (to a standard defined differently across jurisdictions).⁵ The employer bears the onus of establishing that it took the steps necessary to prevent the discriminatory acts taking place.⁶ It will usually be necessary to demonstrate that some positive action was taken; relying on ignorance of the unlawful conduct will not usually be sufficient,⁷ nor will the mere fact that the employer had an anti-discrimination policy in place.⁸ However, where an employee or agent committed the relevant act contravening equal opportunity legislation but is immune under separate legislation, the employer or principal may still be liable if the other legislation does not confer immunity on the employer or principal.⁹ In some jurisdictions corporate bodies are expressly made liable for the actions of persons acting on behalf of the corporation¹⁰ and the corporate veil may be lifted where a director is involved.¹¹ A member of the Australian Capital Territory Legislative Assembly has been held to be the employer of persons in the member's office.¹² A union taking no action when sexual harassment has been brought to its attention may be liable for damages¹³ and a community housing service may be liable for the sexually harassing action of its president and director, even though the latter was employed in a voluntary capacity.¹⁴ The Victorian Police Force was found vicariously liable for the discriminatory acts of a number of its superior officers towards a female employee, the tribunal finding that any efforts which may have been taken by the force to prevent its employees contravening the legislation had not reached or had any effect on a number of senior people in the force that were the critical players in the events underlying the complaints.¹⁵ However, the State Rail Authority was not vicariously liable when one of its guards left insufficient time for a visually impaired woman to board the train because it was established that the authority had detailed procedures (which the guard ignored) for guards to follow to ensure that all passengers are able to board the trains.¹⁶ No

liability could be established against a football league, whose role was the better conduct of the competition, when a participating club terminated a contract over attitudes towards a bisexual trainer.¹⁷

An employer may be vicariously liable for the discriminatory acts of an employee which occur while the employee is off duty if it is evident that the employer exercises some control over employees' off duty behaviour.¹⁸

Notes

- 1 *Petersen v Delacey* (1991) EOC ¶92-348, HREOC; *Bryce v City Hall Albury Wodonga Pty Ltd* (2004) EOC ¶93-349; [2004] VCAT 1519.
- 2 *Leves v Haines* (1986) EOC ¶92-167, EOT(NSW) (school, education authority, Minister or Crown); *Fares v Box Hill College of TAFE* (1992) EOC ¶92-391, EOB(VIC) (division, College, State management board or Crown). See also *Bahonko v Nurses Board of Victoria (No 4)* (2007) 97 ALD 721; [2007] FCA 1449; BC200707898 at [116] per Middleton J (Minister not vicariously liable under (CTH) *Racial Discrimination Act 1975* s 18A for the conduct of the Nurses Board of Victoria (the 'NBV') (following *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325; BC200608062) since the Minister was not directly involved in the decisions and conduct of the NBV, which was constituted as a distinct and separate body and its decisions were its own).
- 3 *Gutchen v Delacey* (1991) EOC ¶92-350, HREOC.
- 4 *Hill v Water Resources Commission* (1985) EOC ¶92-127; 14 IR 158, EOT(NSW); *Rodgers v Revenue SA, Dept of Treasury and Finance (SA)* (2014) 240 IR 202; [2014] SASCFC 2; BC201400092 (employer with no knowledge of the harassing conduct could not be liable).
- 5 (CTH) *Racial Discrimination Act 1975* s 18A, 18E; (CTH) *Sex Discrimination Act 1984* ss 105, 106; (CTH) *Disability Discrimination Act 1992* ss 122, 123; (CTH) *Age Discrimination Act 2004* ss 56, 57. On the distinction between the operation of (CTH) *Racial Discrimination Act 1975* s 18A to excuse liability and failure giving rise to liability see *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69; BC200803114 at [81]-[83] per French and Jacobson JJ.

(ACT) *Discrimination Act 1991* s 121A (renders conduct on behalf of a person by a representative to be engaged in by the person if within the scope of the representative's actual or apparent authority (applies to ibid Pts 3 (unlawful discrimination), 5 (sexual harassment), 7 (other), s 67A (vilification))

(NT) *Anti-Discrimination Act 1992* ss 27, 105

(NSW) *Anti-Discrimination Act 1977* ss 52, 53

(QLD) *Anti-Discrimination Act 1991* ss 114-116, 132, 133

(SA) *Equal Opportunity Act 1984* ss 90, 91

(TAS) *Anti-Discrimination Act 1998* s 21 (no provision for vicarious liability)

(VIC) *Equal Opportunity Act 2010* ss 11, 105, 106, 109, 110; (VIC) *Racial and Religious Tolerance Act 2001* ss 15-18

(WA) *Equal Opportunity Act 1984* ss 160, 161.

In the context of failure to take appropriate steps note **liability** may result where a person causes, instructs, induces, aids or permits an unlawful act, for example, where an employment agency places an employee with an employer knowing there is a material chance of discrimination but takes no steps to influence or control the employer's conduct: *Elliott v Nanda* (2001) 111 FCR 240; (2001) EOC ¶93-135; [2001] FCA 418; BC200101644 at [163] per Moore J (referring to (CTH) *Sex Discrimination Act 1984* s 105). As to incitement to unlawful acts see [80-695].

But see *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615; [2014] VSCA 75; BC201402714 (court was divided as to whether employer was directly liable or vicariously liable and whether the employee could still be found liable).

(C) Discrimination

- 6 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 ; *BC200107018* at [35] per Driver FM; *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6; *Asnicar v Mondo Consulting Pty Ltd* (2004) EOC ¶93-339 ; [2004] NSWADT 143. See also obiter statements of Spender J in *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1  at [12]; *15 ALD 540*; (1988) EOC ¶92-222, Fed C of A.
- 7 See, for example, *Boyle v Ozden* (1986) EOC ¶92-165; *Korczak v Commonwealth (Dept of Defence)* (2000) EOC ¶93-056; *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6; *D v Berkeley Challenge Pty Ltd* (2001) EOC ¶93-150; [2001] NSWADT 92. See also obiter statements of Spender J in *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1 ; *15 ALD 540*; (1988) EOC ¶92-222, Fed C of A.
- 8 *D v Berkeley Challenge Pty Ltd* (2001) EOC ¶93-150; [2001] NSWADT 92. See also *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 ; *BC201005221*.
- 9 *Towie v Victoria* (2008) 19 VR 640 ; [2008] VSC 177; *BC200803908* (immunity in (VIC) Magistrates' Court Act 1989 s 24 (for failure to provide equipment to enable a party with high frequency deafness to follow proceedings) would not negate an equal opportunity contravention but would only prevent suit being brought and personal *liability* being imposed. Accordingly the employer or principal may have *liability* in relation to the equal opportunity contravention).
- 10 (CTH) *Sex Discrimination Act 1984* s 107; (CTH) *Disability Discrimination Act 1992* s 123; (CTH) *Age Discrimination Act 2004* s 57(2)
(WA) *Equal Opportunity Act 1984* s 162.
- There are no equivalent provisions in the other jurisdictions.
- In *Pinecot Pty Ltd v Anti-Discrimination Cmr* (2001) 165 FLR 25 ; [2001] NTSC 107; *BC200107480* at [47] per Mildren J, the Northern Territory Supreme Court held that it was not possible to construe (NT) *Anti-Discrimination Act 1992* s 22 ('a person shall not') as meaning that a corporation was to be vicariously liable for the acts of its agents.
- 11 *Bell v Galea* (1994) EOC ¶92-579, EOT(NSW) (sexual harassment). As to lifting the corporate veil generally see CORPORATIONS [120-3010].
- 12 *Marshall v Australian Capital Territory* (1996) 42 ALD 101 ; (1996) EOC ¶92-831, AAT(ACT). See also (NSW) *Anti-Discrimination Act 1977* s 22B(7) (sexual harassment by members of either house of parliament or other members or of workplace participants made unlawful).
- 13 *Horne v Press Clough Joint Venture* (1994) EOC ¶92-556 (complaint against the union); *Horne v Press Clough Joint Venture* (1994) EOC ¶92-591, EOT(WA) (*liability* of \$92,000 apportioned between union and employer). As to discriminatory actions by trade unions in awards see [80-2165].
- 14 *Brown v Moore* (1996) EOC ¶92-835 ; (1996) 68 IR 176; *BC9603096*, SC(QLD) (dismissing appeals from *Doyle v Riley* (1995) EOC ¶92-748; *Moore v Brown* (1995) EOC ¶92-749). For *liability* of persons other than the primary perpetrator see [80-800]. As to sexual harassment see [80-655]-[80-675].
- 15 *McKenna v Victoria* (1998) EOC ¶92-927; [1998] VADT 83.
- 16 *Vance v State Rail Authority* [2004] FMCA 240 .
- 17 *Campagnolo v Benalla & District Football League Inc* [2009] VSC 228 ; *BC200905010*. For an unsuccessful application to join contributors to a taxi service to a racial vilification claim see *Black & White (Quick Service) Taxis Ltd v Sailor* [2008] QSC 077 ; *BC200802756*.
- 18 See, for example, *Trainor v South Pacific Resort Hotels Pty Ltd* (2004) 213 ALR 347 ; 186 FLR 132; [2004] FMCA 374; *BC200407731* (affirmed on appeal *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 ; (2005) EOC ¶93-399; [2005] FCAFC 130; *BC200505024*) (employer liable where off duty employee sexually harassed another employee in the staff accommodation quarters of the hotel where both employees resided). See also *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 ; *BC201005221* (appeal ground that conduct in sending emails was not in connection with employment (since sent outside work hours, not the continuation of work correspondence and had no connection with employment) rejected as primary Judge did not base conclusion of sex discrimination of employer on the basis of its *liability* for that employee).

The paragraph below is current to **07 March 2018**

The basic rule is that employers may not unlawfully discriminate in the arrangements made for offering employment, in their selection of employees, or in the terms and conditions of the employment offer.¹ Employment agencies may not discriminate unlawfully in performing their functions.² Trade unions, employer organisations and professional organisations must comply with the legislation.³ Advertisers must not publish advertisements that are capable of being understood as indicating an intention to do an unlawful discriminatory act.⁴ A discriminatory appointment process may include a failure to employ on grounds of race,⁵ disability,⁶ a presumed disability,⁷ child-bearing potential⁸ or age⁹ but was not involved in a case where the applicant for a position was not appointed because of being attractive.¹⁰ The terms offered may be discriminatory, and could involve indirect discrimination on grounds of sex.¹¹ An Aboriginal person received substantial damages for non-appointment on grounds of race,¹² and the existence of internal standards for fire service, police or ambulance employees may not prevail if the tribunal considers the standard is not a genuine occupational qualification.¹³ Failure to renew an employee's contract or appoint an employee to a permanent position at the conclusion of a fixed-term or casual contract may constitute unlawful discrimination if it is based on a prohibited ground.¹⁴

Notes

- 1 See [80-410] note 2. As to grounds of discrimination see [80-290]-[80-400].
- 2 See [80-410] note 8. See further *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [\[2001\] FCA 418](#); [BC200101644](#) at [\[163\]](#) per Moore J (referring to *liability* of an employment agency in placing an employee with an employer knowing there is a material chance of discrimination).
- 3 See [80-410] note 7. As to discriminatory actions by trade unions in awards see [\[80-2165\]](#).
- 4 (CTH) [Racial Discrimination Act 1975](#) s [16](#) (unlawful act); (CTH) [Sex Discrimination Act 1984](#) s [86](#) (**criminal** offence); (CTH) [Disability Discrimination Act 1992](#) s [44](#) (**criminal** offence); (CTH) [Age Discrimination Act 2004](#) s [50](#) (**criminal** offence)
 (ACT) [Discrimination Act 1991](#) s [69](#) (unlawful act)
 (NT) [Anti-Discrimination Act 1992](#) ss [25](#) (unlawful act), [109](#) (**criminal** penalty)
 (NSW) [Anti-Discrimination Act 1977](#) s [51](#) (**criminal** penalty)
 (QLD) [Anti-Discrimination Act 1991](#) ss [127](#), [128](#) (**criminal** penalty)
 (SA) [Equal Opportunity Act 1984](#) s [103](#) (**criminal** penalty)
 (TAS) [Anti-Discrimination Act 1998](#) s [20](#) (unlawful act)
 (VIC) [Equal Opportunity Act 2010](#) ss [182](#) (**criminal** penalty), [183](#) (reasonable precautions defence)
 (WA) [Equal Opportunity Act 1984](#) s [68](#) (unlawful act).
 As to discrimination in advertisements see [80-720].
- 5 *Arumugam v Health Commission of Victoria* (1986) EOC ¶92-155, EOB(VIC) (reversing the Board's decision because of lack of proof of intent in the appointing body *Arumugam v Health Commission of Victoria* [\[1988\] VR 319](#) ; (1987) 30 AILR 117; (1987) EOC ¶92-195, SC(VIC)); *Slater v Brookton Farmers Co-op Co Ltd* (1990) EOC ¶92-321. Compare *Sharma v Legal Aid Queensland* (2001) 112 IR 124 ; (2002) EOC ¶93-191; [\[2001\] FCA 1699](#); [BC200107543](#) (affirmed on appeal *Sharma v Legal Aid Queensland* (2002) 115 IR 91 ; (2002) EOC ¶93-231; [\[2002\] FCAFC 196](#); [BC200203336](#); special leave to High Court of Australia refused: *Sharma v Legal Aid Queensland* (unreported, HC of A, McHugh, Kirby JJ, B48/2002, 25 June 2003) (decision not to appoint highest scoring candidate not based on grounds of race and not unlawfully discriminatory). As to discrimination on the grounds of race generally see [80-330]-[80-345].
- 6 *Clinch v Cmr of Police* (1989) EOC ¶92-262, EOT(NSW); *Cummaudo v Aerospace Technologies of Australia Pty Ltd* (1990) EOC ¶92-316, EOB(VIC); *Peck v Cmr of Corrective Services* (2002) EOC ¶93-236, NSWADT; *Airflite Pty Ltd v Goyal* [\[2003\] WASCA 45](#) ; [BC200301124](#) (on appeal from EOT(WA), no error of law found); *Eliezer v Total Marine*

(C) Discrimination

Services Pty Ltd (2004) EOC ¶93-326, EOT(WA). Failure will include failure to test adequately whether a disability actually prevents efficient job performance: *Boldra v Metropolitan (Perth) Passenger Transport Trust* (1992) EOC ¶92-445, EOT(WA); *Boldra v Metropolitan (Perth) Passenger Transport Trust (No 2)* (1992) EOC ¶92-458, EOT(WA). See also *Barry v Victoria* (1994) EOC ¶92-598 (Hodgkin's disease cured). As to discrimination on the ground of impairment or disability generally see [80-350]-[80-365].

- 7 *O'Neill v Burton Cables Pty Ltd* (1986) EOC ¶92-159, EOB(VIC); *Garton v Hillcrest Hospital Inc* (1984) EOC ¶92-101, Handicapped Persons Discrimination Tribunal (SA). Compare *Cooper v Ford Motor Co of Australia Ltd* (1987) EOC ¶92-191 (likely disability can justify non-appointment).
- 8 *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC ¶92-002, EOB(VIC). As to discrimination on the ground of sex generally see [80-300]-[80-325]. As to discrimination on the ground of pregnancy generally see [80-310].
- 9 *Blatchford v Qantas Airways Ltd* (1997) EOC ¶92-888, HREOC. *Commonwealth v Bradley* (1999) 95 FCR 218 ; [167 ALR 268](#); [\[1999\] FCA 1524](#); [BC9907167](#) (employee refused employment as pilot because over 28 years old was discriminatory as requirement that pilots be between 19 and 28 years old not based on inherent requirements of position). Note that amendments to (CTH) [Age Discrimination Act 2004 Sch 1](#) contain age related provisions implementing international aviation safety standards pursuant to the *Convention on International Civil Aviation* (minimum ages for pilots' licences and medical fitness); *Gardener v Norcott* [2004] QADT 39; see also *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC ¶93-457 ; [\[2007\] QSC 075](#); [BC200702388](#) (selection of airline cabin staff favouring younger applicants as a result of flawed selection process). Compare *Tully v McIntyre* [\[2001\] 2 Qd R 338](#) ; (2000) EOC ¶93-083; [\[2000\] QCA 115](#); [BC200001741](#); *Moore v TAB Ltd* (2004) EOC ¶93-348 ; [2004] NSWADT 163 (decision not to employ 15 year old at betting agency found to be discriminatory but not unlawful as minimum age requirement of 18 years reasonable). As to discrimination on the ground of age generally see [80-380].
- 10 *Russell v Director General, Department of Juvenile Justice* (1994) EOC ¶92-632, EOT(NSW) (female not appointed as prison worker because 'attractive', but attractiveness could not be characterised as a 'characteristic'). As to discrimination on account of a characteristic see [80-260]. However, note that in Victoria 'physical features' is a prohibited attribute of discrimination under (VIC) [Equal Opportunity Act 2010](#) s 6(j) and failure to appoint a person because of some physical feature would be unlawfully discriminatory. See, for example, *Jamieson v Benalla Golf Club Inc* (2000) EOC ¶93-106 (tattoos found to be a 'physical feature' within the meaning of the Victorian legislation, although there was insufficient evidence to show that the tattoos were the reason the club did not employ the complainant).
- 11 *Australian Public Service Assn v Australian Trade Commission* (1988) EOC ¶92-228, HREOC. As to indirect discrimination see [80-265]-[80-285].
- 12 *O'Neill v Steiler* (1994) EOC ¶92-607, ADT(QLD).
- 13 *Commissioner of Fire Service v Seaton* (1996) EOC ¶92-839, SC(QLD) (imperfect eyesight). *Browne v NSW Ambulance Service* (2004) EOC ¶93-345 ; [2004] NSWADT 192 ('protanopia' or mild colour-blindness); *Johnson v Cmr of Police* (2004) EOC ¶93-343 ; [2004] NSWADT 198 ('visual acuity' or imperfect eyesight); *Commissioner of Police, NSW Police v Zraika* (2005) EOC ¶93-368 ; [2005] NSWADTAP 1 ('visual acuity' or imperfect eyesight). As to genuine occupational qualifications see [80-440].
- 14 See, for example, *Mayer v ANSTO* (2003) EOC ¶93-285 ; [\[2003\] FMCA 209](#) (decision to renew employee's contract only for one year not two was inconsistent with employer's normal practice and less favourable treatment based on employee's impending maternity leave); *Forbes v Australian Federal Police (Commonwealth of Australia)* [\[2004\] FCAFC 95](#) ; [BC200402343](#) (failure to re-appoint not unlawfully discriminatory because based on employer's view that employment relationship had irrevocably broken down rather than on employee's depressive illness disability); *Commonwealth v Evans* [\(2004\) 81 ALD 402](#) ; (2004) EOC ¶93-335; [\[2004\] FCA 654](#); [BC200402934](#) (decision not to renew contract influenced by attendance record and unlawfully discriminatory on ground of family responsibilities); *Dekretser v PrixCar Services Pty Ltd* [2005] VCAT 738 (employer discriminated on ground of impairment when casual employee applied for full time position and was not appointed because of previous WorkCover claim); *Gordon v Commonwealth* (2008) EOC ¶93-495 ; [\[2008\] FCA 603](#); [BC200803167](#) (withdrawal of employment offer because of imputed disability).

[80-425] Conditions of employment

The paragraph below is current to **07 March 2018**

(C) Discrimination

It is unlawful for an employer to discriminate on any of the prescribed grounds or attributes in the terms or conditions of employment offered, by denying access to promotion or other benefits, or by dismissing or subjecting an employee to any other detriment or less favourable working conditions.¹ Discrimination through permitting unfavourable conditions of employment can include allowing continuing racist² or sexist³ remarks and slights,⁴ unwanted sexual attention,⁵ down-grading because of the disability of occupational overuse syndrome,⁶ denying the opportunity to work overtime because of previous injury⁷ or reducing an employee's status after absence on maternity leave.⁸ However, unfavourable conditions may not necessarily exist where an employer fails to provide a disabled employee with special equipment so as to perform duties.⁹ In Victoria, unfavourable conditions may include denigrating remarks about an employee's weight or other physical features.¹⁰ Denials of promotion can result from direct discrimination through a preferential selection of a person of the other sex,¹¹ exclusion of a person with a visual impairment¹² or through maintaining separate seniority lists.¹³ Indirect discrimination in promotion can be involved if it is based on seniority¹⁴ or if only certain grade persons¹⁵ or only persons with certain types of experience are considered eligible.¹⁶ Discrimination can also occur through detriment, resulting from harassment of a sexual kind outside working hours,¹⁷ failure to allow a pregnant employee to access her sick leave when normal duties cannot be performed,¹⁸ a transfer after absence on maternity leave,¹⁹ imposition of a policy that employees cannot sit down while serving customers,²⁰ as a result of a public statement²¹ or simply in the form of racist harassment.²² The phrase 'any other benefits' should be interpreted broadly so as to embrace the concept of 'quiet employment'.²³

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s 15(1); (CTH) [Sex Discrimination Act 1984](#) s 14(1), 14(2); (CTH) [Disability Discrimination Act 1992](#) s 15(1), 15(2); (CTH) [Age Discrimination Act 2004](#) s 18(1), 18(2)
(ACT) [Discrimination Act 1991](#) s 10
(NT) [Anti-Discrimination Act 1992](#) s 31
(NSW) [Anti-Discrimination Act 1977](#) ss 8, 25, 38C, 40, 49D, 49V, 49ZH, 49ZYB
(QLD) [Anti-Discrimination Act 1991](#) s 15
(SA) [Equal Opportunity Act 1984](#) ss 30, 52, 67, 85B
(TAS) [Anti-Discrimination Act 1998](#) ss 3 (definition of 'employment'), 22(1)(a)
(VIC) [Equal Opportunity Act 2010](#) ss 16, 18
(WA) [Equal Opportunity Act 1984](#) ss 11, 35AC, 35B, 35P, 37, 54, 66B, 66W.
As to the prescribed grounds see [80-290]-[80-400]. As to discrimination on the ground of race see [80-330]-[80-345]. As to the employers obligations regarding employees see EMPLOYMENT [\[165-350\]](#), [\[165-470\]](#).
- 2 *Shaikh v Cmr, New South Wales Fire Brigades* (1996) EOC ¶92-808, EOT(NSW); *Oyekanmi v National Forge Operations Pty Ltd* (1996) EOC ¶92-797, EOB(VIC); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#).
- 3 *Dunn-Dyer v ANZ Banking Group Ltd* (1997) EOC ¶92-897, HREOC (derogatory sex-based remarks, lack of training opportunities and a restructure leading to redundancy: damages \$135,000); *Packer v RL & SJ Vagg Pty Ltd t/as Lismore Supermarket* (2002) EOC ¶93-192 (homosexual employee questioned by colleagues as to sexuality and subjected to laughter); *Employment Services Australia Pty Ltd v Poniatowska* [\[2010\] FCAFC 92](#) ; [BC201005221](#) (robust working environment).
- 4 *Kordos v Plumrose (Aust) Ltd* (1989) EOC ¶92-256, County Court (Vic).
- 5 *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023 at 75,499; (1983) 5 IR 320; *McAlister v SEQ Aboriginal Corp for Legal Services* [\[2002\] FMCA 109](#) ; [BC200203577](#) (unwelcome sexual conduct from client which

(C) Discrimination

- employer failed to prevent or stop); *Dee v Cmr of Police, NSW Police (No 2)* (2004) EOC ¶93-346 ; [2004] NSWADT 168.
- 6 *Corp v Peninsula Country Golf Club Inc* (1996) EOC ¶92-793, EOB(VIC).
- 7 *Perlidis v Brambles Security Services Ltd t/as Brambles Armoured* (2003) EOC ¶93-264 ; [2003] NSWADT 11. See also *Higginson v Cargill Australia Ltd* (2001) EOC ¶93-174 ; [2001] NSWADT 152 (affirmed on appeal *Cargill Australia Ltd v Higginson* (2002) EOC ¶93-245 ; [2002] NSWADTAP 20) (employer prevented employee from returning to work after surgery even though medical certificate indicated employee fit for duties); *Darlington v Casco Australia Pty Ltd* [2002] FMCA 176 ; [BC200205582](#) (employer restricting casual employee's hours for fear of aggravating her pre-existing injury found to be unlawfully discriminatory).
- 8 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#); *Rispoli v Merck Sharpe & Dohme* (2003) EOC ¶93-304 ; [\[2003\] FMCA 160](#).
- 9 *Commonwealth v Humphries* (1998) 86 FCR 324 ; [54 ALD 395](#); [BC9804337](#). See also comments of the High Court of Australia in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92  at [104] per McHugh and Kirby JJ at [217], [218] per Gummow, Hayne and Heydon JJ; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#); *Fetherston v Peninsula Health* (2004) EOC ¶93-331 ; [\[2004\] FCA 485](#); [BC200402081](#) at [77] per Heerey J. Note (CTH) [Disability Discrimination Act 1992](#) ss 7-9 (carers, assistants, assistance animals and disability aids) and that ibid s 8 clarifies that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability.
- 10 *Hill v Canterbury Road Lodge Pty Ltd* (2004) EOC ¶93-340 ; [2004] VCAT 1365.
- 11 *Perrett-Abrahams v Occupational Assistance Service* (1990) EOC ¶92-311, EOB(VIC).
- 12 *Lavery v Cmr of Fire Brigades (New South Wales)* (2003) EOC ¶93-274 ; [2003] NSWADT 93 (affirmed on appeal *Commissioner of Fire Brigades (New South Wales) v Lavery* (2005) EOC ¶93-378 ; [\[2005\] NSWSC 268](#); [BC200501869](#)) (placed in non-operation role and denied opportunity for promotion for 31 years).
- 13 *Squires v Qantas Airways Ltd (No 1)* (1985) EOC ¶92-135; 12 IR 21, EOT(NSW). See also subsequent cases *Thompson v Qantas Airways Ltd* (1989) EOC ¶92-251 (complainants who retired before lists merged); *Qantas Airways Ltd v Gubbins* [\(1992\) 28 NSWLR 26](#) ; [28 ALD 538](#); (1992) EOC ¶92-454; 45 IR 292, CA(NSW) (reinstatement on conditions, appeal from the tribunal dismissed).
- 14 *Kemp v Minister for Education* (1991) EOC ¶92-340, EOT(WA). As to indirect discrimination see [80-265]-[80-285].
- 15 *Styles v Secretary, Dept of Foreign Affairs & Trade* [\(1988\) 16 ALD 234](#) ; [84 ALR 408](#); (1988) EOC ¶92-239, Fed C of A (affirmed *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265, Fed C of A, Full Court); *Nojin v Commonwealth* (2012) 208 FCR 1 ; [298 ALR 410](#); [\[2012\] FCAFC 192](#).
- 16 *Hills v South Australia* (2002) 82 SASR 102 ; [\[2002\] SASC 171](#); [BC200203076](#).
- 17 *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023; (1983) 5 IR 320. *Leslie v Graham* (2002) EOC ¶93-196 ; [\[2002\] FCA 32](#); [BC200200227](#); *Trainor v South Pacific Resort Hotels Pty Ltd* [\(2004\) 213 ALR 347](#) ; 186 FLR 132; [\[2004\] FMCA 374](#); [BC200407731](#) (affirmed on appeal *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 ; (2005) EOC ¶93-399; [\[2005\] FCAFC 130](#); [BC200505024](#)).
- 18 *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 ; (2004) EOC ¶93-359; [\[2004\] FMCA 242](#).
- 19 *Gibbs v Australian Wool Corp* (1990) EOC ¶92-327.
- 20 *Daghlian v Australian Postal Corp* (2003) EOC ¶93-287 ; [\[2003\] FCA 759](#); [BC200303964](#).
- 21 *Thorne v R* (1986) EOC ¶92-182, EOB(VIC).
- 22 *Kwa v Secretary for Local Government* (1987) EOC ¶92-213, EOT(WA).
- 23 *R v Equal Opportunity Board; Ex parte Burns* [\[1985\] VR 317](#)  at [323](#); (1984) EOC ¶92-112, SC(VIC) at 76,111 per Nathan J ('A benefit of employment is in fact the concept of quiet employment, that is, the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an

unwelcome manner'); expressly relied upon by McInnis FM in *McBride v Victoria (No 1)* [2003] FMCA 285 ; [BC200304270](#) at [55], [61].

[80-430] Termination of employment

The paragraph below is current to **07 March 2018**

A person's employment may not be terminated on one of the grounds declared unlawful by the anti-discrimination legislation.¹ In this context, 'termination' covers dismissal, retirement and redundancy.² Dismissal need not be 'strictly' construed, but may include being relieved of duties followed by expiry of a contract,³ or constructive dismissal resulting from a forced resignation or a purported unilateral alteration of the person's employment contract.⁴ Dismissal because of race may arise from racist conditions⁵ or attitudes⁶ in a workplace, or a decision to terminate the employment of employees who were not of the particular race for which a community program was designed but which was open to members and non-members of that race.⁷ However, the failure of a union to support a member complaining of racist behaviour may not be based on race.⁸ Dismissal on the ground of religious belief can include instances where an employee is dismissed because he or she has no religious belief.⁹ Discrimination on the grounds of pregnancy or family responsibilities¹⁰ has been a frequent cause of unresolved complaints and is often claimed by employers to be based on economic¹¹ or organisational¹² considerations and sometimes may be attributed to concern for the pregnant woman.¹³ However concern for them as an insurance risk is likely to be discriminatory.¹⁴ Sometimes pregnancy is coupled with deteriorating performance or conduct, in which case discrimination may still be found,¹⁵ but reasonable accommodation must be made.¹⁶ It is unlawful to discriminate in the retirement ages of men and women employees¹⁷ and dismissal where no shortage of work or incompetence can be shown has led to a finding of unlawful discrimination based on age.¹⁸ A retrenchment policy based on the 'last on first off' principle may be unlawful indirect sex discrimination if the effect is discriminatory.¹⁹ Insufficient investigation by the discrimination Commissioner of complaints of unlawful discrimination by an employee before dismissal may result in the setting aside of a decision of the Commissioner not to investigate a complaint of unlawful discrimination,²⁰ and insufficient investigation by the employer of possible means of dealing with a disability may result in an unlawful act of discrimination.²¹ Impairment also may be found to be an element in dismissal,²² and excessive monitoring or failure to assess the employee against appropriate performance criteria may lead to unfavourable treatment and accordingly to dismissal being discriminatory.²³

Notes

- 1 As to the prescribed grounds of unlawful discrimination see [80-290]-[80-400]. As to termination of employment see generally EMPLOYMENT [\[165-565\]-\[165-600\]](#).
- 2 See, for example, *Oset v Ministry of Cabinet (WA)* (1990) EOC ¶92-322, EOT(WA); *Randell v Consolidated Bearing Co (SA) Pty Ltd* (2002) EOC ¶93-216 ; [\[2002\] FMCA 44](#); [BC200201466](#) (dismissal); *Anstee v Allders International Pty Ltd* (1985) EOC ¶92-132; 12 IR 10; *Allders International Pty Ltd v Anstee* [\(1986\) 5 NSWLR 47](#) ; (1986) EOC ¶92-157; 16 IR 116, SC(NSW) (retirement); *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#); *Nesci v TAFE Commission of NSW (No 2)* (2005) EOC ¶93-404 ; [2005] NSWADT 183 (redundancy).
- 3 *Oset v Ministry of Cabinet (WA)* (1990) EOC ¶92-322, EOT(WA). See also *Lorang v Mater Misericordiae Hospital* (1994) EOC ¶92-602; [BC9402654](#), CA(NSW); *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC ¶93-285 ; [\[2003\] FMCA 209](#); *Commonwealth v Evans* [\(2004\) 81 ALD 402](#) ; (2004) EOC ¶93-335; [\[2004\] FCA 654](#); [BC200402934](#); *Dekretser v PrixCar Services Pty Ltd* [2005] VCAT 738.

(C) Discrimination

- 4 *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#); *Song v Ainsworth Game Technology Pty Ltd* (2002) EOC ¶93-194 ; [2002] FMCA 31; *Rispoli v Merck Sharpe & Dohme* (2003) EOC ¶93-304 ; [\[2003\] FMCA 160](#); *Mooney v Cmr of Police, New South Wales Police Service (No 2)* (2003) EOC ¶93-281 ; [2003] NSWADT 107; *Thompson v Big Bert Pty Ltd t/as Charles Hotel* (2007) 168 IR 309 ; [\[2007\] FCA 1978](#); [BC200711029](#) (no finding of indirect sex discrimination in a requirement to work an irregular shift pattern as barmaid, as circumstances of caring for children were not distinguished from that of other single parents).
- 5 *Kordos v Plumrose (Aust) Ltd* (1989) EOC ¶92-256, County Court (Vic); *Ardesirian v Robe River Iron Associates* (1990) EOC ¶92-299, HREOC.
- 6 *Daniels v Queensland Nursing Homes Pty Ltd* (1995) EOC ¶92-710, HREOC.
- 7 *Carr v Boree Aboriginal Corp* (2003) EOC ¶93-301 ; [\[2003\] FMCA 408](#).
- 8 *Ellenbogen v Federated Municipal and Shire Council Employees' Union of Australia* (1989) EOC ¶92-252, HREOC. As to discrimination on the ground of race see [80-330]-[80-345].
- 9 *Dixon v Anti-Discrimination Cmr of Queensland* [\[2005\] 1 Qd R 33](#) ; (2004) EOC ¶93-327; [\[2004\] QSC 058](#); [BC200401342](#).
- 10 *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 ; (2008) EOC ¶93-483; [\[2007\] FCA 1903](#); [BC200711032](#) (dismissal not to do with family responsibilities, or any characteristic attributed to a working mother but non-observance of agreed hours by senior employee).
- 11 *Erbs v Overseas Corp Pty Ltd* (1986) EOC ¶92-181, HREOC; *Cook v Lancet Pty Ltd* (1989) EOC ¶92-257, EOT(WA); *Friedauer v Lauralee Marketing Pty Ltd (t/as Bed Centre and Furniture)* (1992) EOC ¶92-428, EOT(WA).
- 12 *Turland v Captains Girl MV Pty Ltd* (2002) EOC ¶93-189, EOT(WA); *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ; (2002) EOC ¶93-227; [\[2002\] FCA 939](#); [BC200204194](#); *Rispoli v Merck Sharpe & Dohme* (2003) EOC ¶93-304 ; [\[2003\] FMCA 160](#). See also *Piper v Metanoia Kojo Pty Ltd* (2005) EOC ¶93-429 ; [\[2005\] FMCA 1051](#); [BC200511617](#) (decision to sell business and purchase new one not related to fact of employee being pregnant and pregnancy found not to affect employment status before or after business was sold).
- 13 *Bear v Norwood Private Nursing Home* (1984) EOC ¶92-019, Sex Discrimination Board (SA).
- 14 *Smith v Arranmore Pty Ltd* (unreported, Sex Discrimination Board (SA), October 1977) noted in *Practitioners' Guide to Equal Opportunity Law and Practice*, CCH, Sydney, 1992 p 406.
- 15 *Robson v Geoffrey Button (Sales) Pty Ltd* (1985) EOC ¶92-125, EOT(NSW); *Larsen v RSPCA, Northern Division (Tas)* (1991) EOC ¶92-356, HREOC; *Ho v Regulator Australia Pty Ltd* (2004) EOC ¶93-332 ; [\[2004\] FMCA 62](#); *Dare v Hurley* (2005) EOC ¶93-405 ; [\[2005\] FMCA 844](#); [BC200505928](#).
- 16 *Windler v McDermott* (1996) EOC ¶92-842, A-DC(NT) (occasional lifting of heavy weights). Contrast *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 ; [152 ALR 365](#); [\[1998\] HCA 18](#); [BC9800685](#) (being under age 60 an inherent requirement of position as international pilot). As to discrimination on the ground of pregnancy see [80-310].
- 17 *Anstee v Allders International Pty Ltd* (1985) EOC ¶92-132; 12 IR 10; *Allders International Pty Ltd v Anstee* [\(1986\) 5 NSWLR 47](#) ; (1986) EOC ¶92-157; 16 IR 116, SC(NSW). As to discrimination on the ground of age see [80-380].
- 18 *Goodworth v Marsden Motors Pty Ltd* (1996) EOC ¶92-837, EOT(NSW) (complainant aged 53 and no other sufficient reason for dismissal identified); *Skinner v Lightning Bolt Co Pty Ltd* (2001) EOC ¶93-167 (affirmed on appeal *Lightning Bolt Co Pty Ltd v Skinner* (2003) EOC ¶93-260 ; [\[2002\] QSC 062](#); [BC200201087](#); *Lightning Bolt Co Pty Ltd v Skinner* [\[2002\] QCA 518](#) ; [BC200207090](#)).
- 19 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 ; [89 ALR 1](#); 64 ALJR 53; [BC8902682](#).
- 20 *Re Jacob* [\(1996\) 43 ALD 459](#) ; (1996) EOC ¶92-869, AAT(ACT).
- 21 *Vanderhorn v VYMP International Pty Ltd (t/as Artflo Design)* (1992) EOC ¶92-402, EOB(VIC) (employer failed to make sufficient inquiries as to how a hearing disability could be dealt with); *Randell v Consolidated Bearing Co (SA) Pty Ltd* (2002) EOC ¶93-216 ; [\[2002\] FMCA 44](#); [BC200201466](#) (employer failed to seek assistance from Employment National to help improve employee's performance prior to termination); *Barghouthi v Transfield Pty Ltd* (2002) 122 FCR 19 ; (2002) EOC ¶93-218; [\[2002\] FCA 666](#); [BC200202970](#) (special leave to High Court of Australia refused *Barghouthi v Transfield Pty Ltd* (2003) 24(10) Leg Rep SL4  (failure to explore other possible positions the

(C) Discrimination

employee could fill which would accommodate his disability arising from back injury). As to discrimination on the ground of impairment see [80-350]-[80-365].

- 22** *Campbell v FH Productions* (1984) EOC ¶92-104, EOB(VIC); *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254 ; 132 IR 102; [2003] FCA 1475; [BC200307661](#) (includes imputed impairment).
- 23** *McNeill v Commonwealth* (1995) EOC ¶92-714, HREOC; *Mooney v Cmr of Police, New South Wales Police Service* (No 2) (2003) EOC ¶93-281 ; [2003] NSWADT 107; *Ware v OAMPS Insurance Brokers Ltd* (2005) EOC ¶93-402 ; [2005] FMCA 664.

(c) Exemptions in the Area of Work

[80-435] Definition

The paragraph below is current to **07 March 2018**

The purpose of the numerous exemptions¹ provided in relation to the area of work is to allow certain actions to take place that would otherwise have amounted to unlawful discrimination,² such as the employment of a female or disabled person for a female or disabled person's role in a play or the engagement of a female or a married couple to work in a private household.³ Individual time limited exemptions may be sought in all jurisdictions.⁴ There is clear tension between human rights standards established in legislation and the grant of exemptions.⁵

Notes

- 1** As to general exemptions or exceptions see [80-595]-[80-640].
- 2** See [80-410]-[80-430].
- 3** The exemptions specific to work are dealt with in the following paragraphs. For those relating to anti-discrimination legislation generally see [80-595]-[80-640]. The (CTH) [Racial Discrimination Act 1975](#) contains fewer exemptions than the more recent legislation in which the exemptions are usually common to all jurisdictions.
- 4** (CTH) [Sex Discrimination Act 1984](#) s 44; (CTH) [Disability Discrimination Act 1992](#) s 55; (CTH) [Age Discrimination Act 2004](#) s 44
- (ACT) [Discrimination Act 1991](#) s 109
- (NT) [Anti-Discrimination Act 1992](#) s 59
- (NSW) [Anti-Discrimination Act 1977](#) s 126
- (QLD) [Anti-Discrimination Act 1991](#) s 113
- (SA) [Equal Opportunity Act 1984](#) s 92
- (TAS) [Anti-Discrimination Act 1998](#) s 56
- (VIC) [Equal Opportunity Act 2010](#) s 89
- (WA) [Equal Opportunity Act 1984](#) s 135.
- 5** See *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532  at [40]-[42] per Morris J; *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 ; [BC200903903](#).

[80-440] Genuine occupational qualification

The paragraph below is current to **07 March 2018**

The most commonly cited exemption is related to the genuine need to employ a person with a particular attribute or status to perform a particular job, and is usually referred to as the 'genuine occupational status' exemption. It is described with varying degrees of specificity across the anti-discrimination legislation.¹ When a position can be described as 'identified' or 'targeted', that is, within one of the specific categories identified in the legislation, for example male cleaners for male toilets,² then an appointment that would otherwise be based on an unlawful ground of discrimination may be made. It may in some circumstances be possible to employ male workers in preference to female workers at a detention centre even if the cleaning of showers, toilets and other facilities could be done without employing more males.³ An eyesight standard set for a fire, ambulance or police service may not stand scrutiny on grounds of disability discrimination,⁴ although an ability to lift heavy weights and withstand repetitive lifting and bending may justify discrimination against an employee whose disability prevents those activities where they are necessary for the position.⁵ It is not necessarily unlawfully discriminatory to dismiss a person who cannot speak or write a particular language where the role involves catering for people who speak that language.⁶ In cases where it is not clear whether a position is targeted for potentially discriminatory application, the tribunals have power to grant exemptions of a temporary character.⁷ In general, the inherent requirements of a particular occupation mean those things which are 'essential to' or an 'essential element' of the role and are to be determined with reference to the function which the employee performs as part of the employer's undertaking.⁸ It includes not just the physical ability to perform the necessary tasks of the job but the ability to perform them with reasonable safety to the employee and to others with whom the employee may come into contact in the course of employment.⁹ A distinction has been drawn between an 'inability' and a 'difficulty' in performing the inherent requirements of a position, the defence (depending on the statute) only being available for the former situation and not the latter.¹⁰ In some instances, the inherent requirement of a position may stem from a condition imposed by third parties which an employer must accommodate to conduct its business, as where international airports in other countries impose a requirement that pilots flying into their airspace be below a certain age.¹¹

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 30 (contains extensive list of genuine occupational qualifications); (CTH) [Australian Human Rights Commission Act 1986](#) s 3(1) (para (c) of definition of 'discrimination' takes account of the inherent requirements of the job in general terms and religious purposes and susceptibilities); (CTH) [Age Discrimination Act 2004](#) s 18(4), 18(5) (refers generally to inherent requirements and only provides the exemption in respect of discrimination occurring in the arrangements made for the purpose of determining who should be offered employment, and in dismissing the employee); (CTH) [Disability Discrimination Act 1992](#) ss ss 5, 6 (extending direct discrimination to the failure to make reasonable adjustments for a person with a disability, where the effect is less favourable treatment than a person without the disability, and extending indirect discrimination to cover situations where the relevant requirement or condition could be complied with if the discriminator made reasonable adjustments but fails to do so), 15(3) (domestic duties on the premises and provides the exemption in relation to discrimination occurring in determining who should be offered employment and in dismissing the employee), 21A (now extends to most employment contexts (but not, for example, promotion). There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#).

(ACT) [Discrimination Act 1991](#) ss 34 (religious appointments and susceptibilities), 42, 48, 57A (genuine occupational qualifications in relation to sex, race, disability and age respectively are listed)

(NT) [Anti-Discrimination Act 1992](#) s 35(1)(b)(i) (genuine occupational qualification and inherent requirements of the work and applies in the area of work generally)

(NSW) [Anti-Discrimination Act 1977](#) ss 14, 31, 49D(4), 49V(4), 49ZYJ (genuine occupational qualifications are listed but note ibid s 49D(4) only provides exemption for disability discrimination occurring in determining who should be offered employment and in dismissal)

(QLD) [Anti-Discrimination Act 1991](#) s 25 (genuine occupational requirements are illustrated with examples)

(C) Discrimination

(SA) [Equal Opportunity Act 1984](#) ss [34\(2\)-\(4\)](#) (note ibid s 34(4) extends to dress codes), 56(2), 71(2), 85F(2), 85F(3) (genuine occupational requirements)

(TAS) [Anti-Discrimination Act 1998](#) ss [27\(1\)\(d\)](#), 36(a), [41](#), 45(a), [49](#), [51\(1\)](#) (genuine occupational qualification or requirement)

(VIC) [Equal Opportunity Act 2010](#) ss [20](#) (employer must make reasonable adjustments for person offered employment or employee with an impairment in order for them to perform the genuine and reasonable requirements of the employment), [23](#) (adjustments in order to perform the genuine and reasonable requirements of the employment), [26](#) (genuine occupational requirement in relation to sex), [33](#) (reasonable adjustments for person invited to become a partner or partner with an impairment), [34](#) (adjustments in order to perform the genuine and reasonable requirements of partnership in the firm), [82\(2\)](#). Note ibid s 33 amended by (VIC) [Equal Opportunity Amendment Act 2011](#) to clarify that employers are not required to make a reasonable adjustment where compliant or exempt under the (CTH) [Disability Discrimination Act 1992](#); and that (VIC) [Equal Opportunity Act 2010](#) s [82](#) was amended to remove ibid s 82(3)-(4).

(WA) [Equal Opportunity Act 1984](#) ss ss 27, 50, 66S (genuine occupational qualification exemptions), 66 (educational and religious bodies), 66Q, 66ZQ (specific circumstances described for impairment).

- 2 (CTH) [Sex Discrimination Act 1984](#) s [30\(2\)\(e\)](#). As to discrimination on the ground of sex see [80-300]-[80-325].
- 3 *Bowie v Director-General of Community Services* (1990) EOC ¶92-320 ; [BC9001106](#), SC(WA) (overruling *Bowie v Director-General, Department of Community Services* (1989) EOC ¶92-255, EOT(WA)). Compare *Re an Application for Exemption by Neham Pty Ltd and Working Women's Centre Inc* (1987) EOC ¶92-194, EOT(SA) (application for exemption to employ females only in topless restaurant refused); *Flannery v O'Sullivan (No 2)* (1993) EOC ¶92-501, ADT(Qld) (eyesight standard set for police not a genuine occupational requirement); *Ho v Regulator Australia Pty Ltd* (2004) EOC ¶93-332 ; [\[2004\] FMCA 62](#) (female employee unlawfully discriminated when made to change towels in men's washroom because employer saw it as a job that had always been done by 'one of the girls').
- 4 *Commissioner of Fire Service v Seaton* (1996) EOC ¶92-839, SC(QLD). *Browne v NSW Ambulance Service* (2004) EOC ¶93-345 ; [\[2004\] NSWADT 192](#); *Johnson v Cmr of Police* (2004) EOC ¶93-343 ; [\[2004\] NSWADT 198](#); *Zraika v Cmr of Police, NSW Police* (2004) EOC ¶93-334 ; [\[2004\] NSWADT 67](#) (error of law found on appeal but did not alter NSWADT decision *Commissioner of Police, NSW Police v Zraika* (2005) EOC ¶93-368 ; [\[2005\] NSWADTAP 1](#)); *Lavery v Cmr of Fire Brigades (New South Wales)* (2003) EOC ¶93-274 ; [\[2003\] NSWADT 93](#) (affirmed on appeal *Commissioner of Fire Brigades (New South Wales) v Lavery* (2005) EOC ¶93-378 ; [\[2005\] NSWSC 268](#); [BC200501869](#)). As to disability discrimination see [80-350]-[80-365].
- 5 *Cucanic v IGA Distribution (Vic) Pty Ltd* (2005) EOC ¶93-367 ; [\[2004\] FCA 1226](#); [BC200406152](#). Compare *Airflite Pty Ltd v Goyal* [\[2003\] WASCA 45](#) ; [BC200301124](#) (not shown that employer has actually concluded that employee's physical ailments meant he would not be able to perform job. On appeal Pullin J found no error of law, but suggested that a different view of the facts may have been open if factual review had been permissible).
- 6 *Badke v Orchid Key No 2 Pty Ltd* [2004] QIRComm 5.
- 7 See, for example, *Prime Appointments Pty Ltd & Equal Opportunity Commissioner, Re* (1987) EOC ¶92-202, EOT(SA) (application for exemption refused where females were sought for promotional roles); Application for Exemption under (CTH) Sex Discrimination Act 1984 by Australian Bureau of Statistics, Cth Gaz GN 32 of 17 August 2005, p 1 (exemption granted to allow training for conducting personal safety survey, and allocating the work of the survey, to primarily female interviewers from current panel of employee interviewers. Exemption made on condition that interviewees be given a choice as to gender of interviewer, or may advise no preference). As to tribunal-granted temporary exemptions see [80-640].
- 8 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 ; [152 ALR 365](#); [\[1998\] HCA 18](#); [BC9800685](#); *X v Commonwealth* (1999) 200 CLR 177 ; [167 ALR 529](#); [\[1999\] HCA 63](#); [BC9907850](#) at [\[31\]-\[35\]](#) per McHugh J (the inherent requirements include at least the ability to carry out the physical tasks encompassed by the particular employment but also matters such as having regard for the safety of other employees, the general public and the employee himself) (applied *Gordon v Commonwealth* (2008) EOC ¶93-495 ; [\[2008\] FCA 603](#); [BC200803167](#)); *Razumic v Brite Industries* [\[2008\] FCA 985](#) ; [BC200805124](#) (deterioration in work performance and psychological and social dysfunction due to epilepsy rendered the employee unable to carry out the inherent requirements of employment when would need to be isolated from co-workers and supervised almost one-on-one); *Thompson v IGT (Aust) Pty Ltd* (2008) 173 IR 395 ; [\[2008\] FCA 994](#); [BC200805151](#) (claim that request for psychiatric examination was discriminatory — no detriment where medical disability (back injury) not the reason for request but quest for unexplained absences, and assessment of occupational health and safety obligations and inherent requirements of work); *Chivers v Queensland*

(C) Discrimination

(Queensland Health) [\[2014\] 2 Qd R 561](#) ; [\[2014\] QCA 141](#); [BC201404605](#) (requirement for nurse to work night shift was a genuine occupational requirement in a 24 hour hospital as the roster system that shared the night shifts was essential to the undertaking of the hospital). The (CTH) [Disability Discrimination Act 1992](#) has a general inherent requirements definition in new *ibid* s 21A providing a defence in the case of inability to perform the inherent requirements of the employment, even if reasonable adjustments were made. It now applies in all employment situations (with certain exceptions), not just (as previously) in the case of a job offer or dismissal.

9 *X v Commonwealth* (1999) 200 CLR 177 ; [167 ALR 529](#); [\[1999\] HCA 63](#); [BC9907850](#) (safe bleeding of a soldier an inherent requirement when considering dismissal of person with positive HIV test). See also *Y v Australia Post* (1996) EOC ¶92-865, HREOC (employee with mental illness and history of violence and harassment unable to undertake employment requiring him to mix with members of the public and operate in a team environment). As to discrimination on the ground of HIV status or AIDS infection see [80-360].

10 *Power v Aboriginal Hostels Ltd* (2004) EOC ¶93-342 ; [\[2004\] FMCA 452](#); [BC200404941](#).

11 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 ; [152 ALR 365](#); [\[1998\] HCA 18](#); [BC9800685](#).

[80-445] Superannuation

The paragraph below is current to **07 March 2018**

Under the Commonwealth legislation, discrimination in the provision of superannuation or insurance is not to be unlawful in employment or the provision of goods and services,¹ in defined circumstances. In relation to sex, the exemption extends only to discrimination based on actuarial data such as:²

- (1) discrimination on the ground of sex in the terms on which an insurance policy is offered;
- (2) discrimination on grounds of sex or marital status in providing death and disability benefits;
- (3) to indirect discrimination where it arises from portability, preservation or vesting provisions; and
- (4) to transitional schemes.

In relation to disability and age, there may only be discrimination if it is based on actuarial data or, if that is not available, on other relevant factors.³ There is also an exemption for age discrimination in relation to acts done in compliance with Commonwealth superannuation legislation.⁴ Most legislation in the other jurisdictions contains an exemption for discrimination in superannuation in relation to sex and marital status, age and disability.⁵ The refusal to offer special benefits in relation to a life insurance policy to a person with a visual disability was held to be valid despite inconsistency with the (NSW) [Anti-Discrimination Act 1977](#), because of inconsistency with the (CTH) Life Insurance Act 1945 (repealed).⁶ A requirement imposed by a life insurance company that a homosexual man who could not answer 'yes' to a specific declaration regarding AIDS complete an additional questionnaire regarding his sexual practices and drug use was found not to be discriminatory. The Tribunal found that other applicants whose initial responses indicated a possible risk, for example those with a history of bladder or kidney disease, were also asked to complete additional questionnaires.⁷

Commonwealth legislation recently addressed discrimination against same-sex couples and the children of same-sex relationships in superannuation schemes and related tax legislation.⁸

(C) Discrimination

- 1 As to discrimination in the provision of goods and services, dealings in land and access to premises or public places see [80-520]-[80-530].
- 2 (CTH) [Sex Discrimination Act 1984](#) ss [41](#), [41A](#), [41B](#). As to discrimination on the ground of sex see [80-300]-[80-325].
- 3 (CTH) [Disability Discrimination Act 1992](#) s [46](#). (CTH) [Age Discrimination Act 2004](#) s [37](#). As to discrimination on the ground of impairment or disability see [80-350]-[80-365]. As to discrimination on the ground of age see [80-380].

There is no equivalent exemption under the (CTH) [Racial Discrimination Act 1975](#). As to discrimination on the ground of race see [80-330]-[80-345].
- 4 (CTH) [Age Discrimination Act 2004](#) s [38](#).
- 5 (ACT) [Discrimination Act 1991](#) s [29](#) (all grounds, more limited for age)
(NT) [Anti-Discrimination Act 1992](#) s [49](#) (all grounds)
(NSW) [Anti-Discrimination Act 1977](#) ss 36 (sex), 38T (transgender), 49 (marital status), 49Q (disability), 49ZYS (age)
(QLD) [Anti-Discrimination Act 1991](#) ss 52-57 (comprehensive provisions that indicate areas where there may be no discrimination), 58-65 (areas where there are exemptions — sex and relationship status, age and impairment)
(SA) [Equal Opportunity Act 1984](#) ss [63](#) (race), [78\(1\)\(c\)](#) (disability), [85R](#) (age)
(TAS) [Anti-Discrimination Act 1998](#) ss [30](#) (gender, marital status or relationship status), [33](#) (age), [44](#) (disability)
(VIC) [Equal Opportunity Act 2010](#) ss [78](#) (existing fund conditions — all grounds), [79](#) (age and if permitted by relevant Commonwealth legislation, sex, marital status, impairment, age)
(WA) [Equal Opportunity Act 1984](#) s 34 (sex and marital status), 35AR(aa)-(bb) (superannuation: gender history), 66P(aa)-(bb) ((superannuation: impairment), 66ZL(c)-(f) ((superannuation: age).
- 6 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 ; [65 ALR 637](#); [BC8601433](#) (reversing *Goulden v Australian Mutual Provident Society* (1984) EOC ¶92-020, EOT(NSW)). However, note that now (CTH) [Disability Discrimination Act 1992](#) contains a minimum requirement that an insurance company demonstrate that a discriminatory provision is based on actuarial or statistical data or, in their absence, on other relevant factors. As to discrimination on the ground of impairment or disability see [80-350]-[80-365].
- 7 *Lombardo v Tower Life Australia Ltd* (2000) EOC ¶93-088.
- 8 (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Act 2008 amended legislation governing the Commonwealth superannuation schemes and related tax legislation and acts regulating the superannuation industry to eliminate discrimination against same-sex couples and the children of same-sex relationships in the provision made for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits.

[80-450] Religion

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation provides exemptions for discrimination on some or all of the prohibited grounds in the practice of a religion or creed in certain aspects of employment and other areas of activity.¹ The 'religious bodies' exemption applies to the ordination or appointment of priests or ministers of religion, to their training and the selection and use of persons to perform duties or functions for the purposes of religious observance or practice.² The exemption also applies to discriminatory acts or practices that conform to the beliefs of the religion or creed or are 'necessary' to avoid injuring the religious susceptibilities of adherents.³

In South Australia, an exception to discrimination on the ground of sexual orientation or gender identity applies to employment at an educational institution administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.⁴

(C) Discrimination

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss [37](#) (grounds of sex, marital status or pregnancy — religious bodies), [38](#) (grounds of sex, marital status or pregnancy — educational institutions); (CTH) [Age Discrimination Act 2004](#) s [35](#) (ground of age — religious bodies); (CTH) [Australian Human Rights Commission Act 1986](#) s [1](#) (definition of discrimination, para (d))

(ACT) [Discrimination Act 1991](#) ss [26\(1\)\(b\)](#) (all grounds — accommodation), [32](#) (all grounds — religious bodies), [33](#) (all grounds — education), [44](#) (ground of religious conviction — workers in education or health services), [46](#) (ground of religious conviction — education)

(NT) [Anti-Discrimination Act 1992](#) ss 30(2) (ground of religion — educational authority), 37A (grounds of sexuality and religious belief or activity — education), 40(2A), [40\(3\)](#) (ground of religious belief — accommodation), [43](#) (grounds of sex, age, race or religion — sites), [51](#) (all grounds — religious bodies)

(NSW) [Anti-Discrimination Act 1977](#) s 56 (all grounds — religious bodies)

(QLD) [Anti-Discrimination Act 1991](#) ss 25(2)-(8) (ground of religion — work for educational institutions or other bodies established for religious purposes), [41](#) (ground of religion — education), [48](#) (grounds of sex, age, race or religion — sites of cultural or religious significance), [80](#) (grounds of sex, age, race or religion — disposition of land of cultural or religious significance), [90](#) (all grounds — accommodation), [109](#) (all grounds — religious bodies)

(SA) [Equal Opportunity Act 1984](#) ss [50\(1\)\(a\)-\(c\)](#) (grounds of sex, chosen gender, sexuality — religious bodies), [85ZM](#) (grounds of marital or domestic partnership status — religious bodies), [85ZN](#) (ground of religious appearance or dress if discrimination arises from reasonable request to verify identity)

(TAS) [Anti-Discrimination Act 1998](#) ss [27\(1\)\(a\)](#) (ground of gender — religious institutions), [42](#) (ground of race — sites of cultural or religious significance), [51](#) (ground of religious belief — employment), [52](#) (ground of religious belief — religious observance)

(VIC) [Equal Opportunity Act 2010](#) ss [82](#) (all grounds — religious bodies), [83](#) (all grounds — schools), 84 (all grounds — general exemption for religious beliefs or principles). Note *ibid* s 83 was amended by the (VIC) [Equal Opportunity Amendment Act 2011](#) to remove (VIC) [Equal Opportunity Act 2010](#) s [83\(3\)](#), 83(4) (repealed).

(WA) [Equal Opportunity Act 1984](#) ss 66(1) (ground of religious conviction — employment in educational institution or health service), 72 (all grounds — religious bodies), 73(1), 73(2) (all grounds — employment in educational institution), 73(3) (all grounds except race, impairment or age — provision of education or training by educational institution).

As to discrimination on grounds of religion or belief generally see [80-370], [80-375]. As to freedom of thought, conscience and religion see [\[80-1445\]-\[80-1535\]](#).
- 2 (CTH) [Sex Discrimination Act 1984](#) ss 37(a)-(c). There are no equivalent provisions in the Commonwealth race, disability or age discrimination legislation:

(ACT) [Discrimination Act 1991](#) s 32(a)-(c)

(NT) [Anti-Discrimination Act 1992](#) s 51(a)-(c)

(NSW) [Anti-Discrimination Act 1977](#) s 56(a)-(c)

(QLD) [Anti-Discrimination Act 1991](#) s 109(1)(a)-(c)

(SA) [Equal Opportunity Act 1984](#) s [50\(1\)\(a\)-\(ba\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s 52(a)-(c)

(VIC) [Equal Opportunity Act 2010](#) s [82\(1\)](#)

(WA) [Equal Opportunity Act 1984](#) s 72(a)-(c).
- 3 (CTH) [Sex Discrimination Act 1984](#) ss 37(d), [38\(1\)](#), [38\(2\)](#); (CTH) [Age Discrimination Act 2004](#) s [35](#); (CTH) [Australian Human Rights Commission Act 1986](#) s [1](#) (definition of 'discrimination', para (d)). There are no equivalent provisions in the Commonwealth race or disability discrimination statutes.

(ACT) [Discrimination Act 1991](#) ss 32(d), 33

(NT) [Anti-Discrimination Act 1992](#) ss 37A, [40\(3\)](#), [43](#)

(NSW) [Anti-Discrimination Act 1977](#) s 56(d)

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) ss [48](#), [80](#), [90](#), 109(1)(d)

(SA) [Equal Opportunity Act 1984](#) s [50\(1\)\(c\)](#)

(TAS) [Anti-Discrimination Act 1998](#) ss 42(b), 52(d)

(VIC) [Equal Opportunity Act 2010](#) ss [82\(2\)](#), [83\(2\)](#)

(WA) [Equal Opportunity Act 1984](#) ss 72(d), 73.

4 (SA) [Equal Opportunity Act 1984](#) s [34\(3\)](#).

[80-452] Political belief

The paragraph below is current to **07 March 2018**

There is an exemption on the ground of political conviction or political belief in the Australian Capital Territory, Tasmania, Victoria and Western Australia in relation to employment or work as an adviser to or a member of the staff of a Minister, as an officer or employee or a worker for a political party, as a member of the electoral staff of a person or in any other similar employment or work.¹ In Queensland, there is an exemption for a member of a local authority discriminating on the basis of political belief or activity against another member in the performance of official functions.² A similar exemption applies in Victoria.³

Notes

1 (ACT) [Discrimination Act 1991](#) s [45](#)

(TAS) [Anti-Discrimination Act 1998](#) s [53](#)

(VIC) [Equal Opportunity Act 2010](#) s [27](#)

(WA) [Equal Opportunity Act 1984](#) s 66(2).

2 (QLD) [Anti-Discrimination Act 1991](#) s [102](#).

3 (VIC) [Equal Opportunity Act 2010](#) ss [73](#), [74](#).

[80-455] Sport

The paragraph below is current to **07 March 2018**

An exemption related to sex and to age applies in all the relevant anti-discrimination legislation to competition in sport, but not to employment in coaching or administration related to a sport.¹

Notes

1 See [80-635].

[80-460] Exemptions based on grounds of pregnancy and impairment

The paragraph below is current to **07 March 2018**

In some jurisdictions, limitations have been placed on the unlawfulness of discrimination based on grounds or attributes that are related to the biological facts of pregnancy and disability, even if the lack of capacity is temporary.¹ Anti-discrimination legislation in several jurisdictions provides that special rights or privileges granted to women in connection with pregnancy or childbirth do not constitute unlawful discrimination.² In some jurisdictions pregnancy specifically includes potential pregnancy, to cover claims based on the likelihood of becoming pregnant in future.³

Under the anti-discrimination legislation generally a ground or attribute will in all cases make direct discrimination, that is less favourable treatment, unlawful provided it occurs in the same or not materially different circumstances.⁴ Some jurisdictions address indirect discrimination⁵ to render the applicable condition or requirement unlawful if not reasonable in the circumstances.⁶

In Western Australia this extends also to direct discrimination, making proof harder in such claims.⁷ In the other relevant jurisdictions pregnancy is generally treated the same as the other grounds of unlawful discrimination.⁸ In Victoria there is a specific exemption permitting discrimination against another person on the basis of pregnancy where necessary to protect the health or safety of any person (including the person discriminated against),⁹ and in Tasmania, there is an express provision making it not unlawful to discriminate against a person on the ground of pregnancy, breastfeeding, parental status, family responsibilities or marital or relationship status if the person requires special services or facilities the supply of which would impose unjustifiable hardship.¹⁰

In relation to disability or impairment, there are special provisions in most jurisdictions that allow reasonableness or other mitigating factors to be taken into account.¹¹ In the Commonwealth, Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Western Australia, unjustifiable hardship of all parties may be taken into account in certain circumstances.¹² In all jurisdictions except South Australia and Western Australia, there is an exemption for discrimination on the basis of impairment or disability where it is necessary to protect public health, although under Commonwealth, New South Wales, South Australia and Tasmanian legislation this only applies where the impairment is an 'infectious disease'.¹³ In determining a complaint of discrimination based on impairment, it is not open to the tribunal to revise a statement of duties¹⁴ but the requirements must be reasonable.¹⁵ Reasonableness is a requirement in all the legislation among the elements of indirect discrimination,¹⁶ and all relevant circumstances must be considered.¹⁷

Notes

1 As to discrimination on the grounds of pregnancy generally see [80-310], and disability generally see [80-350]-[80-365].

2 (CTH) [Sex Discrimination Act 1984](#) s [31](#)

(ACT) [Discrimination Act 1991](#) s [37](#)

(NT) [Anti-Discrimination Act 1992](#) s [54](#)

(NSW) [Anti-Discrimination Act 1977](#) s [35](#)

(SA) [Equal Opportunity Act 1984](#) s [47](#)

(TAS) [Anti-Discrimination Act 1998](#) s [25](#) (disadvantaged groups and special needs)

(VIC) [Equal Opportunity Act 2010](#) s [88](#) (special needs)

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) s 28.

There are no equivalent provisions in Queensland.

- 3** Under the Commonwealth, Australian Capital Territory, Northern Territory and Tasmanian legislation, discrimination on the ground of pregnancy also includes potential pregnancy: (CTH) [Sex Discrimination Act 1984](#) ss [4B](#), [7](#).

(ACT) [Discrimination Act 1991](#) ss ss 2, [5A](#) (meaning of 'potential pregnancy'), Dictionary (definition of pregnancy includes potential pregnancy)

(NT) [Anti-Discrimination Act 1992](#) s [4\(1\)](#) (definition of 'pregnancy' includes child-bearing capacity)

(TAS) [Anti-Discrimination Act 1998](#) s [3](#) (definition of 'pregnancy' includes child-bearing capacity).

See also (NSW) [Anti-Discrimination Act 1977](#) s 24(1B) (the fact that a woman is or may become pregnant is a characteristic that appertains generally to women).

There are no express equivalent provisions in the other jurisdictions.

- 4** As to less favourable treatment see [80-255].

- 5** As to the difference between direct and indirect discrimination see [80-245]-[80-285].

- 6** As to pregnancy see [80-310].

(CTH) [Sex Discrimination Act 1984](#) ss [7](#), [7B](#) (indirect discrimination)

(NSW) [Anti-Discrimination Act 1977](#) s 24(1)(b), 24(1B), 24(2)(a).

- 7** (WA) [Equal Opportunity Act 1984](#) s 10 (direct discrimination is not unlawful if 'reasonable in the circumstances').

- 8** (ACT) [Discrimination Act 1991](#) ss [7\(1\)\(f\)](#), [8\(3\)](#) (for all attributes a number of matters need to be taken into account in determining whether a condition or requirement is reasonable in the circumstances)

(NT) [Anti-Discrimination Act 1992](#) s [19\(1\)\(f\)](#)

(NSW) [Anti-Discrimination Act 1977](#) s 24(1)(b), 24(1B), 24(2)(a)

(QLD) [Anti-Discrimination Act 1991](#) ss 7(c), 9-11

(SA) [Equal Opportunity Act 1984](#) s [29\(2\)\(b\)\(iii\)](#) (indirect discrimination on grounds of sex)

(TAS) [Anti-Discrimination Act 1998](#) ss [15](#), 16(g)

(VIC) [Equal Opportunity Act 2010](#) s [9](#) (indirect discrimination).

- 9** Ibid s 86(2).

- 10** (TAS) [Anti-Discrimination Act 1998](#) s [28](#).

- 11** (CTH) [Disability Discrimination Act 1992](#) ss [6](#) (direct and indirect discrimination), [21A](#) (inherent requirement), [21B](#) (unjustifiable hardship — relevant factors set out in ibid s 11; see also ibid s 29A; the intention being to make the defence available in all areas where discrimination on the ground of disability is unlawful except harassment and victimization). Note (CTH) [Disability Discrimination Act 1992](#) s [6](#) was recently changed (by (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#)) to substitute the 'proportionality test' for indirect discrimination with proof that the condition or requirement had the effect of disadvantaging people with disability). In the context of the former (CTH) [Disability Discrimination Act 1992](#) s 15(4) see *Devers v Kindilan Society* (2010) 116 ALD 239 ; 269 ALR 404; [2010] FCAFC 72; BC201004166 at [87] per Ryan, Mansfield and McKerracher JJ (the limited extent and nature of the employment of a profoundly deaf employee was a matter to be taken into account in assessing the reasonable balance which has to be struck). Note also (CTH) [Disability Discrimination Act 1992](#) ss [5](#), [6](#) extend direct discrimination to the failure to make reasonable adjustments for a person with a disability, where the effect is less favourable treatment than a person without the disability, and extend indirect discrimination to cover situations where the relevant requirement or condition could be complied with if the discriminator made reasonable adjustments but fails to do so.

(ACT) [Discrimination Act 1991](#) ss [48-50](#)

(NT) [Anti-Discrimination Act 1992](#) ss ss 19(1)(j), [24](#), [35\(1\)](#) (special terms), [58](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 49D(4), 49E(3), 49F(2), 49G(3), 49I(3), 49J(2), 49K(2)

(QLD) [Anti-Discrimination Act 1991](#) ss [34](#), [35](#) (fixed special terms)

(SA) [Equal Opportunity Act 1984](#) ss ss 66, [71\(2\)](#), [73\(2\)](#), [79](#) (lower wages), [84](#) (access to premises)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) s 45

(VIC) [Equal Opportunity Act 2010](#) ss 20, 23, 33, 34. Note also ibid s 20 (employer must make reasonable adjustments for person offered employment or employee with an impairment in order for them to perform the genuine and reasonable requirements of the employment).

(WA) [Equal Opportunity Act 1984](#) ss 66Q, 66S.

- 12** (CTH) [Disability Discrimination Act 1992](#) ss 11, 21B, 29A (ibid s 5 also excludes special accommodation needs related to disability from constituting a material difference)

(ACT) [Discrimination Act 1991](#) s 47

(NT) [Anti-Discrimination Act 1992](#) ss 24(3), 58(2)

(NSW) [Anti-Discrimination Act 1977](#) ss 49C (defines 'unjustifiable hardship'), 49D(4)(b), 49E(3)(b), 49F(2)(b), 49I(3)

(QLD) [Anti-Discrimination Act 1991](#) ss 5, 35, 36 (special services or facilities)

(SA) [Equal Opportunity Act 1984](#) s 84

(TAS) [Anti-Discrimination Act 1998](#) ss 45, 48

(WA) [Equal Opportunity Act 1984](#) s 66Q(1)(b).

- 13** (CTH) [Disability Discrimination Act 1992](#) s 48

(ACT) [Discrimination Act 1991](#) s 56

(NT) [Anti-Discrimination Act 1992](#) s 55

(NSW) [Anti-Discrimination Act 1977](#) s 49P

(QLD) [Anti-Discrimination Act 1991](#) s 107

(SA) [Equal Opportunity Act 1984](#) s 79A

(TAS) [Anti-Discrimination Act 1998](#) s 47

(VIC) [Equal Opportunity Act 2010](#) s 86.

Note that under (WA) [Equal Opportunity Act 1984](#) s 66U, the Governor may make regulations in relation to discrimination on basis of impairment in cases of infectious disease.

- 14** *Jamal v Dept of Health* (1986) EOC ¶92-162, EOT(NSW) (appealed *Jamal v Dept of Health* (1987) EOC ¶92-183; *Jamal v Secretary, Dept of Health* (1988) 14 NSWLR 252; (1988) EOC ¶92-234, CA(NSW)). See also *Clinch v Cmr of Police* (1987) EOC ¶92-203 (again in the Tribunal, *Clinch v Cmr of Police* (1989) EOC ¶92-262, EOT(NSW)).

- 15** See, for example, *Bugden v State Rail Authority of New South Wales* (1991) EOC ¶92-360. See also *Urie v Cadbury Schweppes Pty Ltd* (1986) EOC ¶92-180 (risk of injury); *Smith v St John Ambulance Australia (SA) Inc* (1991) EOC ¶92-383 (reasonableness of testing for colour-blindness); *McLean v Airlines of Tasmania Pty Ltd* (1996) EOC ¶92-862 (reasonableness of requirement on a small airline for a support worker to cover a person with a severe mobility disability); *Daghlian v Australian Postal Corp* (2003) EOC ¶93-287; [2003] FCA 759; BC200303964 (reasonableness of requirement that staff not permitted to sit down).

- 16** (CTH) [Disability Discrimination Act 1992](#) s 6

(ACT) [Discrimination Act 1991](#) s 8

(NSW) [Anti-Discrimination Act 1977](#) s 49B(1)(b) (but not unjustifiable hardship (ibid s 49C) applies in ibid s 49D-49G, 49I, and inherent inability in ibid ss 49J-49K, 49P (discrimination reasonable to protect public health))

(QLD) [Anti-Discrimination Act 1991](#) ss 11, 34 (special terms)

(SA) [Equal Opportunity Act 1984](#) s 66(b)

(TAS) [Anti-Discrimination Act 1998](#) s 15

(VIC) [Equal Opportunity Act 2010](#) s 9

(WA) [Equal Opportunity Act 1984](#) s 66A(3).

(C) Discrimination

In the (NT) [Anti-Discrimination Act 1992](#) s 20 there is no reference to indirect discrimination or to unreasonableness: see [80-265] note 8.

17 *McLean v Airlines of Tasmania Pty Ltd* (1996) EOC ¶92-862, HREOC.

[80-465] Sexuality

The paragraph below is current to **07 March 2018**

In the Northern Territory and Queensland, it is lawful to discriminate in the area of work on the ground of sexuality where the work involves the care, instruction or supervision of children, and discrimination is necessary to protect the well-being of children.¹ In Victoria, a similar exemption applies but is not limited to discrimination on the basis of lawful sexual activity and sexual orientation but extends to all the other prohibited grounds of discrimination.² In the Northern Territory it is lawful for an educational authority to discriminate on the grounds of sexuality in the area of work if it is done in accordance with the doctrine of a particular religion and to avoid offending the religious sensitivities of people of that religion.³

Notes

- 1** (QLD) [Anti-Discrimination Act 1991](#) s 28 (discrimination on the ground of lawful sexual activity).
As to sexuality see further [80-315], [\[80-1265\]](#).
- 2** (VIC) [Equal Opportunity Act 2010](#) s 25.
- 3** (NT) [Anti-Discrimination Act 1992](#) ss 37 (*criminal* record), 37A (religious educational institutions).

[80-470] Accommodation

The paragraph below is current to **07 March 2018**

Accommodation is described as including residential and business accommodation,¹ but there is no clarification in some legislation² and an extended definition in other legislation.³ All discrimination legislation contains limited exemptions in relation to discrimination where there is work-related accommodation. In general, the exemptions relate to domestic employment, to enterprises with small numbers of employees and to private educational authorities.⁴ In some jurisdictions, the maximum number of employees covered by the exemption is specified in the legislation.⁵ Some jurisdictions exclude areas of employment such as on a ship or aircraft⁶ or to employment of married or de facto couples.⁷

Notes

- 1** (CTH) [Racial Discrimination Act 1975](#) ss 3(1), 12(1); (CTH) [Sex Discrimination Act 1984](#) s 4; (CTH) [Disability Discrimination Act 1992](#) s 4(1); (CTH) [Age Discrimination Act 2004](#) s 29(4)
(ACT) [Discrimination Act 1991](#) s 2, Dictionary
(NSW) [Anti-Discrimination Act 1977](#) s 4(1)
(TAS) [Anti-Discrimination Act 1998](#) s 3

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) s 4(1).

- 2 (SA) [Equal Opportunity Act 1984](#) s 40 (accommodation simply referred to).

- 3 (NT) [Anti-Discrimination Act 1992](#) s 4 (definition extends more broadly to include among others caravan site, camping site)

(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary (definition extends more broadly to include among others caravan site, mobile home site, camping site, building or construction site)

(TAS) [Anti-Discrimination Act 1998](#) s 3 (includes accommodation in a house, flat, hotel, motel, boarding house or caravan)

(VIC) [Equal Opportunity Act 2010](#) s 4 (definition extends more broadly to include among others caravan site, mobile home site and camping site).

- 4 (CTH) [Racial Discrimination Act 1975](#) s 15(5); (CTH) [Sex Discrimination Act 1984](#) ss 23(3)(a), 30(2)(f), 34; (CTH) [Disability Discrimination Act 1992](#) s 25(3)(a); (CTH) [Age Discrimination Act 2004](#) ss 18(3), 29(3)

(ACT) [Discrimination Act 1991](#) ss 24, 26, 39, 52, 54

(NT) [Anti-Discrimination Act 1992](#) ss 35(2), 40

(NSW) [Anti-Discrimination Act 1977](#) ss 8(3), 20(3), 25(3), 31(2)(f), 34(3), 38C(3), 38N(3), 40(3), 48(3), 49D(3), 49N(3), 49V(3), 49ZH(3), 49ZQ(3), 49ZB(3), 49ZO(3)

(QLD) [Anti-Discrimination Act 1991](#) ss 30, 31, 88 (and, in some circumstances, ss 26, 27, 87 and, in other circumstances ss 90, 91)

(SA) [Equal Opportunity Act 1984](#) ss 40(3), 40(4), 62(2a), 77(2a), 85L(4), 85L(5), 85ZH(4), 85ZH(5), 87A

(TAS) [Anti-Discrimination Act 1998](#) s 27(1)

(VIC) [Equal Opportunity Act 2010](#) ss 59-62

(WA) [Equal Opportunity Act 1984](#) ss 11(3), 21(3), 32, 33, 35AC(3), 35AM(3), 35B(3), 35L, 35P(3), 35Z(3), 37(3), 47(3), 54(4), 63(3), 66B(3), 66L(3), 66W(3), 66ZG(3).

- 5 (CTH) [Sex Discrimination Act 1984](#) s 23(3)(a); (CTH) [Disability Discrimination Act 1992](#) s 25(3)(a); (CTH) [Age Discrimination Act 2004](#) s 29(3)

(ACT) [Discrimination Act 1991](#) s 26

(NSW) [Anti-Discrimination Act 1977](#) ss 20(3)(b), 25(3)(b), 34(3)(b), 38C(3)(b), 38N(3)(b), 40(3)(b), 48(3)(b), 49D(3)(b), 49N(3)(b), 49V(3), 49ZH(3)(b), 49ZQ(3)(b), 49ZO(3)(b)

(QLD) [Anti-Discrimination Act 1991](#) s 87

(TAS) [Anti-Discrimination Act 1998](#) s 27(1)(e)

(WA) [Equal Opportunity Act 1984](#) ss 21(3), 35AM(3), 47(3), 54(4), 66L(3), 66ZG(3).

There are no equivalent provisions in the other jurisdictions.

- 6 (CTH) [Racial Discrimination Act 1975](#) ss 9(3), 15(4)

(NSW) [Anti-Discrimination Act 1977](#) s 16.

There are no equivalent provisions in the other jurisdictions.

- 7 (CTH) [Sex Discrimination Act 1984](#) s 35(2) (positions involving residential care of children)

(ACT) [Discrimination Act 1991](#) s 35

(NSW) [Anti-Discrimination Act 1977](#) s 46; see also *ibid* s 31(2)(i)

(QLD) [Anti-Discrimination Act 1991](#) s 31

(WA) [Equal Opportunity Act 1984](#) ss 29 (all jobs to be held by couples), 33(2) (positions involving residential care of children).

There are no equivalent provisions in the other jurisdictions.

[80-475] Child-care and domestic duties

The paragraph below is current to **07 March 2018**

In some jurisdictions, exemptions permitting discrimination are available where the duties involve the care of children in the place where the children reside¹ or where the employee's or contract worker's duties involve the performance of domestic duties in the premises of the employer.² Four jurisdictions contain an exemption for discrimination in employment where the position involves the care, instruction or supervision of children and the discrimination is necessary to protect the well-being of the children. In the Northern Territory and Tasmania, this exemption applies only for discrimination on the grounds of irrelevant **criminal** record,³ in Queensland on the grounds of lawful sexual activity, gender identity or the conviction of certain offences,⁴ and in Victoria on all grounds covered by the legislation.⁵

Notes

- 1** (CTH) [Sex Discrimination Act 1984](#) s [35](#) (discrimination on the grounds of sex or marital status)
(ACT) [Discrimination Act 1991](#) s [25](#)
(QLD) [Anti-Discrimination Act 1991](#) s [27](#) (other than on ground of race)
(TAS) [Anti-Discrimination Act 1998](#) s [27\(1\)\(c\)](#)
(WA) [Equal Opportunity Act 1984](#) s 33 (discrimination on the grounds of sex or marital status).
- 2** (CTH) [Sex Discrimination Act 1984](#) s [14\(3\)](#); (CTH) [Disability Discrimination Act 1992](#) s [15\(3\)](#); (CTH) [Age Discrimination Act 2004](#) s [18\(3\)](#)
(ACT) [Discrimination Act 1991](#) s [24](#)
(NT) [Anti-Discrimination Act 1992](#) s [35\(2\)](#)
(NSW) [Anti-Discrimination Act 1977](#) ss 8(3), 22G, 25(3)(a), 38C(3)(a), 40(3)(a), 49D(3)(a), 49V(3)(a), 49ZH(3)(a), 49ZYB(3)
(QLD) [Anti-Discrimination Act 1991](#) s [26](#) (other than on ground of race)
(SA) [Equal Opportunity Act 1984](#) ss [34\(1\)](#), [56\(1\)](#), [71\(1\)](#), [85F\(1\)](#) (purposes not connected with a business)
(VIC) [Equal Opportunity Act 2010](#) s [24](#)
(WA) [Equal Opportunity Act 1984](#) ss 11(3), 13(2), 35AC(3), 35B(3), 35D(2), 35P(3), 35R(2), 37(3), 54(4), 66B(3), 66D(2), 66W(3), 66Y(2).
- 3** (NT) [Anti-Discrimination Act 1992](#) s [37](#) (extends not just to children but all 'vulnerable persons', defined to include children, aged persons and persons with an intellectual disability or mental illness)
(TAS) [Anti-Discrimination Act 1998](#) s [50](#).
- 4** (QLD) [Anti-Discrimination Act 1991](#) s [28](#).
- 5** (VIC) [Equal Opportunity Act 2010](#) s [25](#).

[80-480] Combat duties and peacekeeping services

The paragraph below is current to **07 March 2018**

Commonwealth sex and disability discrimination legislation provides exemptions where combat-related

(C) Discrimination

duties as defined by regulations are involved in service with the Australian Defence Force¹ or the Australian Federal Police as part of a peacekeeping force.²

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 43; (CTH) [Disability Discrimination Act 1992](#) s 53. (CTH) Sex Discrimination Regulations 1984 reg 3 ('combat duties'); (CTH) Disability Discrimination Regulations 1996 regs 3 ('combat duties'), 4 ('combat-related duties'). See, for example, *Commonwealth v Williams* (2002) 125 FCR 229; [72 ALD 369](#); [2002] FCAFC 435; [BC200207958](#) (employee discharged from RAAF on ground of insulin-dependent diabetes not unlawfully discriminatory as within the defence force exemption in (CTH) [Disability Discrimination Act 1992](#) s 53(1)).
- 2 (CTH) [Disability Discrimination Act 1992](#) s 54.

[80-482] Employment Programs

The paragraph below is current to **07 March 2018**

Age based criteria are exempt in the delivery of certain employment programs, such as those that provide young people with opportunities for training or work experience, or to alleviate disadvantage of particular age groups.¹

Notes

- 1 See, for example, (CTH) [Age Discrimination Act 2004](#) s 41A. See also:
(CTH) [Fair Work Act 2009](#), which allows junior rates of pay in certain instruments (for example in a modern award)
(SA) [Equal Opportunity Act 1984](#) s 85F(4)(b) (decision to offer employment only to a young person)
(VIC) [Equal Opportunity Act 2010](#) s 28A.

(D) Education

[80-485] General

The paragraph below is current to **07 March 2018**

The area of education is covered by all the grounds of discrimination¹ on which there is legislation.² It is largely confined to discrimination by educational authorities or educational institutions³ but includes failure on the part of the authority to prevent action by fellow pupils.⁴ Discrimination on the ground of race in an educational institution may lead, through detriment in the place of work and in relation to future prospects, to a successful complaint for damages.⁵ Discrimination may be permitted (subject to applicable legislation):

- (1) on the ground of sex in the range of subjects available in boys' and girls' schools;⁶
- (2) in relation to dress rules;⁷

(C) Discrimination

- (3) on grounds of race, in exclusion from a class;⁸
- (4) in relation to the closure of a school;⁹
- (5) on grounds of impairment related to the provision of special teaching assistance or programs;¹⁰
or
- (6) adequate facilities for disabled students.¹¹

However, in cases where a pupil's impairment results in excessively disruptive or violent behaviour expulsion may not be unlawfully discriminatory.¹²

Notes

- 1 As to the grounds of discrimination see [80-290]-[80-400]. As to education-specific exemptions see [80-505]-[80-510]. As to general exemptions see [80-595]-[80-640].
- 2 (CTH) [Racial Discrimination Act 1975](#) s 9 (by implication, through reference to a distinction, for example, limiting the enjoyment of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life); (CTH) [Sex Discrimination Act 1984](#) s 21; (CTH) [Disability Discrimination Act 1992](#) s 22; (CTH) [Age Discrimination Act 2004](#) s 26
(ACT) [Discrimination Act 1991](#) s 18
(NT) [Anti-Discrimination Act 1992](#) ss 28(a), 29
(NSW) [Anti-Discrimination Act 1977](#) ss 17, 31A, 38K, 46A, 49L, 49ZO, 49ZYL
(QLD) [Anti-Discrimination Act 1991](#) ss 37-39
(SA) [Equal Opportunity Act 1984](#) ss 37, 59, 74, 85I, 85ZE
(TAS) [Anti-Discrimination Act 1998](#) s 22(1)(b)
(VIC) [Equal Opportunity Act 2010](#) s 38
(WA) [Equal Opportunity Act 1984](#) ss 18, 35AJ, 35I, 35W, 44, 61, 66I, 66ZD.
- 3 (TAS) [Anti-Discrimination Act 1998](#) has broader application, as does the (CTH) [Racial Discrimination Act 1975](#).
- 4 *A v Director-General, Dept Education and Training* [2008] NSWSC 1091 ; [BC200809128](#) (failure on the part of an educational authority to prevent racist remarks against Australian citizens of Chinese descent constituted direct discrimination).
- 5 *Metwally v University of Wollongong* (1984) EOC ¶92-030 (reversed *University of Wollongong v Metwally* (1984) 158 CLR 447 ; [56 ALR 1](#); 59 ALJR 48; [BC8400485](#)).
- 6 *Leves v Haines* (1986) EOC ¶92-167, EOT(NSW).
- 7 *Cope v Girton Grammar School Ltd* (1995) EOC ¶92-680, EOB(VIC) (boy required to cut hair).
- 8 *Ellis v Mount Scopus Memorial College* (1996) EOC ¶92-824, ADT(VIC). Compare *Hassan v Hume* (2004) 80 ALD 272 ; [2004] FCA 886; [BC200404217](#) (special leave to appeal refused by High Court of Australia *Hassan v Hume* [2005] HCATrans 342) (cancellation of enrolment and scholarship due to non-compliance with requirement to disclose previous incomplete courses of study not for reasons of race); *AB v Minister for Education and Training (NSW)* [2003] FMCA 16 ; [BC200300113](#) (selective school entry criterion that students be permanent residents or citizens not discriminatory on basis of national origin as permanent residence or citizenship does not depend on national origin and no evidence that people of Australian national origin better able to comply with permanent residency or citizenship requirement).
- 9 *Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC ¶92-415, HREOC (the complaint failed); *Sinnapan v Victoria* (1993) EOC ¶92-498, EOB(VIC); *Sinnapan v Victoria* (1994) EOC ¶92-611 ; [BC9401194](#), SC(VIC); *Sinnapan v*

(C) Discrimination

Victoria (No 3) (1994) EOC ¶92-659; *Victoria v Sinnapan (No 2)* (1995) EOC ¶92-663; [BC9503214](#), SC(VIC), Full Court; *Victoria v Sinnapan (No 3)* (1995) EOC ¶92-698, EOB(VIC) (final orders) (Northland Secondary College).

- 10 *Martinovic v Ministry of Education (Vic)* (1989) EOC ¶92-264, EOB(VIC); *Bacon v Victoria* (unreported, SC(VIC), Beach J, 7 November 1997, [BC9706048](#)) (affirmed on appeal *Victoria v Bacon* [\[1998\] 4 VR 269](#); [BC9801467](#)); *Clarke v Catholic Education Office* [\(2003\) 76 ALD 84](#); [202 ALR 340](#); [2003] FCA 1085; [BC200305857](#) (affirmed on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121; [81 ALD 66](#); [\[2004\] FCAFC 197](#); [BC200404916](#)); *Hurst v Education Queensland* (2005) EOC ¶93-386; [\[2005\] FCA 405](#); [BC200502074](#). Compare *Hinchcliffe v University of Sydney* (2004) 186 FLR 376; [2004] FMCA 85 (university's failure to reformat vision-impaired student's course materials not unlawfully discriminatory as student could reformat materials to suit preference and university had taken all reasonable steps). See also *Victoria v Turner* [\(2009\) 23 VR 110](#); [\[2009\] VSC 66](#); [BC200901163](#) (indirect discrimination in relation to access to education for a child with a brain dysfunction by imposing a condition that she access education without a teacher's aide).
- 11 *Travers v New South Wales* (2001) 163 FLR 99; [2001] FMCA 18; *Krenske-Carter v Minister for Education* (2003) EOC ¶93-256.
- 12 *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) (anti-social and violent behaviour resulting from severe brain injury sustained by pupil during infancy); *Minns v New South Wales (Dept of Education and Training)* [\[2002\] FMCA 60](#) (pupil with Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder). See also *Tyler v Kesser Torah College* (2006) EOC ¶93-425; [\[2006\] FMCA 1](#); [BC200600169](#) (no constructive expulsion as parents voluntarily withdrew child from school and temporary suspension not based on disability but on risk that child's behaviour posed to others).

[80-490] Special provisions

The paragraph below is current to **07 March 2018**

The anti-discrimination legislation in all jurisdictions¹ makes it unlawful for an educational authority to discriminate against a person in relation to his or her admission as a student or in access to benefits, or in relation to expulsion or subjection to any other detriment.² However, there are exemptions for single sex schools³ and for religious bodies.⁴

Notes

- 1 Except (CTH) [Racial Discrimination Act 1975](#) (however *ibid* s 9(1) may cover education by invoking (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5(e)(v)). As to the International Convention on the Elimination of all Forms of Racial Discrimination see [80-330].
- 2 (CTH) [Sex Discrimination Act 1984](#) s 21; (CTH) [Disability Discrimination Act 1992](#) s 22; (CTH) [Age Discrimination Act 2004](#) s 26
- (ACT) [Discrimination Act 1991](#) ss 2, 18, Dictionary
- (NT) [Anti-Discrimination Act 1992](#) ss 4, 29 ('educational institution' covers training by an employer)
- (NSW) [Anti-Discrimination Act 1977](#) ss 4(1), 17, 31A, 38K, 46A, 49L, 49ZO, 49ZYL
- (QLD) [Anti-Discrimination Act 1991](#) ss 4, 18, 38, 39, Sch Dictionary ('educational institution' covers training by an employer)
- (SA) [Equal Opportunity Act 1984](#) ss 5, 37, 59, 74, 85I
- (TAS) [Anti-Discrimination Act 1998](#) ss 3, 22(1)(b) (by implication)

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) ss 4(1), 37; see also *Bacon v Victoria* (unreported, SC(VIC), Beach J, 7 November 1997, [BC9706048](#)) (affirmed on appeal *Victoria v Bacon* [1998] 4 VR 269 ; [BC9801467](#)) (a government policy requiring school students over 18 years of age to be enrolled in VCE units to be entitled to remain at school was discriminatory and unreasonable because it would stop intellectually disabled people from enrolling as a result of their disability).

(WA) [Equal Opportunity Act 1984](#) ss 4(1), 18, 35AJ, 35I, 35W, 44, 61, 66I, 66ZD.

As to discrimination on the ground of impairment or disability see [80-350].

3 See [80-505].

4 See [80-510].

[80-495] Definition of education authority or institution

The paragraph below is current to **07 March 2018**

Most of the anti-discrimination legislation defines an 'educational authority' and an 'educational institution' as meaning respectively a person or body administering an educational institution and as including a school, college, university or other institution at which education or training is provided.¹ It has been held that the Minister, as the ultimate decision-maker, was the relevant educational authority for schools in New South Wales, although the State was the appropriate respondent.² A tertiary student was unsuccessful in a claim that the university residential college in which she resided was vicariously liable for sexual harassment of her by a fellow resident as the college, being purely residential, was not an educational institution.³

Notes

1 (CTH) [Sex Discrimination Act 1984](#) s 4(1); (CTH) [Disability Discrimination Act 1992](#) s 4(1); (CTH) [Age Discrimination Act 2004](#) s 26(4); there are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#) as it does not expressly address education

(ACT) [Discrimination Act 1991](#) s 2, Dictionary

(NT) [Anti-Discrimination Act 1992](#) s 4(1) (includes place at which employer provides training or instruction)

(NSW) [Anti-Discrimination Act 1977](#) s 4(1)

(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary (includes place at which employer provides training or instruction)

(SA) [Equal Opportunity Act 1984](#) s 5(1)

(TAS) [Anti-Discrimination Act 1998](#) s 3 (school, college or university only)

(VIC) [Equal Opportunity Act 2010](#) s 4(1)

(WA) [Equal Opportunity Act 1984](#) s 4(1).

2 *Leves v Haines* (1986) EOC ¶92-167, EOT(NSW) (the Boys' and Girls' High Schools at Canterbury, NSW). See also *Box Hill College of TAFE v Fares* (1992) EOC ¶92-464, SC(VIC) (sex and ethnicity).

3 *Worsley-Pine v Kathleen Lumley College* (2001) EOC ¶93-160 ; [2001] FCA 818; [BC200103549](#).

[80-500] Sexual harassment in education

The paragraph below is current to **07 March 2018**

Special provision is made covering discrimination on the ground of sex in relation to sexual harassment in education.¹ Sexual harassment in the education context, whether of a school student by a member of staff, or of a student by a student, is covered only in the legislation of the Commonwealth, the Australian Capital Territory, New South Wales, South Australia and Victoria.² At Commonwealth level it is unlawful for a staff member of an educational institution (in connection with that status) to sexually harass a student at another educational institution, and unlawful for an adult student to sexually harass a student or staff member at another educational institution.³

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 28F (note the recent addition of ibid s 28F(2A), 28F(2B) as a result (CTH) [Sex and Age Discrimination Legislation Amendment Act 2011](#)). See also (CTH) [Disability Discrimination Act 1992](#) ss 37, 38 (disability harassment in education; extends to associates with disabilities under ibid s 7)
 (ACT) [Discrimination Act 1991](#) s 60
 (NSW) [Anti-Discrimination Act 1977](#) s 22E
 (NT) [Anti-Discrimination Act 1992](#) ss 22, 29
 (QLD) [Anti-Discrimination Act 1991](#) ss 117-120 (not specific to education)
 (SA) [Equal Opportunity Act 1984](#) s 87
 (TAS) [Anti-Discrimination Act 1998](#) s 17
 (VIC) [Equal Opportunity Act 2010](#) s 98
 (WA) [Equal Opportunity Act 1984](#) s 25; see also ibid s 49B (racial harassment in education).
 As to sexual harassment generally see [80-655]-[80-675].
- 2 (CTH) [Sex Discrimination Act 1984](#) s 28F
 (ACT) [Discrimination Act 1991](#) s 60(2)(a)
 (NSW) [Anti-Discrimination Act 1977](#) s 22E(2)(a)
 (SA) [Equal Opportunity Act 1984](#) s 87(3)
 (VIC) [Equal Opportunity Act 2010](#) s 98(2).

A tertiary student unsuccessfully brought a claim of sexual harassment against a fellow student for allegedly showing her pornographic material on a computer screen. The court found that even if the conduct had occurred, the evidence did not establish that a reasonable person would have anticipated the student would have been offended, humiliated or intimidated in the circumstances: *Huang v University of New South Wales* [2005] FMCA 463 ; [BC200503246](#) (leave to appeal refused *Huang v University of New South Wales* [2006] FCA 380 ; [BC200601865](#)). Similarly, a claim by a tutor in a tertiary educational institution that he had been subjected to sexual harassment by a student was summarily dismissed as the alleged conduct could not be regarded as sufficient to amount to sexual harassment: *Gauci v Kennedy* (2005) 226 ALR 158 ; [2005] FMCA 1505 (appeal allowed *Gauci v Kennedy* (2007) EOC ¶93-467 ; [2007] FCA 1051; [BC200705515](#) at [21]-[24] per Collier J (disagreeing with the conclusion in *Gauci v Kennedy* (2005) 226 ALR 158 ; [2005] FMCA 1505 at [70] that the harassment was clearly such that it did not breach (CTH) [Sex Discrimination Act 1984](#)). A dismissal of a lecturer in a tertiary educational institution on grounds of sexual harassment of a student has been set aside, and the lecturer reinstated on account of errors of law in the findings of the Misconduct Committee: *Chambers v James Cook University of North Queensland* (1995) EOC ¶92-682, Industrial Relations Commission (CTH). However, suspension and dismissal was involved in *M v Australian National University* (unreported, IRC, Moore J, No AI 1331 of 1995, 20 August 1996). For an unsuccessful claim by a PhD student against supervisors for sexual harassment see *Huang v University of New South Wales* [2008] FCA 1930 ; [BC200811505](#)

(C) Discrimination

(offensive remarks about age and marital status but not of a sexual nature or pertaining to sexual activity or attraction or relationships).

- 3 (CTH) [Sex Discrimination Act 1984](#) s 28F(2A), 28F(2B).

(E) Exemptions in the Area of Education

[80-505] Single sex or disabled student institutions

The paragraph below is current to **07 March 2018**

An education authority, whether public or private (including religious) may offer education to persons of one sex¹ or, in some jurisdictions, for mainly students of one sex² but not to achieve an even balance of genders.³

However an application by the Catholic Education Office for a temporary exemption under the (CTH) [Sex Discrimination Act 1984](#) to allow it to offer male-only teaching scholarships in order to encourage more men into the teaching profession was rejected by the Human Rights and Equal Opportunity Commission. The temporary exemption was later granted after the Catholic Education Office revised its application to allocate equal numbers of scholarship to both men and women.⁴

Educational institutions may also be established wholly or primarily for students who have a particular disability and it is lawful for such institutions to exclude students who do not have that disability.⁵

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s [21\(3\)](#)
(ACT) [Discrimination Act 1991](#) s [36](#)
(NT) [Anti-Discrimination Act 1992](#) s [30\(1\)](#)
(NSW) [Anti-Discrimination Act 1977](#) s 31A(3)(b)
(QLD) [Anti-Discrimination Act 1991](#) s 41(a)
(SA) [Equal Opportunity Act 1984](#) s [37\(3\)](#)
(TAS) [Anti-Discrimination Act 1998](#) s [27\(1\)\(b\)](#)
(VIC) [Equal Opportunity Act 2010](#) s [39](#) (also covers other attributes)
(WA) [Equal Opportunity Act 1984](#) s 18(3).
- 2 (CTH) [Sex Discrimination Act 1984](#) s [21\(3\)\(b\)](#) (does not apply to tertiary institutions)
(NT) [Anti-Discrimination Act 1992](#) s [30\(1\)](#)
(QLD) [Anti-Discrimination Act 1991](#) s 41(a)
(SA) [Equal Opportunity Act 1984](#) s [37\(3\)\(a\)](#)
(VIC) [Equal Opportunity Act 2010](#) s [39](#).

There are no equivalent provisions in the other jurisdictions.

- 3 *Pulteney Grammar School v Equal Opportunity Tribunal* (2007) 250 LSJS 309 ; [\[2007\] SASC 308](#); [BC200706834](#). Compare *In the Matter of Carey Baptist* (1997) EOC ¶92-905; *In the Matter of Wesley College* [1998] VADT 138; *In the Matter of Ivanhoe Grammar School* (unreported, VCAT, 10 November 1999); *In the Matter of St Leonard's College* [2004] VCAT 1818; *In the Matter of Preshil* [2005] VCAT 2140 (exemption was needed to promote equality of

(C) Discrimination

opportunity since in most cases the school had been a single sex school endeavouring to reach gender equality in enrolment for some years).

- 4 Notice of Grant of Temporary Exemption to Catholic Education Office after new application offers equal number of male and female scholarships (HREOC, 19 March 2004) (expires 18 March 2008).

- 5 (CTH) [Disability Discrimination Act 1992](#) s 22(3)

(ACT) [Discrimination Act 1991](#) s 51(1)

(NT) [Anti-Discrimination Act 1992](#) s 30(3)

(NSW) [Anti-Discrimination Act 1977](#) s 49L(3)(b)

(QLD) [Anti-Discrimination Act 1991](#) s 41(b)

(SA) [Equal Opportunity Act 1984](#) s 74(3)

(TAS) [Anti-Discrimination Act 1998](#) s 46 (provision of special educational facilities for the use of persons with disabilities rather than institutions solely for students with particular disability)

(VIC) [Equal Opportunity Act 2010](#) s 39. Note also *ibid* s 40 (reasonable adjustments required in order for person with impairment to participate in educational program, which was amended by (VIC) [Equal Opportunity Amendment Act 2011](#) to clarify that reasonable adjustment not necessary where compliant or exempt under (CTH) [Disability Discrimination Act 1992](#)).

(WA) [Equal Opportunity Act 1984](#) s 66I(3).

[80-510] Religious institutions

The paragraph below is current to **07 March 2018**

All jurisdictions provide for exemptions related to the training of persons such as priests and ministers of religion¹ and for the employment of staff or contract workers by religious institutions.² There is also exemption from the normal discrimination provisions (limited in the case of the (CTH) [Sex Discrimination Act 1984](#) to grounds of sexual orientation, gender identity, marital or relationship status or pregnancy) where the beliefs of the religion or creed are involved and in order to avoid injury to the religious susceptibilities of adherents.³ Some legislation expressly provides an exemption for educational institutions wholly or mainly for students of a particular religion.⁴

In South Australia, an exception to discrimination on the ground of sexual orientation or gender identity applies to employment at an educational institution administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.⁵

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 37(b)
(ACT) [Discrimination Act 1991](#) ss 32(b), 46
(NT) [Anti-Discrimination Act 1992](#) s 51(b)
(NSW) [Anti-Discrimination Act 1977](#) s 56(b)
(QLD) [Anti-Discrimination Act 1991](#) s 109(1)(b)
(SA) [Equal Opportunity Act 1984](#) s 50(1)(b)
(TAS) [Anti-Discrimination Act 1998](#) s 52(b)
(VIC) [Equal Opportunity Act 2010](#) s 82(1)

(C) Discrimination

(WA) [Equal Opportunity Act 1984](#) s 72(b).

There are no equivalent provisions under the (CTH) [Racial Discrimination Act 1975](#), (CTH) [Disability Discrimination Act 1992](#), or (CTH) [Age Discrimination Act 2004](#).

2 (CTH) [Sex Discrimination Act 1984](#) s [38\(1\)](#), [38\(2\)](#)

(ACT) [Discrimination Act 1991](#) ss 33(1), 44(a)

(NT) [Anti-Discrimination Act 1992](#) ss 37A, 51(c)

(NSW) [Anti-Discrimination Act 1977](#) s 56(c)

(QLD) [Anti-Discrimination Act 1991](#) s 25(2)-(5)

(SA) [Equal Opportunity Act 1984](#) s [50\(1\)\(c\)](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [51](#), 52(c)

(VIC) [Equal Opportunity Act 2010](#) s [82\(1\)\(c\)](#), [82\(2\)](#), [82\(3\)](#)

(WA) [Equal Opportunity Act 1984](#) ss 72(c), 73.

There are no equivalent provisions under the (CTH) [Racial Discrimination Act 1975](#), (CTH) [Disability Discrimination Act 1992](#) or (CTH) [Age Discrimination Act 2004](#).

3 (CTH) [Sex Discrimination Act 1984](#) s [38\(3\)](#); (CTH) [Age Discrimination Act 2004](#) s [35](#)

(ACT) [Discrimination Act 1991](#) ss 32(d), 33(2), [38](#), [46](#)

(NT) [Anti-Discrimination Act 1992](#) s 37A; see also *ibid* s 51(d) (no reference to avoiding injury to susceptibilities)

(NSW) [Anti-Discrimination Act 1977](#) s 56(d)

(QLD) [Anti-Discrimination Act 1991](#) s 109(1)(d) (but does not apply in work or education area: s 109(2))

(SA) [Equal Opportunity Act 1984](#) ss [34\(3\)](#), [50\(1\)\(c\)](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [51](#), 52(d)

(VIC) [Equal Opportunity Act 2010](#) s [82\(2\)](#). See also *ibid* s 84.

(WA) [Equal Opportunity Act 1984](#) ss 72(d), 73.

There are no equivalent provisions in the Commonwealth under the (CTH) [Racial Discrimination Act 1975](#) and (CTH) [Disability Discrimination Act 1992](#).

4 (ACT) [Discrimination Act 1991](#) s [46](#)

(NT) [Anti-Discrimination Act 1992](#) s 30(2)

(QLD) [Anti-Discrimination Act 1991](#) s 41(a)

(TAS) [Anti-Discrimination Act 1998](#) s [51A\(1\)](#)

(VIC) [Equal Opportunity Act 2010](#) s [83](#).

There are no equivalent provisions in the other jurisdictions.

See also (VIC) [Equal Opportunity Act 2010](#) s 84.

5 (SA) [Equal Opportunity Act 1984](#) s [34\(3\)](#).

(F) Provision of Goods and Services, Dealings in Land and Access to Premises or Public Places

[80-520] General

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation makes it unlawful to discriminate in the provision of goods and services (most legislation also covering dealings in land and access to public places or to premises) by either refusing or failing on demand to supply, or in the manner of supplying, the service or access on any of the grounds covered.¹ There are few exemptions from this area, the main ones being related to the grounds of sex (need for a single sex service)² and impairment (unreasonable or undue hardship to provide),³ and to the areas of clubs,⁴ superannuation and insurance,⁵ and religious bodies.⁶

Notes

- ¹ As to the grounds of discrimination see [80-290]-[80-400].
- ² See [80-535].
- ³ See [80-540].
- ⁴ See [80-580].
- ⁵ As to general exemptions see [80-595]-[80-640].
- ⁶ See [80-620].

[80-525] Definitions

The paragraph below is current to **07 March 2018**

There has been minimal judicial consideration of the meaning of 'goods' in discrimination law as such,¹ but 'services' is both defined in the anti-discrimination legislation and has been the subject of decisions in the tribunals and courts.² In relation to land and public places, most of the legislation focuses on discrimination in access to places and vehicles or facilities and on dealings in land.³ In relation to services and facilities, all the anti-discrimination legislation defines 'services' to include banking and insurance, entertainment and refreshment, transport, professional or trade services and governmental (including local government) services.⁴ Where access to land is not covered specifically, denial of access may not constitute denial of a service.⁵ A Cabinet policy relating to Aboriginal holdings of land was found to be discriminatory,⁶ but not a Regulation Impact Statement prepared by the Attorney-General for Cabinet in relation to draft disability standards for public transport.⁷ Despite earlier doubts, a decision to refuse services in the future can be discriminatory even though the service has not yet been withdrawn.⁸ A decision has been held to be discriminatory even if the decision has not been implemented.⁹ An argument that there is no discrimination if the person can access the goods or services elsewhere has been rejected as inconsistent with the aims of the discrimination legislation.¹⁰ Services have been held to include the following:

- (1) to prison visitors;¹¹
- (2) prison food and accommodation service standards;¹²
- (3) domestic violence crisis services;¹³
- (4) functions performed by the Registrar of Births, Deaths and Marriages;¹⁴
- (5) the assessment of applications to become foster parents by the Minister and Director-General of Community Services;¹⁵
- (6) various local council services;¹⁶

(C) Discrimination

- (7) alteration of a birth registration record following sex affirmation surgery;¹⁷
- (8) taxi services, but not to a bystander from whom directions sought;¹⁸
- (9) the conduct of police when protective assistance is sought, and in the detection and prevention of crime;¹⁹ and
- (10) adoption services.²⁰

However, a refusal by a local government pursuant to planning powers to issue a permit for a change in use does not constitute a service,²¹ nor does the conduct of the Director of Public Prosecutions exercising its prosecutorial discretion relating to the institution of proceedings.²² It has been doubted whether an illegal service such as an illegal brothel would constitute a service for the purpose of the legislation.²³

Notes

- 1 See, for example, *Johanson v Blackledge* (2001) 163 FLR 58; [2001] FMCA 6 (bone shaped by butcher into offensive object found to constitute sexual harassment of customer in provision of goods, but no discussion of concept of 'goods' generally).
- 2 Although education is an area of unlawful discrimination in all legislation, it may also be regarded as a 'service': *Fenn v Victoria* (1993) EOC ¶92-514, EOB(VIC) (refusal of service through closure of school). However, note that the (VIC) Equal Opportunity Act 1984 s 4(1) expressly provides that 'services' do not include education or training in an educational institution. For a claim that failure by a child care centre to apply funds appropriately when in receipt of Commonwealth funding (as part of scheme to benefit appellant due to special needs resulting from disability) limited access to the service and education the respondent provided: see *Applicant N v Respondent C* [2007] FCA 1182; [BC200706448](#) ('no case' application upheld). See also *Rainsford v Victoria* (2007) 167 FCR 1; [242 ALR 128](#); [2007] FCA 1059; [BC200705627](#) at [76]-[79] per Sundberg J (transportation of prisoners between prisons and between a prison and court and the accommodation of prisoners in cells within the prison system could not constitute a service for the purpose of (CTH) *Disability Discrimination Act 1992* even though certain facilities provided to prisoners may constitute services (applying *IW v City of Perth* (1997) 191 CLR 1; [146 ALR 696](#); 71 ALJR 943; [BC9703257](#)). On appeal in *Rainsford v Victoria* (2008) 167 FCR 26; [100 ALD 483](#); [2008] FCAFC 31; [BC200801493](#) at [9] per Tamberlin, North and Mansfield JJ it was not necessary to consider 'service' or 'facility' but it was noted some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility. See also *Director-General Department of Community Services v MM* (2007) EOC ¶93-464; [2003] NSWSC 1241; [BC200308751](#) at [28]-[44] per Barr J (extensive review of interpretation of 'services'; when processing foster care applications a government department provides 'services').
- 3 (CTH) *Racial Discrimination Act 1975* ss 11, 12 (places, facilities and land); (CTH) *Sex Discrimination Act 1984* ss 22, 24, 28G, 28J (goods, services, facilities, land only, not places); (CTH) *Disability Discrimination Act 1992* ss 23, 24, 26 ('premises' includes structures, vehicles and places: *ibid* s 4(1); (CTH) *Age Discrimination Act 2004* ss 27, 28, 30 ('premises' includes structures, vehicles and places: *ibid* s 5))
(ACT) *Discrimination Act 1991* ss 19, 20 ('premises' includes structures, vehicles and places: s 2, Dictionary) (access to premises and facilities)
(NT) *Anti-Discrimination Act 1992* ss 4(1) (definition of 'services' pars (a) and (c)), 28(d), 41 (access to land, places, vehicles or facilities and dealings in land)
(NSW) *Anti-Discrimination Act 1977* ss 4(1) (definition of 'services' para (f)), 19, 22F, 22H (land — sexual harassment), 33, 38M, 47, 49M, 49ZP, 49ZYN (access to and use of facilities in places or vehicles)
(QLD) *Anti-Discrimination Act 1991* ss ss 4, 45, 46, 76, 77 (access to and use of places, vehicles and facilities and disposition of land), Sch Dictionary (definition of 'services' para (a))
(SA) *Equal Opportunity Act 1984* ss 5(1) (definition of 'services' para (a)), 38, 39, 60, 61, 75, 76, 85J, 85K (access to and use of places and disposition of land)

(C) Discrimination

- (TAS) [Anti-Discrimination Act 1998](#) s 3 (definition of 'services' paras (a) and (g)), [22\(1\)\(c\)](#) (use of places and dealings in land)
- (VIC) [Equal Opportunity Act 2010](#) ss 4(1) (definition of 'services'), 44, 50 (access to and use of places and dealings in land but not leases for accommodation)
- (WA) [Equal Opportunity Act 1984](#) ss 19, 20, 21A, 35AK, 35AL, 35AN, 35X, 35Y, 35ZA, 45, 46, 47A, 62, 66J, 66K, 66ZE, 66ZF, 66ZH (places and vehicles, facilities and dealings in land).
- 4 (CTH) [Racial Discrimination Act 1975](#) ss 3(1), 13 (includes only banking, insurance and credit); (CTH) [Sex Discrimination Act 1984](#) ss 4(1), 22, 28G; (CTH) [Disability Discrimination Act 1992](#) ss 4(1) (also includes telecommunications services), 24, 39; (CTH) [Age Discrimination Act 2004](#) ss 5 (also includes telecommunications services), 28
- (ACT) [Discrimination Act 1991](#) ss 2 (also includes provision of scholarships, prizes or awards), 20, Dictionary
- (NT) [Anti-Discrimination Act 1992](#) ss 4(1), 28(d), 41
- (NSW) [Anti-Discrimination Act 1977](#) ss 4(1), 19, 22F, 33, 38M, 47, 49M, 49ZP, 49ZYN
- (QLD) [Anti-Discrimination Act 1991](#) ss 4 (also includes the provision of scholarships, prizes or awards), 45, 46, Sch Dictionary
- (SA) [Equal Opportunity Act 1984](#) ss 5(1) (includes the provision of scholarships, prizes and awards, introduction services and coaching and umpiring), 39, 61, 76, 85K
- (TAS) [Anti-Discrimination Act 1998](#) ss 3, 22(1)(c)
- (VIC) [Equal Opportunity Act 2010](#) ss 4(1), 44
- (WA) [Equal Opportunity Act 1984](#) ss 4(1), 20, 35AL, 35Y, 46, 62, 66K, 66ZF.
- 5 *Pearce v Glebe Administration Board* (1985) EOC ¶92-131, EOB(NSW); *Wolk v Randwick City Council* (1995) EOC ¶92-721. In a related context see *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#) (exclusion from a reserve).
- 6 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ; [39 ALR 417](#); 56 ALJR 625; [BC8200052](#).
- 7 *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#). For a decision in which building plans did not include provision for wheelchair access and no discrimination was found see *Woods v Wollongong City Council* (1986) EOC ¶92-174, EOT(NSW). The latter case was raised after completion of the shopping centre and remedies were given: *Woods v Wollongong City Council* (1993) EOC ¶92-486, EOT(NSW). Contrast *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 ; [56 ALD 387](#); [\[1999\] FCA 180](#); [BC9900605](#) (decision by council to approve cinema complex without wheelchair access found to be unreasonable).
- 8 *Payne v Chief Executive Officer, Department for Community Welfare* (1988) EOC ¶92-242, EOT(SA) (welfare report); *Vintila v Federal Attorney-General* [\[2001\] FMCA 110](#) ; [BC200108527](#) (regulatory impact statement). See also *Wood v Calvary Hospital* (2005) EOC ¶93-392 ; [\[2005\] FMCA 799](#); [BC200504301](#) (cannot claim refusal of a service discriminatory where the service is not available).
- 9 *Waters v Rizkalla* [\[1991\] 1 VR 12](#) ; (1990) EOC ¶92-282. Compare *Vintila v Federal Attorney-General* [\[2001\] FMCA 110](#)  (regulatory impact statement had no more than the ability to influence decision of Cabinet on disability standards for public transport).
- 10 *Tate v Rafin* (2001) EOC ¶93-125 ; [\[2000\] FCA 1582](#); [BC200006864](#) (although no unlawful discrimination found as reason for refusal of services or facilities based not on disability but on reprehensible behaviour).
- 11 *Henderson v Victoria* (1984) EOC ¶92-027, EOB(VIC).
- 12 *Clarkson v Governor of Metropolitan Reception Prison* (1986) EOC ¶92-153, EOB(VIC); *Cameron v New South Wales* (1995) EOC ¶92-732.
- 13 *Kowalski v Domestic Violence Crisis Service* [\[2005\] FCA 12](#) ; [BC200500069](#) (although no discrimination found in delivery of service).
- 14 *L v Registrar of Births, Deaths and Marriages* (1985) EOC ¶92-142, EOT(NSW).
- 15 *MM & AM v New South Wales (Dept of Community Services)* [2002] NSWADT 256.

(C) Discrimination

- 16 *Byham v Preston City Council (Vic)* (1991) EOC ¶92-377, EOB(VIC).
- 17 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528 ; [240 ALR 399](#); [\[2007\] FCAFC 140](#); [BC200707248](#) (related matter on appeal to the High Court of Australia (*AB v Western Australia* [2011] HCATrans 87 )).
- 18 *Black & White (Quick Services) Taxis Ltd v Sailor* [\[2010\] QSC 073](#) ; [BC201001397](#).
- 19 *Commissioner of Police (NSW) v Mohamed* [\(2009\) 262 ALR 519](#) ; [\[2009\] NSWCA 432](#); [BC200911617](#) at [\[27\]-\[48\]](#) per Spigelman CJ and Basten JA (with reference to race discrimination claims under (NSW) [Anti-Discrimination Act 1977](#) s 19 (rudeness)).
- 20 *OV v Members of the Board of the Wesley Mission Council* [\(2010\) 270 ALR 542](#) ; [\[2010\] NSWCA 155](#); [BC201004640](#).
- 21 *IW v City of Perth* (1997) 191 CLR 1 ; [146 ALR 696](#); 71 ALJR 943; [BC9703257](#) (dismissing appeal from *City of Perth v D L (Representing Members of people living with Aids (WA) Inc)* (1996) 90 LGERA 178 ; (1996) EOC ¶92-796; [BC9601048](#), SC(WA)). However, only two judges of the majority (at 15 per Brennan and McHugh JJ) based their conclusion on the view that the local government was not providing a 'service'; other members of the Court appeared to accept that there was a service (at 23, 24 per Dawson and Gaudron JJ; at 44, 45 per Gummow J; at 28 per Toohey J; at 72 per Kirby J) but that there had been no refusal of that service (at 23, 24 per Dawson and Gaudron JJ; at 44, 45 per Gummow J).
- 22 *Secretary of the Department of Justice and Industrial Relations v Anti-Discrimination Cmr* (2003) 11 Tas R 324 ; [\[2003\] TASSC 27](#); [BC200302333](#). See also *Maghiar v Western Australia* [\[2002\] FCA 262](#) ; [BC200200887](#) (alleged mistreatment by police unlikely to be a service within meaning of (CTH) [Disability Discrimination Act 1992](#)). On whether failure to provide a graphic equaliser and headphones to enable a party with high frequency deafness to follow proceedings constituted failure to provide a service (or goods) see *Towie v Victoria* [\(2008\) 19 VR 640](#) ; [\[2008\] VSC 177](#); [BC200803908](#) (found to have an arguable case, not justifying summary dismissal of proceedings).
- 23 *Ball v Morgan* [\[2001\] FMCA 127](#) ; [BC200108534](#) (applied *Fetherson v Peninsula Health (No 2)* (2004) 137 FCR 262 ; [79 ALD 424](#); [\[2004\] FCA 594](#); [BC200402589](#)).

[80-530] Examples

The paragraph below is current to **07 March 2018**

Examples of the litigation include:

- (1) the provision of service in bars;¹
- (2) the availability of sporting facilities;²
- (3) access to community facilities such as are provided by government authorities³ or community organisations such as clubs;⁴
- (4) the denial or withdrawal of access to shopping or entertainment facilities;⁵
- (5) the refusal of service by dating agencies to people with disabilities, although refusal was allowed to married persons not separated from their spouses;⁶ and
- (6) eligibility criteria by a health services providers for indigenous Australians or those under 25 years old;⁷ and
- (7) adoption services.⁸

(C) Discrimination

A State law denying access to reproductive services on the ground of marital status has been held to be inconsistent with the (CTH) Sex Discrimination Act 1984 and inoperative to that extent,⁹ but the denial of those services was found to be reasonable when it was based on the failure to fulfil the reasonable requirement of being infertile.¹⁰ Not every distinction in the provision of services by reference to sex will be unlawful discrimination — a factual causal relationship has to be established between the less favourable treatment and the sex of the complainant.¹¹

Notes

- 1 *Coe v Bobilak* (1984) EOC ¶92-026, EOT(NSW); *Maynard v Neilson* (1988) 15 ALD 364 (1988) EOC ¶92-226, Fed C of A; *Holmes v Donhardt* (1989) EOC ¶92-270, EOT(SA); *White v Gollan* (1990) EOC ¶92-303, HREOC; *Oakley v Rochefort Holdings Pty Ltd* (1991) EOC ¶92-352, EOT(WA); *Tully v Ceridale* (1990) EOC ¶92-319, HREOC (sex discrimination in differential charges); *Whitehead v Criterion Hotel, Geelong* (1985) EOC ¶92-129, EOB(VIC) (failure of service on ground of parenthood); *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC ¶92-903 (requirement of tolerating tobacco smoke indirectly discriminatory against persons with asthma); *Halliwell v Stephens* (1998) EOC ¶92-914, EOT(NSW) (eviction from club on ground of sex); *Marsden v HREOC* (2001) EOC ¶93-126 (refused service, removed from club and deprived of membership on ground of disability of opioid dependence); *Sutherland v Van Kooten* (2001) EOC ¶93-176, ADT(NSW) (refusal of service on ground of race). Compare *Stanley v Wellington Bowling Club Ltd* (2003) EOC ¶93-283 (suspension not due to aboriginality but inappropriate drunken behaviour).
- 2 *Gulliver v Council of City of Sydney* (1987) EOC ¶92-185, Human Rights Commission (CTH) (kick-boxing); *Mosk v Re-Creation Health Sport and Fitness Club* (1990) EOC ¶92-317, EOB(VIC); *McKenna v Re-Creation Pty Ltd* (1984) EOC ¶92-100, EOB(VIC) (disabled person and spa); *Pulis & Banfield v Moe City Council* (1986) EOC ¶92-170, EOB(VIC) (appeal Mayor, Councillor & Citizens of Moe v Pulis (1988) EOC ¶92-243 (women's night at pool and men wanting access); *Ross v University of Melbourne (Vic)* (1990) EOC ¶92-290, EOB(VIC) (men wanting access to women's night at exercise centre). Compare *Tate v Rafin* (2001) EOC ¶93-125 (exclusion from using cricket club facilities and terminating membership not based on disability but misconduct and reprehensible behaviour).
- 3 *Pearce v Glebe Administration Board* (1985) EOC ¶92-131, EOT(NSW); *Williams v Council of the Shire of Exmouth* (1990) EOC ¶92-296, EOT(WA) (use of community land and hall respectively); *Waters v Public Transport Corp* (1990) EOC ¶92-293, EOB(VIC) (appeals *Public Transport Corp v Waters* [1992] 1 VR 151 (1991) EOC ¶92-334, SC(VIC); *Waters v Public Transport Corp* (1991) 173 CLR 349 (at first instance *Ellis v Metropolitan Transit Authority* (1988) EOC ¶92-232, EOB(VIC)) (tramway services disadvantaging people with disabilities); *Woods v Wollongong City Council* (1986) EOC ¶92-174, EOT(NSW) (disability discrimination in planned services); *Byham v Preston City Council (Vic)* (1991) EOC ¶92-377, EOB(VIC) (inaccessibility of services to person with impairment); *Payne v Legal Services Commission of South Australia* (1990) EOC ¶92-276, EOT(SA) (claimed discrimination on ground of sex because of refusal of legal aid to father to fight for custody of son); *Lewin v ACT Health & Community Care Service* (2002) EOC ¶93-201; [2002] ACTDT 2 (attendee of group therapy course requested providers of course to impose 'no perfume rule' due to her multiple chemical sensitivity disorder); *Access for all Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2005) EOC ¶93-372 (external wash basins on public toilets unlawfully discriminatory against persons with disabilities whose toileting regime requires use of basins in private). Compare *Vance v State Rail Authority* [2004] FMCA 240 (no discrimination against visually impaired person in provision of train services as procedures in place to ensure all passengers could board, although not followed by one guard); *Access for all Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2005) EOC ¶93-372 (improving access for mobility-impaired persons to community centre and picnic tables would impose unjustifiable hardship).
- 4 *Brotherhood Union of WA (Inc) v Yugoslav Clubs & Community Assns of WA (Inc)* (1987) EOC ¶92-190, EOT(WA) (access to radio time); *McInnes v Confederation of Australian Motor Sport* (1990) EOC ¶92-286, EOB(VIC) (appeal *Keefe (on behalf of Cams) v McInnes* [1991] 2 VR 235 (1991) EOC ¶92-331, SC(VIC); *McInnes v Confederation of Australian Motor Sport* (1991) EOC ¶92-343, EOB(VIC) (discrimination on grounds of disability in refusing to grant a test or in requiring a special test)); *Lindisfarne R & SLA Sub-Branch v Buchanan* (2004) 80 ALD 122 (2004) EOC ¶93-347; [2004] TASSC 73; BC200404555 (membership requirement to swear loyalty to Commonwealth not reasonable and unlawfully discriminatory against people with republican convictions).

(C) Discrimination

- 5 *Blair v Venture Stores Retailers Pty Ltd* (1984) EOC ¶92-103, EOB(VIC) (complaint of no wheelchair access to higher floor of store: dismissed); *Moreira v Peter Robert Motors Pty Ltd* (2002) EOC ¶93-209, AATA(NSW) (complaint by customers who discussed price of car in Spanish and told to leave car yard); *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 ; [56 ALD 387](#); [\[1999\] FCA 180](#); [BC9900605](#) (council approved construction of cinema complex with no wheelchair access).
- 6 *Re People Matching Pty Ltd (t/as Dinner for Six)* (1997) EOC ¶92-895, ADT(VIC) (exemption refused although disabled persons could be advised of potential difficulties in finding a match).
- 7 *Central Northern Adelaide Health Service v Atkinson* [\(2008\) 252 ALR 168](#) ; 222 FLR 207; [\[2008\] SASC 371](#); [BC200811606](#) ((SA) [Equal Opportunity Act 1984](#) s 65 exception).
- 8 *OV v Members of the Board of the Wesley Mission Council* [\(2010\) 270 ALR 542](#) ; [2010] NSWCA 155; [BC201004640](#).
- 9 *McBain v Victoria* (2000) 99 FCR 116 ; [177 ALR 320](#); [\[2000\] FCA 1009](#); [BC200004187](#) (appeal to High Court of Australia dismissed without consideration of the merits *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#)). Note that some State and Territory discrimination legislation seeks to remove the provision of reproductive technology services from the ambit of the legislation, or at least provide an exemption from discrimination being unlawful on certain grounds. Both (NT) [Anti-Discrimination Act 1992](#) s 4(8) and (SA) [Equal Opportunity Act 1984](#) s 5(2) state that 'services' for the purpose of the Act do not include the carrying out of artificial fertilisation procedures. In Queensland there is an express exemption for discrimination on the basis of relationship status or sexuality in the provision of reproductive technology services: (QLD) [Anti-Discrimination Act 1991](#) s 45A. Given the decision in *McBain* this would appear to be inconsistent with the (CTH) [Sex Discrimination Act 1984](#), at least to the extent that it covers marital status. See also *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; [BC201004776](#) (no finding of discrimination in denying a prisoner access to IVF on the basis of 'infertility impairment' ((VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 8) on the basis that fertile prisoners are allowed conjugal visits and may fall pregnant as a result).
- 10 *QFG v JM* (1997) EOC ¶92-902 (doctor required lesbian woman to demonstrate that she was biologically infertile); *JM v QFG* (1997) EOC ¶92-876, ADT(QLD) (allowing an appeal from, and remitting to, the tribunal the question of indirect discrimination for further hearing and consideration); *JM v QFG & GK* [\[2000\] 1 Qd R 373](#) ; (2000) EOC ¶93-047; [1998] QCA 228; [BC9804065](#) (appeal to Qld Court of Appeal, remitting matter to Tribunal for consideration of indirect discrimination) (special leave to appeal to High Court of Australia refused 24 June 1999); *Morgan v GK* (2001) EOC ¶93-154 ; [2001] QADT 10 (on remission to Tribunal no indirect discrimination found). Section 45A was inserted into the (QLD) Anti-Discrimination Act 1991 to provide an exemption for discrimination on grounds of relationship status or sexuality in the provision of assisted reproductive technology services. To the extent that relationship status includes marital status, this would seem to be inconsistent with (CTH) [Sex Discrimination Act 1984](#): see note 8 above.
- 11 *Commonwealth v Human Rights & Equal Opportunity Commission* (1997) 77 FCR 371 ; [47 ALD 235](#); [147 ALR 469](#); [BC9703200](#), Fed C of A (ordering fresh hearing and determination by HREOC of *Hagar v Minister for Health and Family Services* (1997) EOC ¶92-881 (denial of osteoporosis drugs to men under pharmaceutical benefits scheme)).

(G) Exemptions in Provision of Goods and Services, Dealings in Land and Access to Premises or Public Places

[80-535] Services for one sex or provided in a different manner

The paragraph below is current to **07 March 2018**

The anti-discrimination legislation regulating discrimination on the grounds of sex¹ contains, in some cases, exemptions allowing services or facilities that are needed exclusively for members of one sex, or for women for pregnancy or childbirth.²

(C) Discrimination

- 1 See [80-300]-[80-325].
- 2 (CTH) [Sex Discrimination Act 1984](#) ss [31](#) (pregnancy or childbirth), [32](#) (members of one sex)
(ACT) [Discrimination Act 1991](#) ss [37](#) (pregnancy or childbirth), [38](#) (members of one sex)
(NT) [Anti-Discrimination Act 1992](#) ss [42](#) (members of one sex), [54](#) (pregnancy and childbirth)
(NSW) [Anti-Discrimination Act 1977](#) ss 33(2) (allows discrimination in the exercise of skills), 35 (pregnancy or childbirth)
(QLD) [Anti-Discrimination Act 1991](#) (no specific exemptions, but ibid s 104 provides an exemption for an act for the welfare of persons for whose benefit the legislation was designed)
(SA) [Equal Opportunity Act 1984](#) ss [39\(2\)](#) (allows discrimination in the exercise of skills; see also ibid ss 76(2) for same exemption for impairment discrimination), 85ZJ (pregnancy/childbirth)
(TAS) [Anti-Discrimination Act 1998](#) s [27\(1\)\(f\)](#) (facilities may be provided for one gender only if reasonably required)
(VIC) [Equal Opportunity Act 2010](#) s [88\(3\)](#) (pregnancy or childbirth)
(WA) [Equal Opportunity Act 1984](#) ss 28 (pregnancy or childbirth), 30 (services only for one sex).

[80-540] Ground of disability or impairment

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation containing provisions making discrimination unlawful on grounds of impairment¹ contains exemptions in relation to the provision of goods and services, dealings in land and access to premises or public places to persons with a disability or an impairment. In essence, the exemptions allow discrimination where the person with the impairment could not use the service or was not, after reasonable adjustment by the supplier, able to use it, or if undue hardship would be involved in the provision of the service.²

Notes

- 1 See [80-350]-[80-365]. There is no equivalent legislation in Tasmania.
- 2 (CTH) [Disability Discrimination Act 1992](#) ss [11](#), [29A](#) (unjustifiable hardship). Note that ibid ss 5(2), 6(2) render discriminatory a failure to make reasonable adjustment for the person with disability. 'Reasonable adjustments' are those that do not impose an unjustifiable hardship on the person making them (removing doubts cast by the High Court of Australia *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#)). Note also () Disability Discrimination Act 1992 s 11(2) places the burden of proving unjustifiable hardship on the person claiming it. See also *Access for all Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2005) EOC ¶93-372; [\[2004\] FMCA 915](#); [BC200408539](#); *Forest v Queensland Health* (2007) 161 FCR 152; [\[2007\] 95 ALD 638](#); [\[2007\] FCA 936](#); [BC200704800](#) (reversed on appeal in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#) at [\[126\]](#) per Spender and Emmett JJ (entry to hospital denied to person with psychiatric disability accompanied by assistance animal without having demonstrated the dogs were trained, safe and hygienic; no unlawful discrimination under (CTH) [Disability Discrimination Act 1992](#) ss [23](#), [24](#), noting nothing unreasonable in that requirement). However note (CTH) [Disability Discrimination and Other Human Rights Legislation Amendment Act 2009](#) clarified (by changes to (CTH) [Disability Discrimination Act 1992](#) s [8](#)) that discrimination on the basis that a person possesses or is accompanied by a carer, assistant or aid, is discrimination on the basis of disability, addressing the issues in *Queensland (Queensland Health) v Che Forest* (2008) 168 FCR 532; [249 ALR 145](#); [\[2008\] FCAFC 96](#); [BC200804217](#)).
(ACT) [Discrimination Act 1991](#) ss [47](#), [52](#), [53](#)
(NT) [Anti-Discrimination Act 1992](#) s [58](#) (where accommodating a 'special need' is 'unreasonable')
(NSW) [Anti-Discrimination Act 1977](#) ss 49C, 49M(2)

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) ss [5](#), [51](#)

(SA) [Equal Opportunity Act 1984](#) ss [76\(3\)](#), [84](#)

(TAS) [Anti-Discrimination Act 1998](#) s [48](#)

(VIC) [Equal Opportunity Act 2010](#) ss ss 45, [46](#) (service provider must make only reasonable adjustments for person with an impairment), [57](#) (discrimination in access to public premises). Ibid s 45 amended by the (VIC) [Equal Opportunity Amendment Act 2011](#) to clarify that reasonable adjustment not required where compliant or exempt under (CTH) [Disability Discrimination Act 1992](#).

(WA) [Equal Opportunity Act 1984](#) ss 4(4), 66J(2), 66K(2).

[80-545] Religious activities and charities

The paragraph below is current to **07 March 2018**

Although there are no exemptions for religious activities or charities specifically related to the provision of goods and services, some legislation provides specific exemptions for access to sites of religious or cultural significance.¹ Most of the legislation contains provisions that exempt charitable donations, and in some cases religious bodies and associated activities, from certain aspects of its operation.²

Notes

1 (NT) [Anti-Discrimination Act 1992](#) s [43](#)

(QLD) [Anti-Discrimination Act 1991](#) s [48](#)

(TAS) [Anti-Discrimination Act 1998](#) s [42](#).

2 (CTH) [Racial Discrimination Act 1975](#) s [8\(2\)](#) (charitable donations); (CTH) [Sex Discrimination Act 1984](#) ss [36](#) (charitable donations), [37](#) (religious bodies); (CTH) [Disability Discrimination Act 1992](#) s [49](#) (charitable donations); (CTH) [Age Discrimination Act 2004](#) ss [34](#) (charities), [35](#) (religious bodies)

(ACT) [Discrimination Act 1991](#) ss [32](#) (religious bodies). See also ibid ss 44, 46 (certain other exemptions for religious bodies)

(NT) [Anti-Discrimination Act 1992](#) ss [51](#) (religious bodies), [52](#) (charitable donations); see also ibid s 41(2) (exemption in provision of goods and services for not-for-profit associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or similar purposes)

(NSW) [Anti-Discrimination Act 1977](#) ss 55 (charitable donations), 56 (religious bodies)

(QLD) [Anti-Discrimination Act 1991](#) ss [109](#) (religious bodies), [110](#) (charities); see also ibid s 46 (exemption in provision of goods and services for not-for-profit associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or similar purposes)

(SA) [Equal Opportunity Act 1984](#) ss ss 45, [64](#), [80](#), [85N](#) (charitable donations), [50](#) (religious bodies). See also ibid s 34(3).

(TAS) [Anti-Discrimination Act 1998](#) ss [23](#) (charitable donations), [42](#) (cultural and religious places)

(VIC) [Equal Opportunity Act 2010](#) ss ss 80, [81](#) (charitable donations), [82](#) (religious bodies), 84 (religious beliefs)

(WA) [Equal Opportunity Act 1984](#) ss 70 (charitable donations), 72 (religious bodies).

(H) Accommodation

[80-550] General

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation makes it unlawful to discriminate on any of the grounds covered in relation to accommodation.¹ 'Accommodation' is defined in most jurisdictions to include residential and business accommodation.² 'Discrimination' covers:³

- (1) refusing an application for accommodation or deferring to a lower order of precedence the terms on which accommodation is offered or provided;
- (2) the terms on which an offer is accepted;
- (3) subjecting a person accommodated to any detriment in relation to their accommodation;
- (4) evicting a person; and
- (5) the provision of means of access to premises to person with an impairment.

The cases heard in the tribunals have related to:

- (1) special type accommodation such as aged persons' homes;⁴
- (2) failing to provide adequately for an intellectually disabled person;⁵ and
- (3) discrimination on the basis of an attribute of the person applying.⁶

An Aboriginal person treated less favourably by a real estate agent or landlord on account of her race in making accommodation available was awarded substantial damages.⁷ However, a lease requirement that accommodation provided to an Aboriginal family not be overcrowded to the point where acts of nuisance were inevitable was held to be reasonable and the family's eviction not unlawfully discriminatory.⁸

Notes

¹ As to the grounds of discrimination see [80-290]-[80-400].

² (CTH) [Racial Discrimination Act 1975](#) ss [3\(1\)](#) (defines 'residential accommodation'), [12](#) (includes 'residential or business accommodation'); (CTH) [Sex Discrimination Act 1984](#) s [4\(1\)](#); (CTH) [Disability Discrimination Act 1992](#) s [4\(1\)](#); (CTH) [Age Discrimination Act 2004](#) s [29\(4\)](#)

(ACT) [Discrimination Act 1991](#) s [2](#), Dictionary

(NT) [Anti-Discrimination Act 1992](#) s [4\(1\)](#) ('accommodation' includes business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a manufactured home or site, a camping site and a building or construction site)

(NSW) [Anti-Discrimination Act 1977](#) s [4\(1\)](#)

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) s 4, Sch Dictionary ('accommodation' includes business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a manufactured home or site, a camping site and a building or construction site)

(SA) [Equal Opportunity Act 1984](#) s 40 (accommodation simply referred to)

(TAS) [Anti-Discrimination Act 1998](#) s 3 (includes accommodation in a house, flat, hotel, motel, boarding house or caravan)

(VIC) [Equal Opportunity Act 2010](#) s 4(1) ('accommodation' includes business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a mobile home or mobile home site and a camping site). *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 ; [2014] VSCA 75; [BC201402714](#) (refusal to accept adventure resort booking for purposes of suicide prevention project for same sex attracted young people) decided under predecessor (VIC) Equal Opportunity Act 1995

(WA) [Equal Opportunity Act 1984](#) s 4(1).

- 3 (CTH) [Racial Discrimination Act 1975](#) s 12; (CTH) [Sex Discrimination Act 1984](#) ss 23, 28H, 34; (CTH) [Disability Discrimination Act 1992](#) s 25 (includes refusing reasonable alterations); (CTH) [Age Discrimination Act 2004](#) s 29

(ACT) [Discrimination Act 1991](#) s 21

(NT) [Anti-Discrimination Act 1992](#) ss 38, 39 (includes refusing reasonable alterations)

(NSW) [Anti-Discrimination Act 1977](#) ss 20, 34, 38N, 48, 49N, 49ZQ, 49ZYO

(QLD) [Anti-Discrimination Act 1991](#) ss 81-85 (includes refusing reasonable alterations and refusing to provide accommodation or charging extra where person has assistance dog)

(SA) [Equal Opportunity Act 1984](#) ss 40, 62, 77, 85L, 85ZH, 87A. See also *ibid* s 88 (blind or deaf person not to be separated from guide dog). Note the *ibid* s 5(1) definition of 'discrimination' extends services to include access to or use of a place or facilities that members of the public are permitted to enter or use and the *ibid* s 76(3) disability exclusion where the provider of the service with a disability cannot reasonably be expected to perform the service in the required manner.

(TAS) [Anti-Discrimination Act 1998](#) s 22(1)(d)

(VIC) [Equal Opportunity Act 2010](#) ss 52-57 (provision of accommodation, includes refusing reasonable alterations and refusing to provide accommodation or charging extra where person has guide dog). *Ibid* s 58 amended by (VIC) [Equal Opportunity Amendment Act 2011](#) to clarify that avoidance of discrimination not required where compliant or exempt under (CTH) [Disability Discrimination Act 1992](#).

(WA) [Equal Opportunity Act 1984](#) ss 21, 35AM, 35Z, 47, 63, 66L, 66ZG.

- 4 *Wright v City of Brighton* (1991) EOC ¶92-389, SC(SA) (validity of limitation to aged persons).
- 5 *Power v Victoria* (1988) EOC ¶92-221, EOB(VIC).
- 6 *Wagen v Nicholas Moss (Vic) Pty Ltd* (1985) EOC ¶92-121, EOB(VIC) (single man and a male friend not constituting a 'happy family'); *Burke v Tralagga* (1986) EOC ¶92-161, EOT(NSW) (unmarried couple not offered a unit because of marital status and owner's belief); *Cobaw v Christian Youth Camps* [2010] VCAT 1613 .
- 7 *Lamb v Samuels* (1996) EOC ¶92-790, EOT(NSW) (affirmed on appeal *Samuels Real Estate v Lamb* (1998) EOC ¶92-923 ; [BC9800277](#), SC(NSW)) (compensation \$6000); *Sheather v Daley* (2003) EOC ¶93-278 ; [2003] NSWADT 51 (compensation \$10,000). See also *Bull v Kuch* (1993) EOC ¶92-518, HREOC (caravan park: damages \$20,700).
- 8 *State Housing Commission v Martin* (1999) EOC ¶92-975 ; [BC9806686](#), SC(WA).

(i) Exemptions in the Area of Accommodation

[80-555] Sharing a home

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation provides an exemption for people who have a home and who wish to share it with others, provided that they themselves reside, or one of their near relatives resides, at those premises. The maximum number of people to be involved is specified in most jurisdictions.¹

Notes

- 1** (CTH) [Racial Discrimination Act 1975](#) s [12\(3\)](#) (no limit); (CTH) [Sex Discrimination Act 1984](#) s [23\(3\)\(a\)](#) (maximum three additional persons); (CTH) [Disability Discrimination Act 1992](#) s [25\(3\)](#) (maximum three additional persons); (CTH) [Age Discrimination Act 2004](#) s [29\(3\)](#) (maximum three additional persons). Note (CTH) Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 changed (CTH) [Age Discrimination Act 2004](#) s [29\(3\)](#), [29\(4\)](#) to extend a 'near relative' to include same - sex partners and their families (including a child who is a product of a relationship with another person).
- (ACT) [Discrimination Act 1991](#) s [26\(1\)](#) (maximum six additional persons)
- (NT) [Anti-Discrimination Act 1992](#) s [40\(1\)](#) (no limit; main home)
- (NSW) [Anti-Discrimination Act 1977](#) ss 20(3), 34(3), 38N(3), 48(3), 49N(3), 49ZQ(3), 49ZYO(3) (in all cases, maximum six persons total). 'Near relative' now includes de facto partners: *ibid* s 4.
- (QLD) [Anti-Discrimination Act 1991](#) s [87](#) (maximum three additional persons)
- (SA) [Equal Opportunity Act 1984](#) ss [40\(3\)](#), [62\(2a\)](#), [77\(2a\)](#), [85L\(5\)](#), [87A\(2\)](#) (no limit)
- (TAS) [Anti-Discrimination Act 1998](#) s [27\(1\)\(e\)](#) (shared accommodation for less than five adult persons; gender discrimination only)
- (VIC) [Equal Opportunity Act 2010](#) s [59\(1\)](#) (maximum three additional persons)
- (WA) [Equal Opportunity Act 1984](#) ss 21(3)(a), 35AM(3)(a), 35Z(3)(a), 47(3)(a), 63(3)(a), 66L(3)(a), 66ZG(3)(a) (in all cases, maximum three additional persons).

[80-560] Impairment

The paragraph below is current to **07 March 2018**

There are important exceptions relating to accommodation for persons suffering an impairment. These address the risk of injury to the impaired person or another, the hardship that might be involved in making the place suitable, and the accommodation of only a particular class of impairment.¹

Notes

- 1** (CTH) [Disability Discrimination Act 1992](#) ss [25\(3\)\(b\)](#) (accommodation by registered charities solely for people with particular disability), [29A](#) (unjustifiable hardship) (note also *ibid* s 11)
- (ACT) [Discrimination Act 1991](#) s [54](#)
- (NT) [Anti-Discrimination Act 1992](#) ss [39](#), [58](#) (persons with special needs generally)
- (NSW) [Anti-Discrimination Act 1977](#) s 49N(4), 49N(5), 49N(6) (unjustifiable hardship) (accommodation by charitable or non-profit body for persons with particular disability)
- (QLD) [Anti-Discrimination Act 1991](#) ss [5](#), [92](#)
- (SA) [Equal Opportunity Act 1984](#) s [84](#)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) ss [3](#) (meaning of 'services' includes access to premises and dealings in land including leasing), [48\(b\)](#) (unjustifiable hardship)

(VIC) [Equal Opportunity Act 2010](#) s [86](#) (general exemption for discrimination on grounds of impairment to protect health and safety)

(WA) [Equal Opportunity Act 1984](#) s [66L\(2\)\(d\)](#) (reasonable alterations), [66L\(3\)\(b\)](#) (accommodation by charitable or voluntary body for persons with particular impairment), [66L\(3\)\(c\)](#) (unjustifiable hardship).

[80-565] Accommodation for special persons or groups

The paragraph below is current to **07 March 2018**

Most of the anti-discrimination legislation makes exemption for accommodation that is designed to meet the needs of particular persons or groups, such as employees with a particular marital status or size of family, financially disadvantaged persons, aged persons and students.¹

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss [23\(3\)\(c\)](#) (accommodation provided by a registered charity or non-profit body for persons of one sex or particular marital status), [34](#) (employees, students); (CTH) [Disability Discrimination Act 1992](#) s [45\(b\)\(i\)](#), [45\(1\)\(c\)\(i\)](#) (measures intended to meet special needs of persons with disability in relation to accommodation); (CTH) [Age Discrimination Act 2004](#) no specific provision for accommodation, but see *ibid* s [33](#) (acts done to benefit, meet needs or reduce disadvantage of persons of particular age group)
 - (ACT) [Discrimination Act 1991](#) ss [39](#) (employees, contract workers, students), [57K](#) (recreational accommodation for persons of particular age); see also *ibid* s [27](#) (measures to meet special needs of particular class of people)
 - (NT) [Anti-Discrimination Act 1992](#) s [40\(2\)-\(4\)](#) (students, religions, and charitable purposes); see also *ibid* s [57](#) (measures to reduce disadvantage or meet special needs of groups with particular attribute)
 - (NSW) [Anti-Discrimination Act 1977](#) s [59](#) (aged persons), see also *ibid* ss [21](#), [49ZYR](#) (acts done to meet special needs of persons of particular race or age)
 - (QLD) [Anti-Discrimination Act 1991](#) ss [30](#) (single sex), [44](#) (impairment), [88](#) (workers), [89](#) (students); see also *ibid* ss [104](#) (welfare measures for particular groups), [105](#) (equal opportunity measures for particular groups)
 - (SA) [Equal Opportunity Act 1984](#) ss [40\(4\)](#) (accommodation provided by non-profit organisation for persons of particular sex), [85L\(5\)\(a\)](#) (recreational use for age groups), [85ZH\(5\)](#) (particular marital or domestic partnership status, pregnant women or persons with caring responsibilities)
 - (TAS) [Anti-Discrimination Act 1998](#) ss [25](#) (disadvantaged groups), [26](#) (equal opportunity promotion)
 - (VIC) [Equal Opportunity Act 2010](#) ss [60](#) (welfare hostels), [61](#) (students). See also *ibid* s [87](#) (age benefits and concessions), [88](#) (special needs)
 - (WA) [Equal Opportunity Act 1984](#) ss [32](#) (employees or students), [35L](#) (employees), [66ZG\(3\)\(c\)](#) (particular age groups), [74](#) (aged persons).
- There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#).

[80-567] Accommodation for Sex Workers

The paragraph below is current to **07 March 2018**

Queensland and Victoria provide exemptions in relation to the provision of accommodation when the premises is used or may be used for commercial sexual services.¹

Notes

1 (QLD) [Anti-Discrimination Act 1991](#) s [106C](#)

(VIC) [Equal Opportunity Act 2010](#) s 62.

(J) Clubs and Voluntary Associations

[80-570] General

The paragraph below is current to **07 March 2018**

All the anti-discrimination legislation, except the (CTH) [Racial Discrimination Act 1975](#), provides that clubs, as distinct from voluntary bodies, may not discriminate on the stated grounds. However, the definition of 'club' varies,¹ and there are exceptions that apply to some activities, particularly in the case of single sex and race and impairment-specific clubs.² The banning of discrimination applies to applications made for membership, to the conditions of membership, to benefits and detriments related to membership and to exclusion.³

Although much depends on the applicable legislation, membership or renewal of membership may not be given on a sex-discriminatory basis,⁴ nor on condition that applicants affirm political beliefs where not reasonable in the circumstances.⁵ In relation to benefits offered by clubs, it may not be discriminatory to refuse service at a men's bar to a female non-member;⁶ but it would be discriminatory to refuse service to a homosexual male.⁷ In relation to conditions of use of club facilities, it has been held unlawfully discriminatory to refuse access to an impaired person with an assistance dog,⁸ but a refusal to allow a child to do homework while a parent carries out aerobics was reasonable.⁹ A decision to exclude a club member from using facilities and then terminating his membership was found to be based on the member's misconduct and reprehensible behaviour not on his disabilities and was not unlawfully discriminatory.¹⁰ However, removing a person from a club and depriving him of his membership on the basis of his opioid dependence was found to be less favourable treatment on the basis of disability and unlawful.¹¹ A women's golf club was not a trading association and therefore not subject to the (CTH) [Sex Discrimination Act 1984](#), but could lawfully provide, as a special measure, lower status for male members.¹² A complaint related to a preponderance of male work committee members in a club with predominantly female membership need not necessarily be successful,¹³ and reinstatement need not follow refusal of renewal of membership on account of political and other activities.¹⁴

Notes

1 See [80-575].

2 (CTH) [Racial Discrimination Act 1975](#) (no specific provision, however see ss 9, 11 coupled with (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5(e)); (CTH) [Sex Discrimination Act 1984](#) s [25\(3\)](#) (single sex club); (CTH) [Disability Discrimination Act 1992](#) s [27\(4\)](#) (clubs for persons with particular disability)

(ACT) [Discrimination Act 1991](#) ss [40](#) (one sex), [43](#) (one race), [55](#) (particular disability), [57L](#) (specific age groups)

(C) Discrimination

(NT) [Anti-Discrimination Act 1992](#) s 47 (minority culture, specific age groups, one sex)

(NSW) [Anti-Discrimination Act 1977](#) ss 20A(3), 20A(4) (specified race), 34A(3)-(5) (one sex; different use between sexes), 49O(3)-(5) (particular disability), 49ZYP(3), 49ZYP(4) (age groups)

(QLD) [Anti-Discrimination Act 1991](#) ss 97 (minority, disadvantaged), 98 (reasonable different use between sexes), 99 (risk of injury to a minor or others), 100 (special services for persons with impairment)

(SA) [Equal Opportunity Act 1984](#) ss 35(2) (different use between sexes), 35(2a) (associations for particular sex, particular gender identity, sexual orientation, 35(2b) (religious association), 57(2) (different racial or ethnic groups), 85G(2) (different classes for different ages), 85G(3) (age groups), 85G(4) (associations established for age groups)

(TAS) [Anti-Discrimination Act 1998](#) ss 27(2) (different use between genders), 27(3) (one gender), 32 (age groups), 40 (minority culture; race)

(VIC) [Equal Opportunity Act 2010](#) ss 66 (minority culture, disadvantaged), 67 (age groups), 68 (single sex clubs), 69 (different use between sexes). Ibid s 66A(VIC) [Equal Opportunity Act 2010](#) s 66A added by (VIC) [Equal Opportunity Amendment Act 2011](#) to allow clubs principally established for a political purpose to restrict membership on the basis of political belief or activity.

(WA) [Equal Opportunity Act 1984](#) ss 22(3)-(5) (sex), 48(3), 48(4) (race), 66M(3)-(5) (impairment), 66ZI(3), 66ZI(4) (age).

There are no equivalent provisions in the (CTH) [Age Discrimination Act 2004](#). As to general exemptions see [80-595]-[80-640].

- 3 (CTH) [Racial Discrimination Act 1975](#) (no specific provision, however see ibid ss 9, 11 coupled with (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5(e)); (CTH) [Sex Discrimination Act 1984](#) s 25; (CTH) [Disability Discrimination Act 1992](#) s 27

(ACT) [Discrimination Act 1991](#) s 22

(NT) [Anti-Discrimination Act 1992](#) s 46

(NSW) [Anti-Discrimination Act 1977](#) ss 20A(1), 20A(2), 34A(1), 34A(2), 38O, 48A, 49O(1), 49O(2), 49ZR, 49ZYP(1), 49ZYP(2)

(QLD) [Anti-Discrimination Act 1991](#) ss 93-95

(SA) [Equal Opportunity Act 1984](#) ss 35(1), 35(3), , 57(1), 72, 85G(1), 85G(2)

(TAS) [Anti-Discrimination Act 1998](#) s 22(1)(e) (classes of membership and activities)

(VIC) [Equal Opportunity Act 2010](#) ss 64, 65

(WA) [Equal Opportunity Act 1984](#) ss 22(1), 22(2), 35AO, 35ZB, 48(1), 48(2), 64, 66M(1), 66M(2), 66ZI(1), 66ZI(2).

There are no equivalent provisions in the (CTH) [Age Discrimination Act 2004](#).

- 4 *Umina Beach Bowling Club Ltd v Ryan* [1984] 2 NSWLR 61 ; (1984) EOC ¶92-110 CA(NSW). Compare *Tullamore Bowling and Citizens Club Ltd v Lander* [1984] 2 NSWLR 32 ; (1984) EOC ¶92-109, CA(NSW).
- 5 *Lindisfarne R & SLA Sub-Branch v Buchanan* (2004) 80 ALD 122 ; (2004) EOC ¶93-347; [2004] TASSC 73; BC200404555.
- 6 *Judge v South Hurstville RSL Club Ltd* (1984) EOC ¶92-113, EOT(NSW).
- 7 *Morrison v Gallipoli Legion Club Newcastle Ltd* (1985) EOC ¶92-144; 14 IR 183; , EOT(NSW).
- 8 *Sheehan v Tin Can Bay Country Club* (2002) EOC ¶93-240 ; [2002] FMCA 95; BC200202560.
- 9 *Mosk v Re-Creation Health Sport and Fitness Club* (1990) EOC ¶92-317, EOB(VIC).
- 10 *Tate v Rafin* (2001) EOC ¶93-125 ; [2000] FCA 1582; BC200006864 (even if member's psychological disabilities caused him to behave that way, the club treated him the same as it would treat a person without the disability who behaved that way).
- 11 *Marsden v HREOC* (2001) EOC ¶93-126 ; [2000] FCA 1619; BC200006923.
- 12 *Eleven Fellow Members of McLeod Country Golf Club v McLeod Country Golf Club* (1995) EOC ¶92-739, HREOC.

(C) Discrimination

- 13** *Harvey v Head, President, Kennel Control Council of Victoria* (1991) EOC ¶92-373, EOB(VIC) (failed to establish that women members had been excluded on the basis of their sex, as opposed to not merely failing to include them).
- 14** *Radalj v WA Yugoslav Club Inc* (1989) EOC ¶92-268, EOT(WA).

[80-575] Definition

The paragraph below is current to **07 March 2018**

Some anti-discrimination legislation defines 'clubs' by reference to the licensing or gaming legislation or by reference to selling or supplying liquor,¹ the remainder adopts a broader definition that refers to an association of members, various riders being added, for example, that it carries out its activities for the purpose of making a profit or with State assistance.² Voluntary bodies are exempt from the provisions of the (CTH) [Sex Discrimination Act 1984](#), and so are such bodies in the Australian Capital Territory, New South Wales and Western Australia.³ Clubs that are involved in competitive sport⁴ and trade unions⁵ are subject to special arrangements.

Notes

- 1** (CTH) [Sex Discrimination Act 1984](#) s [4\(1\)](#) (and maintains facilities from club funds)
- (ACT) [Discrimination Act 1991](#) s [2](#), Dictionary (for example, a club that holds a club licence — see (ACT) [Liquor Act 2010](#) s [20](#))
- (NT) [Anti-Discrimination Act 1992](#) s [4\(1\)](#) (and maintains facilities wholly or partly from club funds)
- (NSW) [Anti-Discrimination Act 1977](#) s [4\(1\)](#) ('registered club', refers to the (NSW) [Registered Clubs Act 1976](#))
- (WA) [Equal Opportunity Act 1984](#) s [4\(1\)](#) (and maintains facilities wholly or partly from club funds).
- There are no equivalent provisions in (CTH) [Racial Discrimination Act 1975](#), however, see *ibid* s 9, Sch arts 5(d)(ix) (freedom of association), 5(e)(vi) (participation in cultural activities).
- 2** (CTH) [Disability Discrimination Act 1992](#) s [4\(1\)](#) (facilities maintained from club funds)
- (QLD) [Anti-Discrimination Act 1991](#) s [4](#), Sch Dictionary (association established to make a profit)
- (SA) [Equal Opportunity Act 1984](#) (no provisions defining 'association', but provisions addressing discrimination by 'associations' are set out in ss [35](#), [57](#), [72](#), [85G](#), [85ZB](#))
- (TAS) [Anti-Discrimination Act 1998](#) s [3](#) (a 'club' is defined as incorporated or unincorporated association of at least 30 persons associated together for a lawful purpose that provides and maintains its facilities, wholly or partly, from the funds of the association)
- (VIC) [Equal Opportunity Act 2010](#) s [4\(1\)](#) (and operates its facilities wholly or partly from its own funds).
- 3** (CTH) [Sex Discrimination Act 1984](#) s [39](#)
- (ACT) [Discrimination Act 1991](#) s [31](#)
- (NSW) [Anti-Discrimination Act 1977](#) s [57](#) (voluntary bodies do not include credit unions and building societies)
- (WA) [Equal Opportunity Act 1984](#) s [71](#) (except on grounds of impairment or age if body an incorporated association).
- There are no equivalent provisions in the other Commonwealth Acts or the other jurisdictions. See further [80-630].
- 4** See [80-635].
- 5** See [80-585].

(K) Exemptions for Clubs and Associations

[80-580] Use of benefits by both sexes

The paragraph below is current to **07 March 2018**

All legislation covering discrimination on the grounds of sex carries with it exemptions from the requirement for equal sharing of the facilities offered by the club when that is not practicable,¹ though the principle is difficult to apply in practice.² Other exemptions permit clubs to discriminate on the basis of the group around which they are organised, for example, single sex clubs, specific racial group clubs and impairment-based clubs.³ While it may once have been unlawful to exclude female drivers from competing in trotting races,⁴ it may be lawful to operate clubs based primarily to advance the interests of one sex.⁵ Temporary exemptions have been sought, and granted, for single-sex fitness centres, although the exemption does not always extend to allowing employment of instructors exclusively of that sex.⁶

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 25(4), 25(5)
 (ACT) [Discrimination Act 1991](#) s 40(2), 40(3)
 (NT) [Anti-Discrimination Act 1992](#) s 47(3)(b), 47(4)
 (NSW) [Anti-Discrimination Act 1977](#) s 34A(4), 34A(5)
 (QLD) [Anti-Discrimination Act 1991](#) s 98
 (SA) [Equal Opportunity Act 1984](#) s 35(2)
 (TAS) [Anti-Discrimination Act 1998](#) s 27(2)
 (VIC) [Equal Opportunity Act 2010](#) s 69(a)
 (WA) [Equal Opportunity Act 1984](#) s 22(4), 22(5).
- 2 *Corry v Keperra Country Golf Club* (1985) 64 ALR 556 ; (1985) EOC ¶92-150, Human Rights Commission (CTH). An exemption has been granted on the basis of requiring belief in a supreme being: *Application for Exemption by Girl Guides Assn of Victoria* (1996) EOC ¶92-804, EOB(VIC) (note that the 'private life' ground is no longer included in the Victorian legislation).
- 3 (CTH) [Sex Discrimination Act 1984](#) ss 25(3); (CTH) [Disability Discrimination Act 1992](#) s 27(4)
 (ACT) [Discrimination Act 1991](#) ss 40(1) (sex), 43 (race), 55 (impairment)
 (NT) [Anti-Discrimination Act 1992](#) s 47 (covers minority, age, sex based clubs)
 (NSW) [Anti-Discrimination Act 1977](#) ss 34A(3) (sex), 20A(3), 20A(4) (race), 49O(3), 49O(4) (disability), 49ZYP(3), 49ZYP(4) (age)
 (QLD) [Anti-Discrimination Act 1991](#) s 97 (minority culture and disadvantaged), 99 (may exclude minors if risk of injury)
 (SA) [Equal Opportunity Act 1984](#) ss 57(2) (race), 85G(4) (age), 85ZB (those for whom association is established); see also ibid s 82 (scheme or undertaking for benefit of persons with particular impairment)
 (TAS) [Anti-Discrimination Act 1998](#) s 27(3) (gender), 32 (age), 40 (race)
 (VIC) [Equal Opportunity Act 2010](#) ss 66 (minority culture), 67 (particular age groups), 68 (single sex)
 (WA) [Equal Opportunity Act 1984](#) ss 22(3) (sex), 48(3), 48(4) (race), 66M(3) (impairment), 66ZI (age).
- 4 *Application by Trotting Control Board* (unreported, Sex Discrimination Board, No 1 of 1978).
- 5 *Eleven Fellow Members of McLeod Country Golf Club v McLeod Country Golf Club* (1995) EOC ¶92-739, HREOC. See also *Walker v Cormack* [2011] FCA 861 ; [BC201105742](#) (single sex gymnasium class a special measure).

(C) Discrimination

- 6 See, for example, *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC ¶192-782 (exemption granted by Victorian Equal Opportunity Board for female only gym confirmed; extends to employment of female only staff); Grant of Temporary Exemption to Ballarat Health and Fitness Pty Ltd for a male only gym in Ballarat and Notice declining to grant a request for exemption to employ men only (HREOC, 7 November 2005), expired 6 November 2010 (exemption granted for gym to offer services only to men, but not to employ only male instructors).

[80-585] Exemptions relating to trade unions

The paragraph below is current to **07 March 2018**

Trade unions and employer associations are covered by the normal arrangements under anti-discrimination legislation. However, they are the subject of special provisions in all legislation.¹ Trade unions are defined in some of the legislation, usually by reference to the Commonwealth or State industrial legislation.² They are not permitted to discriminate in refusing an application for membership, in determining eligibility or the terms, conditions and benefits of membership or in depriving a person of membership.³ Affirmative action to improve women's participation in the governance of a union may be permissible.⁴

Notes

- 1 These should be read in conjunction with the general arrangements for clubs and associations noted in [80-570]-[80-580] and with the arrangements under the (CTH) [Workplace Relations Act 1996](#) (renamed as (CTH) [Fair Work \(Registered Organisations\) Act 2009](#)).
- 2 (CTH) [Sex Discrimination Act 1984](#) s 4(1); (CTH) [Disability Discrimination Act 1992](#) s 4(1); (CTH) [Age Discrimination Act 2004](#) s 23(3) (all define 'registered organisation' as an organisation registered or association recognised under (CTH) [Fair Work \(Registered Organisations\) Act 2009](#))
- (NSW) [Anti-Discrimination Act 1977](#) s 4(1) ('industrial organisation')
- (SA) [Equal Opportunity Act 1984](#) ss 35 (sex), 57 (race), 72 (disability), 85G (age), 85ZB ('association' — the term 'registered industrial association' has limited application in tribunal proceedings)
- (TAS) [Anti-Discrimination Act 1998](#) s 3 'trade union' is defined within the term 'industrial organisation' but without reference to Commonwealth or State industrial legislation).
- No express definition is contained in the (CTH) [Racial Discrimination Act 1975](#) or in the Northern Territory, Queensland or Western Australian legislation. Note:
- (ACT) [Discrimination Act 1991](#) s 15(1) (defines 'organisation' without reference to Commonwealth or State industrial legislation)
- (VIC) [Equal Opportunity Act 2010](#) s 4(1) (defines industrial organisation by reference to organisations registered or recognised under State or Commonwealth legislation).
- 3 (CTH) [Racial Discrimination Act 1975](#) s 14 (only covers joining a trade union); (CTH) [Sex Discrimination Act 1984](#) s 19; (CTH) [Disability Discrimination Act 1992](#) s 20; (CTH) [Age Discrimination Act 2004](#) s 23
- (ACT) [Discrimination Act 1991](#) s 15(2), 15(3)
- (NT) [Anti-Discrimination Act 1992](#) s 32
- (NSW) [Anti-Discrimination Act 1977](#) ss 11, 28, 38H, 43, 49I, 49ZA, 49ZL, 49ZYF
- (QLD) [Anti-Discrimination Act 1991](#) ss 19, 20 (note also *ibid* s 115 (discrimination by members also prohibited))
- (SA) [Equal Opportunity Act 1984](#) ss 35 (sex), 57 (race), 72 (disability), 85G (age), 85ZB (provisions for discrimination on other grounds by associations generally)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) ss 3 (definition of 'employment' includes registration, recognition or membership of trade union or professional organisation), [22\(1\)\(a\)](#); see also *ibid* s 22(1)(g) (activity related to 'awards, enterprise agreements or industrial agreements'). As to discrimination in employment see [80-410]-[80-430]. As to exemptions in employment see [80-435]-[80-480].

(VIC) [Equal Opportunity Act 2010](#) s 35

(WA) [Equal Opportunity Act 1984](#) ss 15, 35AG, 35F, 35T, 41, 58, 66F, 66ZA.

- 4 *Re Australian Journalists Assn* (1988) EOC ¶92-224; (1988) 27 IR 207, Australian Conciliation and Arbitration Commission (determination in effect negated by an exemption: *Re Application for Exemption by Australian Journalists Assn* (1988) EOC ¶92-236, HREOC; and a later determination confirming an affirmative action arrangement: *Approval of Submission of Amalgamation to Ballot of Municipal Officers' Assn of Australia* (1991) EOC ¶92-344; 38 IR 13, Industrial Relations Commission). *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149; [81 ALD 1](#); [\[2004\] FCA 1250](#); [BC200406283](#) (union rules stipulating quotas for female representation held to be 'special measures' for purpose of (CTH) [Sex Discrimination Act 1984](#) s 7D as designed to achieve substantive equality between men and women). As to affirmative action see [\[80-810\]-\[80-830\]](#).

(L) Government Programs

[80-590] Administration of and requirements for information

The paragraph below is current to **07 March 2018**

Specific provisions making it unlawful to discriminate in the administration of government programs and in obtaining information (whether by government or non-government agencies) apply only to the Commonwealth sex, disability and age discrimination legislation and the Queensland legislation; in relation to obtaining information only, to the Australian Capital Territory, Northern Territory, Victorian and Western Australian legislation; and in relation to government programs only, to the Tasmanian legislation.¹ The requirement relating to government programs has extended to programs funded by the Commonwealth but administered by a local authority.² It may be noted that all the discrimination legislation binds the Crown specifically.³ It has been held that, in the Commonwealth jurisdiction, the program requirement will extend to an employment program administered by a Territory Minister under a tri-state agreement,⁴ to a racially discriminatory program administered by a State department or agency⁵ and to a local government carrying out a program of stormwater drainage substantially supported by Commonwealth funding through the State.⁶

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 26, 27; see also *ibid* s 28L (sexual harassment); (CTH) Disability Discrimination Act 1992 ss 29 (subject to unjustifiable hardship qualification in *ibid* s 29A), 30; (CTH) [Age Discrimination Act 2004](#) ss 31, 32

(ACT) [Discrimination Act 1991](#) s 23 (requests for information)

(NT) [Anti-Discrimination Act 1992](#) s 26 (unnecessary information)

(QLD) [Anti-Discrimination Act 1991](#) ss 101 (government programs), 124 (unnecessary information)

(TAS) [Anti-Discrimination Act 1998](#) s 22(1)(f) (government programs)

(VIC) [Equal Opportunity Act 2010](#) ss 107-108 (requests for information)

(WA) [Equal Opportunity Act 1984](#) s 23, 35AQ, 35J, 35ZC, 49, 65, 66O, 66ZK (application forms etcetera).

(C) Discrimination

There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#), New South Wales or South Australian, although the New South Wales legislation does make it unlawful to sexually harass another person in administering a government program: (NSW) [Anti-Discrimination Act 1977](#) s 22J.

- 2 See *Hough v Caboolture Shire Council* (1990) EOC ¶92-307, HREOC; (woman participating in Commonwealth government employment program administered by local government authority in Queensland allegedly subject to sex discrimination in the form of sexual harassment). See also *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [\[2001\] FCA 418](#); [BC200101644](#) (while not a case under s 26 of the (CTH) [Sex Discrimination Act 1984](#), the Commonwealth government employment service was found to have aided or permitted sexual discrimination in the form of sexual harassment of a woman it placed in employment with a doctor who was known to have been the subject of previous complaints of sexual harassment that would amount to sex discrimination).
- 3 (CTH) [Sex Discrimination Act 1984](#) ss [12](#) (Act does not bind States unless expressly stated), 26(2), 27(3) (provisions expressly stated to bind States); (CTH) [Disability Discrimination Act 1992](#) s [14\(1\)](#); (CTH) [Age Discrimination Act 2004](#) s [13\(1\)](#)
(ACT) [Discrimination Act 1991](#) s [6](#) (members of the Legislative Assembly as employers)
(NT) [Anti-Discrimination Act 1992](#) s [5](#)
(NSW) [Anti-Discrimination Act 1977](#) s 5
(QLD) [Anti-Discrimination Act 1991](#) s [3](#)
(TAS) [Anti-Discrimination Act 1998](#) s [4](#)
(VIC) [Equal Opportunity Act 2010](#) s [5](#)
(WA) [Equal Opportunity Act 1984](#) s 6.
- 4 *Howard v Northern Territory* (1995) EOC ¶92-672, HREOC.
- 5 *Bligh v Queensland* (1996) EOC ¶92-848, HREOC (under-payment of Aboriginal workers in settlements).
- 6 *Hough v Council of the Shire of Caboolture* (1992) 39 FCR 514  at 520; 79 LGERA 23; (1993) EOC ¶92-480; [BC9203914](#) per Spender J, Fed C of A (the court listed the six kinds of activities to which (CTH) [Sex Discrimination Act 1984](#) s [26](#) applies). See also *McCartney v Sadak* (1992) EOC ¶92-442, HREOC.

(v) General Exemptions

[80-595] General

The paragraph below is current to **07 March 2018**

All anti-discrimination legislation contains a limited number of exemptions from what would otherwise constitute unlawful discrimination that apply regardless of ground or area.¹ Hence they are called 'general exemptions'. They cover such acts as:

- (1) gifts to charities;²
- (2) affirmative action in support of a disadvantaged group;³ and
- (3) action pursuant to statutory requirements.⁴

General exemptions are distinct from 'specific' exemptions, which are specific to either a ground, such as sex or impairment, or to an area.⁵

Notes

- 1 As to the grounds of discrimination see [80-290]-[80-400].
- 2 See [80-605]. As to gifts to charities see CHARITIES [\[75-20\]](#).
- 3 See [80-600].
- 4 See [80-615].
- 5 As to area specific exemptions see [80-435]-[80-482] (work), [80-505]-[80-510] (education), [80-535]-[80-545] (provision of goods and services, dealings in land and access to public places), [80-555]-[80-565] (accommodation), [80-580], [80-585] (clubs and associations).

[80-600] Special measures or affirmative action

The paragraph below is current to **07 March 2018**

All anti-discrimination legislation contains provisions that allow for 'special measures', sometimes referred to as measures to achieve equality.¹ The term 'special measures' derives from the two international conventions on which the Commonwealth race and sex discrimination legislation is based.² The object of the provisions is to ensure that persons or groups within the recognised grounds of discrimination are not prejudiced by the view being taken that the positive measure is discriminatory. The leading discussion by the High Court of Australia on 'special measures' found South Australian legislation valid in allowing the Pitjantjatjara community to regulate access to their statutorily granted land, despite apparent contravention of the (CTH) [Racial Discrimination Act 1975](#).³ In order for a discriminatory act to come within the special measure exemption, it is necessary to determine that the purpose for which the act was taken was a permissible one, namely to further substantive equality or reduce disadvantage. This appears to involve, in part, an enquiry into the subjective intention of the person taking the measure,⁴ as well as an assessment of whether it was objectively reasonable for the person to conclude that the act would further the purpose of substantive equality or reducing disadvantage.⁵ Legislation preventing a local government from holding a general liquor licence,⁶ or imposing restrictions on possessing alcohol in a restricted area⁷ constitute special measures, so does the (CTH) Northern Territory National Emergency Response Act 2007 and actions proposed to be taken under it in compulsorily acquiring the town camps land.⁸ A special day may be set aside for employment training for women.⁹ Union rules requiring 50 per cent representation of women in elected positions in the governance of the union were found to be a special measure designed to achieve substantive equality and the fact that part of the rules' purpose was also to attract women members to the union did not disqualify it from being a special measure within the meaning of the (CTH) [Sex Discrimination Act 1984](#).¹⁰ Eligibility criteria by a health services provider for indigenous Australians or those under 25 years old were upheld.¹¹ Exemption to enrol equal numbers of boys and girls was refused because the purpose of the (SA) [Equal Opportunity Act 1984](#) is equality of opportunity (not just elimination of discrimination) and there was no evidence that students' equality of opportunity was compromised.¹²

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s [8\(1\)](#); (CTH) [Disability Discrimination Act 1992](#) s [45](#); (CTH) [Age Discrimination Act 2004](#) s [33](#); (CTH) [Australian Human Rights Commission Act 1986](#) s [11\(2\)](#)
(ACT) [Discrimination Act 1991](#) s [27](#)
(NT) [Anti-Discrimination Act 1992](#) s [57](#)
(NSW) [Anti-Discrimination Act 1977](#) ss 21 (race only), 35 (pregnancy, childbirth and breastfeeding), 49ZJR (particular age groups), 59 (housing for aged persons), 126A (certified programs)
(QLD) [Anti-Discrimination Act 1991](#) ss [104](#) (welfare measures), [105](#) (equal opportunity measures)

(C) Discrimination

(SA) [Equal Opportunity Act 1984](#) ss 47, 65, 82, 85P, 85ZK

(TAS) [Anti-Discrimination Act 1998](#) ss 25 (disadvantaged groups), 26 (equal opportunities promotion)

(VIC) [Equal Opportunity Act 2010](#) ss 12 (special measures), 88 (special needs); see also *ibid* ss 19-20 (employment), 60 (sex, age, race or religious belief — accommodation), 87 (age concessions)

(WA) [Equal Opportunity Act 1984](#) ss 31, 35K, 35ZD, 51, 66R, 66ZP, 74.

As to Commonwealth and State affirmative action legislation see [\[80-810\]-\[80-830\]](#).

- 2 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) arts 1(4), 2(2); (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979; GA Res 34/180; Aust TS 1983 No 9; 19 ILM 33 (1980)) art 4.
- 3 *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#).
- 4 *Colyer v Victoria* [\[1998\] 3 VR 759](#) ; 12 VAR 175; [BC9704541](#); *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1 ; (2000) EOC ¶92-091; [\[2000\] FCA 654](#); [BC200002586](#) at [\[26\]](#) per Finkelstein J (with whom Heerey J agreed); *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 ; [81 ALD 1](#); [\[2004\] FCA 1250](#); [BC200406283](#) at [\[61\]](#), [\[64\]](#) per Crennan J.
- 5 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 ; [81 ALD 1](#); [\[2004\] FCA 1250](#); [BC200406283](#) at [\[62\]](#), [\[65\]](#) per Crennan J.
- 6 *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) per Keane JA at [188]-[214] (applying *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#) at [519-21](#); 59 ALJR 311; [BC8501115](#)). As to the importance of the wishes of the beneficiaries of a measure to its characterisation as a special measure see *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#) at [\[193\]](#) per Keane JA; *Morton v Queensland Police Service* [\(2010\) 271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#) at [\[26\]-\[36\]](#) per McMurdo P. See also *Walker v Cormack* [\[2011\] FCA 861](#) ; [BC201105742](#) (single sex gymnasium class a special measure).
- 7 *Morton v Queensland Police Service* [\(2010\) 271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#) at [\[36\]](#) per McMurdo P (legislative intent was to confer a benefit on Aboriginal members of the community by minimising harm to them from alcohol-fuelled violence in order that they may enjoy and exercise equally with others their right to security of person and protection by the State against violence or bodily harm). See also *Maloney v R* (2013) 252 CLR 168 ; [298 ALR 308](#); [\[2013\] HCA 28](#); [BC201303066](#) (alcohol management plans could properly be characterised as a special measure to achieve the advancement of certain indigenous communities, but would otherwise be a discriminatory measure under (CTH) [Racial Discrimination Act 1975](#)).
- 8 *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* (2009) 181 FCR 201 ; [113 ALD 286](#); [\[2009\] FCA 1397](#); [BC200910645](#) at [\[165\]](#) per Mansfield J ((CTH) Northern Territory National Emergency Response Act 2007 (repealed) not to be read as requiring procedural fairness when a decision is proposed to be made by the Minister to give a notice pursuant to *ibid* s 47(1), which would have the effect of the Commonwealth compulsorily acquiring the town camps land. *Ibid* s 132(1) (repealed) declared the provisions of that Act and actions taken under it to be 'special measures' (within *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#)) confirming that the Act and acts which it authorised, did not breach (CTH) [Racial Discrimination Act 1975](#). There was a clear intention to ensure that the (CTH) Northern Territory National Emergency Response Act 2007 does not contravene the (CTH) [Racial Discrimination Act 1975](#)).
- 9 *Worrall v Belconnen Community Youth Support Scheme* (1986) EOC ¶92-151, HREOC. See also *Anderson v Director-General of Education* (1984) EOC ¶92-001 (appeal *Anderson v Director-General of Education* [\[1978\] 2 NSWLR 423](#) , SC(NSW)). See, however, confirmation of the exemption granted for appointment of women deputy principals of schools: *Minister for Education v Cmr for Equal Opportunity* (1993) EOC ¶92-517.
- 10 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 ; [81 ALD 1](#); [\[2004\] FCA 1250](#); [BC200406283](#).
- 11 *Central Northern Adelaide Health Service v Atkinson* [\(2008\) 252 ALR 168](#) ; 222 FLR 207; [\[2008\] SASC 371](#); [BC200811606](#) at [\[130\]](#) per Gray J (in relation to race discrimination, although the criteria assisted those of a number of races, they shared a characteristic of disadvantage within the scope of (SA) [Equal Opportunity Act 1984](#) s 65; in

(C) Discrimination

relation to age discrimination the Health Centre directed its practice toward the medical needs of young people in the area of drugs, education, employment, poverty, mental health and family and sexual relationships within *ibid* s 85P).

12 *Pulteney Grammar School v Equal Opportunity Tribunal* (2007) 250 LSJS 309 ; [\[2007\] SASC 308](#); [BC200706834](#).

[80-605] Charities and testamentary dispositions

The paragraph below is current to **07 March 2018**

Most anti-discrimination legislation allows instruments (including wills) that confer a benefit on persons or groups which relates to the grounds or attributes specified in the legislation to be exempt from its provisions. The exemption covers acts done to give effect to the disposition.¹

At Commonwealth level, there are statutory criteria for an entity to be considered a charity.² This definition has been introduced into all exemptions for charities at Commonwealth level.³

Notes

- 1** (CTH) [Racial Discrimination Act 1975](#) s [8\(2\)](#) (benefits for charitable purpose given by a registered charity); (CTH) [Sex Discrimination Act 1984](#) ss [24\(2\)](#) (disposal of land by will or gift), [36](#) (benefits for charitable purposes given by a registered charity); (CTH) [Disability Discrimination Act 1992](#) ss [26\(2\)](#) (disposal of land by will or gift), [49](#) (conferral of charitable benefits for charitable purposes by a registered charity); (CTH) [Age Discrimination Act 2004](#) ss [30\(2\)](#) (disposal of land by will or gift), [34](#) (benefits for a charitable purpose given by a registered charity)
(NT) [Anti-Discrimination Act 1992](#) s [52](#) (dispositions to charities only)
(NSW) [Anti-Discrimination Act 1977](#) ss 49N (accommodation provided by charitable body), 49ZYN(3) (disposal of goods or services by will or gift — age), 55 (charitable benefits)
(QLD) [Anti-Discrimination Act 1991](#) ss [79](#) (disposal of land by will or gift), [91](#) (accommodation with charitable purposes), [110](#) (charitable benefits)
(SA) [Equal Opportunity Act 1984](#) ss ss 38(2), [60\(2\)](#), [75\(2\)](#), [85O](#) (disposal of land by will or gift), [45](#), [64](#), [80](#), [85N](#), [85Z](#) (charitable benefits)
(TAS) [Anti-Discrimination Act 1998](#) s [23](#) (benefits to charities only)
(VIC) [Equal Opportunity Act 2010](#) ss [51](#) (disposal of land by will or gift), [80](#) (dispositions to charities)
(WA) [Equal Opportunity Act 1984](#) ss ss 21A(2), 35AN(2), 35ZA(2), 47A(2), 66ZH(2)(a) (disposal of land by will or gift), 70 (charitable benefits).
There are no equivalent provisions in the Australian Capital Territory (other than in (ACT) [Discrimination Act 1991](#) s [26\(1\)\(c\)](#) the provision of accommodation by a charitable body).
- 2** (CTH) [Charities Act 2013](#).
- 3** (CTH) [Charities \(Consequential Amendments and Transitional Provisions\) Act 2013](#).

[80-610] Public health

The paragraph below is current to **07 March 2018**

In Queensland there is a general exemption under anti-discrimination legislation to acts reasonably necessary to protect public health.¹ Other jurisdictions provide public health exceptions on limited grounds.²

Notes

- 1 (QLD) [Anti-Discrimination Act 1991](#) s 107. See also *ibid* s 108 (acts necessary to protect workplace health and safety). As to the public health exemption on the ground of disability see [80-365].
- 2 (CTH) [Disability Discrimination Act 1992](#) s 48 (infectious disease). *Ibid* s 54A(4) applies to an assistance animal that has an infectious disease.
(ACT) [Discrimination Act 1991](#) ss 56 (impairment), 57C (employment and work), 57J (goods, services and facilities)
(NT) [Anti-Discrimination Act 1992](#) s 55 (impairment)
(NSW) [Anti-Discrimination Act 1977](#) s 49P (infectious diseases)
(SA) [Equal Opportunity Act 1984](#) ss 79A (spread of infectious diseases), 85ZL (health or safety)
(TAS) [Anti-Discrimination Act 1998](#) s 47 (infectious diseases)
(VIC) [Equal Opportunity Act 2010](#) s 86 (impairment or physical features)
(WA) [Equal Opportunity Act 1984](#) ss 66U (regulations re infectious diseases), s 66ZM (age).

[80-615] Compliance with statutory requirements, awards, etc

The paragraph below is current to **07 March 2018**

The general rule of statutory construction is that a later Act prevails over an Act passed earlier.¹ Accordingly, all anti-discrimination legislation except the (CTH) [Racial Discrimination Act 1975](#) and the (CTH) [Australian Human Rights Commission Act 1986](#) contains provisions sustaining the effect of some other legislation, or of actions taken under it, for example awards or workplace agreements made under industrial legislation. Industrial legislation is sustained² and, in addition, orders of courts are unaffected; in most cases, action taken to comply with the requirement of another Act is also sustained.³ The (CTH) [Racial Discrimination Act 1975](#) provides, on the other hand, that no law of the Commonwealth, a State or a Territory is to apply to reduce the enjoyment of a right on grounds of race, colour or national or ethnic origin below that of persons of another race, colour or national or ethnic origin.⁴

If 'protective' legislation, such as prescribing maximum weights which women may lift, is not consistently applied it may not be a defence against failure to employ.⁵ A statutory requirement clause has been held to cover only what is necessary to carry out specific directions given under statutory authority that involve no discretion.⁶ Acts done in compliance with State legislation which only allowed for the registration of male boxers may not be unlawfully discriminatory, although such legislation may have been inconsistent with the (CTH) [Sex Discrimination Act 1984](#) if the provisions of the latter Act relating to the acts of qualifying bodies had been expressed to bind the States.⁷

Notes

- 1 See generally STATUTES [\[385-670\]](#).
- 2 See, for example, *Gibbs v Commonwealth Bank of Australia* (1997) EOC ¶192-887, HREOC (employer acting in general compliance with award relating to relocation immune from complaint of sex discrimination: the special cases of *Gulliver v Council of City of Sydney* (1987) EOC ¶192-185 and *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#) distinguished). Contrast (NSW) [Anti-Discrimination Act 1977](#) s 54 which, since 1994, excludes acts done in compliance with industrial awards from being covered by the exemption. However, in *New South Wales v*

(C) Discrimination

Amery (2006) 230 CLR 174 ; [226 ALR 196](#); [\[2006\] HCA 14](#); [BC200603095](#), Gleeson CJ at [13] (with whom Callinan J at [203] agreed in obiter) and Heydon J at [210] considered that the existence of an industrial agreement or an award may be a relevant circumstance in determining whether a 'requirement or condition' is reasonable in a case of indirect discrimination under the New South Wales legislation. The other majority judges (Gummow, Hayne and Crennan JJ) found that no 'requirement or condition' had been imposed and did not need to address the issue of reasonableness.

- 3 (CTH) [Sex Discrimination Act 1984](#) s 40, (CTH) [Disability Discrimination Act 1992](#) s 47; see also ss 51 (pensions and allowances), 52 (migration); (CTH) [Age Discrimination Act 2004](#) s 39; see also ibid ss 40 (tax), 41 (pensions and allowances), 41A (Commonwealth employment programs), 42 (health), 43 (migration)

(ACT) [Discrimination Act 1991](#) s 30; see also ibid s 25A (adoption)

(NT) [Anti-Discrimination Act 1992](#) s 53

(NSW) [Anti-Discrimination Act 1977](#) s 54 (since 1994 expressly does not include industrial awards)

(QLD) [Anti-Discrimination Act 1991](#) s 106; see also ibid ss 106A (compulsory retirement under Act, award or industrial agreement or public sector instrument before 30 June 1994), 106B (Act does not apply to citizenship or visa requirements imposed under State government policies)

(SA) [Equal Opportunity Act 1984](#) does not provide a single exemption; see, however, ibid s 85F(4)

(TAS) [Anti-Discrimination Act 1998](#) s 24

(VIC) [Equal Opportunity Act 2010](#) ss 75 (statutory authority), 76 (orders of courts or tribunals)

(WA) [Equal Opportunity Act 1984](#) s 69 (however s 69(1)(a), 69(1)(b), 69(1)(e) are no longer operative: ibid s 69(2)).

See *Dunstan v von Doussa (No 2)* [\(2008\) 102 ALD 327](#) ; [\[2008\] FCA 827](#); [BC200804213](#) (termination of complaint in dispute involving claim of victimisation under (CTH) [Sex Discrimination Act 1984](#) s 94 in the Director of Public Prosecutions advocating against parole in exercise of statutory functions).

- 4 (CTH) [Racial Discrimination Act 1975](#) s 10. See *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#); *Mabo v Queensland* (1988) 166 CLR 186 ; [83 ALR 14](#); 66 ALJR 408; [BC8802641](#). Contrast *Vanstone v Clark* (2005) 147 FCR 299 ; [224 ALR 666](#); [\[2005\] FCAFC 189](#); [BC200507054](#) ((CTH) [Racial Discrimination Act 1975](#) s 10 did not require reading down of section of the (CTH) Aboriginal and Torres Strait Islander Commission Act 1989 (now (CTH) [Aboriginal and Torres Strait Islander Commission Amendment Act 2005](#)) concerning standard of behaviour of officers because indigenous persons required to meet same test as non-indigenous persons and no adjustment of rights necessary). As to the Commonwealth definition of 'race' and the operation of (CTH) [Racial Discrimination Act 1975](#) s 10 see [80-330].
- 5 *Najdovska v Australian Iron & Steel Pty Ltd* (1985) EOC ¶92-140; 12 IR 250, EOT(NSW) (affirmed *Australian Iron & Steel Pty Ltd v Najdovska* [\(1988\) 12 NSWLR 587](#) ; 29 IR 349).
- 6 *Waters v Public Transport Corp* (1991) 173 CLR 349 ; [103 ALR 513](#); [BC9102598](#). See also *Director-General of Education v Breen* (1982) 2 IR 93 , CA(NSW) (decided on the law before the (NSW) [Anti-Discrimination Act 1977](#) was amended in 1982); *Kitt v Tourism Commission* (1987) EOC ¶92-196, EOT(NSW) (where the (NSW) Public Service Act 1979 (repealed) s 66 was mandatory) (on appeal *Kitt v Tourism Commission* [\(1987\) 11 NSWLR 686](#) ; (1987) EOC ¶92-209, SC(NSW)).
- 7 *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306 ; [191 ALR 739](#); [\[2001\] FCA 1740](#); [BC200107734](#).

[80-620] Religious bodies and practices

The paragraph below is current to **07 March 2018**

All anti-discrimination legislation except the (CTH) [Racial Discrimination Act 1975](#) and the (CTH) [Disability Discrimination Act 1992](#) provides exemptions for religious practices such as the ordination of priests and ministers, the selection and training of persons for religious work and the acts or practices of a religious body that conform to the doctrines of the religion or are necessary to avoid injuring the

(C) Discrimination

religious susceptibilities of adherents.¹ However, the Commonwealth exemption for acts or practices that conforms to the doctrines of religion or are necessary to avoid injury to the religious susceptibilities of adherents does not apply to the provision of Commonwealth-funded aged care.² Some legislation provides, in addition, for exemption in relation to the provision of education conducted in accordance with the doctrines of a religion, if there is discrimination to avoid injuring the religious susceptibilities of adherents.³

In New South Wales the policies and practices of faith-based organisations are exempt from discrimination on grounds of trans-gender or homosexuality in relation to adoption services.⁴

A body that engages in largely commercial activities cannot be classified as a religious body, even if the activities are motivated by religious convictions and/or its profits are directed towards a religious body.⁵

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) s 37; (CTH) [Age Discrimination Act 2004](#) s 35
(ACT) [Discrimination Act 1991](#) s 32
(NT) [Anti-Discrimination Act 1992](#) s 51
(NSW) [Anti-Discrimination Act 1977](#) s 56. See *OV v Members of the Board of the Wesley Mission Council* (2010) 270 ALR 542, [2010] NSWCA 155; [BC201004640](#) on whether refusal of adoption services to gay couple fell within ibid s 56 exception (note also ibid s 59A). For identification of the religion in issue see Basten JA and Handley AJA (Allsop P agreeing) at [32]-[33], [55].
(QLD) [Anti-Discrimination Act 1991](#) s 109; see also ibid ss 25(3) (work), 41 (education), 48 (age), 80 (sites or land of religious significance), 90 (accommodation)
(SA) [Equal Opportunity Act 1984](#) ss 50, 85ZM; see also ss 34(3), 35(2b), 85Z, 85ZB, 85ZE, 85ZN
(TAS) [Anti-Discrimination Act 1998](#) ss 51, 52; see also ss 27(1), 42
(VIC) [Equal Opportunity Act 2010](#) ss 82 (religious bodies), 83 (religious schools), 84 (discrimination in compliance with a person's religious beliefs). See *Cobaw v Christian Youth Camps* [2010] VCAT 1613 (refusal to accept adventure resort booking from gay project targeting same sex attracted young people in rural areas) decided under predecessor (VIC) Equal Opportunity Act 1995.
(WA) [Equal Opportunity Act 1984](#) s 72.
- 2 (CTH) [Sex Discrimination Act 1984](#) s 37(2) (provided the act or practice is not connected with the employment of persons to provide that aged care).
- 3 (CTH) [Sex Discrimination Act 1984](#) s 38
(ACT) [Discrimination Act 1991](#) s 33(2)
(NT) [Anti-Discrimination Act 1992](#) s 37A. See also ibid s 30(2).
(QLD) [Anti-Discrimination Act 1991](#) s 41 (note this exemption only appears to cover the exclusion of applicants). See also ibid s 25.
(SA) [Equal Opportunity Act 1984](#) s 34(3) (applies in relation to employment but does not apply to race, impairment or age). Note also the absence of reference to religious susceptibilities.
(TAS) [Anti-Discrimination Act 1998](#) ss 27(1)(a) (applies to gender discrimination only 'in a religious institution'), 51 (applies to the employment of staff in religious or educational institutions conducted in accordance with the tenets of a particular religion), 51A (applies to religious belief discrimination in relation to admission of students to educational institutions conducted according to the tenets of a particular religion. Note also the absence of reference to religious susceptibilities).

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) s 83

(WA) [Equal Opportunity Act 1984](#) ss 66(1) (applies to hospitals as well as schools), 73. These only apply to applications for admission and employment.

There are no equivalent provisions in the other Commonwealth Acts or the New South Wales legislation.

See also [80-450].

- 4 (NSW) [Anti-Discrimination Act 1977](#) s 59A. 'Faith-based organisation' means one established or controlled by a religious organisation and accredited under the (NSW) [Adoption Act 2000](#) to provide adoption services.

The case of *OV v Members of the Board of the Wesley Mission Council* (2010) 270 ALR 542 ; [2010] NSWCA 155; [BC201004640](#) (discrimination against homosexual couple in the provision of adoption services) was decided before (NSW) [Anti-Discrimination Act 1977](#) s 59A was enacted.

See also [80-450], [80-510].

- 5 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 ; [2014] VSCA 75; [BC201402714](#) at [244]-[254] per Maxwell P (Neave JA concurring) (a body that provided the hire of camping facilities was not a 'body established for religious purposes').

[80-625] Superannuation and insurance

The paragraph below is current to **07 March 2018**

Superannuation issues may arise in relation to employment, or as an aspect of the provision of goods and services, or as an area of activity in itself, as may insurance. In effect, these two activities have been treated as one specific area of discrimination. All anti-discrimination legislation except the (CTH) [Racial Discrimination Act 1975](#) provides exemptions from other parts of the Acts (effectively those relating to discrimination in the areas of employment and goods and services)¹ for superannuation and insurance.²

Since the (CTH) [Sex Discrimination Act 1984](#) and the (CTH) [Life Insurance Act 1995](#) have provided extensive coverage of the fields of sex discrimination and insurance, it is doubtful whether the State (and the Territory) legislation will prevail where there is any inconsistency. This has been settled in relation to the application of State impairment discrimination legislation.³

An insurance provider who refused to provide travel insurance to a woman suffering from breast cancer failed to make out the grounds necessary to invoke the insurance exemption under the (CTH) [Disability Discrimination Act 1992](#) as it had processed the woman's application in a formulaic way, relying on stereotypes rather than having proper regard to her particular circumstances.⁴ An argument that the insurance exemption under the New South Wales legislation only applies to the terms on which insurance is offered and does not extend to a refusal to provide insurance has been rejected.⁵

Notes

- 1 See [80-410]-[80-430] (work), [80-445] (work exemption: superannuation), [80-520]-[80-530] (goods and services).
- 2 (CTH) [Sex Discrimination Act 1984](#) ss 41 (insurance), 41A, 41B (superannuation); (CTH) [Disability Discrimination Act 1992](#) s 46 (superannuation and insurance); see also *ibid* s 51, relating to pensions or allowances; (CTH) [Age Discrimination Act 2004](#) ss 37 (superannuation and insurance), 38 (acts done under superannuation legislation); see also *ibid* s 41 (pensions or allowances)
- (ACT) [Discrimination Act 1991](#) ss 28 (insurance), 29 (superannuation)
- (NT) [Anti-Discrimination Act 1992](#) s 49 (insurance and superannuation)

(C) Discrimination

(NSW) [Anti-Discrimination Act 1977](#) ss 36 (superannuation — sex), 37 (insurance — sex), 38Q (superannuation — transgender), 49 (superannuation — marital status), 49Q (superannuation and insurance — disability), 49ZYS (superannuation — age), 49ZYT (insurance — age)

(QLD) [Anti-Discrimination Act 1991](#) ss 58-65 (superannuation), 72-75 (insurance)

(SA) [Equal Opportunity Act 1984](#) s 49 (insurance — sex), [78\(1\)\(c\)](#), [78\(1\)\(d\)](#), [78\(2\)](#) (superannuation — disability), [85](#) (insurance — disability), [85R](#) (insurance and superannuation — age)

(TAS) [Anti-Discrimination Act 1998](#) ss 30 (insurance and superannuation — gender, marital status or relationship status), 33 (superannuation — age), 34 (insurance — age), 44 (insurance and superannuation — disability)

(VIC) [Equal Opportunity Act 2010](#) ss 47 (insurance), 78, 79 (superannuation); see also *ibid* s 77 (pensions)

(WA) [Equal Opportunity Act 1984](#) ss 34 (superannuation — sex or marital status), 35AR(aa)-(bb) (superannuation — gender history), 66P(aa)-(bb) (superannuation — impairment), 66T (insurance — impairment), 66ZL(1)(c)-(f) (superannuation — age), 66ZR (insurance — age).

- 3 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 ; [65 ALR 637](#); [BC8601433](#) (to the extent that there is inconsistency, the (CTH) [Disability Discrimination Act 1992](#) s 46 may prevail over the (CTH) [Life Insurance Act 1995](#) and any superannuation legislation and will prevail over State legislation).
- 4 *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88 ; [79 ALD 552](#); [\[2004\] FCA 396](#); [BC200401693](#) (exemption under (CTH) [Disability Discrimination Act 1992](#) s 46(1)(g)). Compare *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433 ; (2001) EOC ¶93-143; [2001] FMCA 15 (exemption under (CTH) [Disability Discrimination Act 1992](#) s 46(1)(f)).
- 5 *Leslie v Barrister's Sickness & Accident Fund Pty Ltd* (2004) EOC ¶93-309 ; [2003] NSWADT 216.

[80-630] Voluntary bodies or voluntary work

The paragraph below is current to **07 March 2018**

There are discrimination law exemptions for voluntary bodies and the activities undertaken on their behalf in relation to their membership and the benefits they provide to members.¹ The exemption under the Commonwealth legislation has been held not to extend to the body's relationships with non-members.²

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 23(3)(c) (accommodation only), 39 (all attributes, admission of, benefits to, members only); (CTH) [Disability Discrimination Act 1992](#) ss 25(3)(b) (accommodation for persons of particular disability), 49 (charitable bodies, in pursuance of gift; note that voluntary body not synonymous with charitable body); (CTH) [Age Discrimination Act 2004](#) s 36 (admission of, and benefits to, members)
- (ACT) [Discrimination Act 1991](#) s 31 (admission of members and benefits to persons, whether members or non-members)
- (NT) [Anti-Discrimination Act 1992](#) s 41(2) (goods and services to persons generally by non-profit association)
- (NSW) [Anti-Discrimination Act 1977](#) ss 49N(5) (accommodation for persons with particular disability), 57 (admission of, and benefits to, members; excludes credit unions and building societies)
- (QLD) [Anti-Discrimination Act 1991](#) s 46(2) (goods and services)
- (SA) [Equal Opportunity Act 1984](#) ss 40(4) (accommodation for one sex or marital status), [85L\(4\)](#) (accommodation for particular age groups)
- (TAS) [Anti-Discrimination Act 1998](#) no provision for voluntary bodies generally, but see *ibid* s 23 (charitable bodies, in pursuance of purpose)

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) s 4(1) (definitions of 'employee', 'employer' and 'employment' expressly do not include unpaid workers or volunteers); see also *ibid* ss 66-69 (private club exceptions)

(WA) [Equal Opportunity Act 1984](#) ss 4(1) (definition of 'voluntary body'), 21(3)(c) (accommodation for persons of particular sex or marital status), 47(3)(b) (accommodation for persons of particular race), 66L(3)(b) (accommodation for persons of particular impairment), 66ZG(3)(c) (accommodation for persons of particular age), 71 (admission of, and benefits to, members).

There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#). As to exemptions for clubs see also [80-580].

- 2 See, for example, *Gardner v All Australia Netball Assn Ltd* (2003) 197 ALR 28 ; 174 FLR 452; (2003) EOC ¶93-277; [2003] FMCA 81 (decision to exclude pregnant netball player from competition not covered by exemption as she was not, and could not be, a member).

[80-635] Competitive sport

The paragraph below is current to **07 March 2018**

Although not in a form usually expressed as a general exemption, activities in competitive sport¹ that are exempted² from anti-discrimination law provisions warrant the status of a general exemption. The exemptions are stated to apply to persons rather than clubs,³ although the latter area is the one to which they mainly apply. The exemptions, insofar as they relate to sex, are available where the strength, stamina or physique of the competitors are relevant,⁴ although in New South Wales and Tasmania the exemption is more general in form⁵ and in South Australia include an exemption for exclusion based on sex where the exclusion is designed to increase participation in the sport by persons of a particular sex.⁶ All jurisdictions have provided exemptions in relation to persons who are not reasonably capable of performing the relevant actions, in relation to selection, and in relation to exclusion from sport conducted for persons with a particular disability.⁷ Only three jurisdictions, however, have in addition included a general provision making discrimination unlawful in relation to sporting activities for people with disabilities.⁸ All jurisdictions except the Commonwealth have included exemptions which permit the restriction of sporting activities to people of a particular age.⁹ In New South Wales, it is not unlawful to discriminate on the ground of nationality or place of birth in selection or eligibility to compete.¹⁰ It should be noted that, except in South Australia, the legislation requires that there be no discrimination on any ground, that is, the exemption does not apply in relation to participation in coaching, umpiring and administration.¹¹ In six jurisdictions there is no exemption of any kind in relation to sport for children under 12 years of age.¹² In Victoria, there are exemptions for single sex competitions which are necessary to allow participants to progress to elite level national or international competitions, and to permit single sex competitions (or restrictions on the participation of one sex) to facilitate participation in the sport.¹³

Notes

- 1 While the term 'competitive sport' is most commonly used, 'sporting activity' is used in:
(CTH) [Disability Discrimination Act 1992](#) s 28
(NSW) [Anti-Discrimination Act 1977](#) ss 38 (sex), 38P (transgender), 49ZYW, 49R
(SA) [Equal Opportunity Act 1984](#) s 81 (disability) (*ibid* ss 48, 85Q refer to 'competitive sporting activity')
(WA) [Equal Opportunity Act 1984](#) ss 35AP, 66N (impairment) (gender history) (these and *ibid* ss 35, 66ZJ(3) refer to 'sporting activity').
- 2 As to exclusion or exemption see [80-405] note 5.

(C) Discrimination

- 3** (CTH) [Sex Discrimination Act 1984](#) s [42](#); (CTH) [Disability Discrimination Act 1992](#) s [28](#)
(ACT) [Discrimination Act 1991](#) ss [41](#) (sex), [57](#) (disability), [57M](#) (age)
(NT) [Anti-Discrimination Act 1992](#) s [56](#)
(NSW) [Anti-Discrimination Act 1977](#) ss 38 (sex), 38P (transgender), 49R (disability), 49ZYW (age); see also *ibid* s 22I (sexual harassment in sport)
(QLD) [Anti-Discrimination Act 1991](#) s [111](#)
(SA) [Equal Opportunity Act 1984](#) ss [48](#) (sex), [81](#) (disability), [85Q](#) (age)
(TAS) [Anti-Discrimination Act 1998](#) ss [29](#) (gender, competitors over 12), [31](#) (age), [43](#) (disability)
(VIC) [Equal Opportunity Act 2010](#) ss [71](#) (the only general unlawfulness provision), [72](#) (exceptions)
(WA) [Equal Opportunity Act 1984](#) ss 35 (sex), 35AP(1) (gender history), 66N (impairment), 66ZJ (age).
There are no equivalent provisions in the (CTH) [Racial Discrimination Act 1975](#) or the (CTH) [Age Discrimination Act 2004](#).
- 4** (CTH) [Sex Discrimination Act 1984](#) s [42](#)
(ACT) [Discrimination Act 1991](#) s [41\(1\)](#)
(NT) [Anti-Discrimination Act 1992](#) s [56\(1\)\(a\)](#)
(QLD) [Anti-Discrimination Act 1991](#) s 111(1)(a) (sex), 111(3) (extends to gender identity)
(SA) [Equal Opportunity Act 1984](#) s [48](#)
(VIC) [Equal Opportunity Act 2010](#) s [72\(1\)](#) (sex and gender identity)
(WA) [Equal Opportunity Act 1984](#) ss 35(1), 35AP(2) (extends to gender reassignment).
- 5** (NSW) [Anti-Discrimination Act 1977](#) ss 38 (sex), 38P (transgender — not confined to matters of strength, stamina, physique)
(TAS) [Anti-Discrimination Act 1998](#) s [29](#) (competitors over 12).
- 6** (SA) [Equal Opportunity Act 1984](#) s 48 (1)(b).
- 7** (CTH) [Disability Discrimination Act 1992](#) s [28\(3\)](#)
(ACT) [Discrimination Act 1991](#) s [57\(1\)](#)
(NT) [Anti-Discrimination Act 1992](#) s [56\(1\)\(b\)](#), [56\(1\)\(d\)](#)
(NSW) [Anti-Discrimination Act 1977](#) s 49R
(QLD) [Anti-Discrimination Act 1991](#) s 111(1)(b), 111(1)(d)
(SA) [Equal Opportunity Act 1984](#) s [81](#)
(TAS) [Anti-Discrimination Act 1998](#) s [43](#)
(VIC) [Equal Opportunity Act 2010](#) s [72\(2\)\(a\)](#), [72\(2\)\(c\)](#)
(WA) [Equal Opportunity Act 1984](#) s 66N(3).
- 8** (CTH) [Disability Discrimination Act 1992](#) s [28\(1\)](#)
(VIC) [Equal Opportunity Act 2010](#) s [71](#) (extends to all attributes)
(WA) [Equal Opportunity Act 1984](#) s 66N(1).
- 9** (ACT) [Discrimination Act 1991](#) s [57M\(1\)](#)
(NT) [Anti-Discrimination Act 1992](#) s [56\(1\)\(c\)](#)
(NSW) [Anti-Discrimination Act 1977](#) s 49ZYW
(QLD) [Anti-Discrimination Act 1991](#) s 111(1)(c)
(SA) [Equal Opportunity Act 1984](#) s [85Q](#)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) s [31](#)

(VIC) [Equal Opportunity Act 2010](#) s [72\(2\)\(b\)](#)

(WA) [Equal Opportunity Act 1984](#) s 66ZJ(3).

10 (NSW) [Anti-Discrimination Act 1977](#) s 22.

11 (CTH) [Sex Discrimination Act 1984](#) s [42\(2\)](#); (CTH) [Disability Discrimination Act 1992](#) s [28\(2\)](#)

(ACT) [Discrimination Act 1991](#) ss [41\(2\)](#), [57\(2\)](#), [57M\(2\)](#)

(NT) [Anti-Discrimination Act 1992](#) s [56\(3\)](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 38, 38P(2), 49ZYW

(QLD) [Anti-Discrimination Act 1991](#) s 111(4)

(TAS) [Anti-Discrimination Act 1998](#) s [3](#) (definition of 'competitive sporting activity' excludes coaching, umpiring or administration)

(VIC) [Equal Opportunity Act 2010](#) s [70](#) (the exemptions apply only to 'competitive sporting activity', which does not include coaching, umpiring or administration, not to 'participating in a sporting activity' which does include coaching, umpiring or administration)

(WA) [Equal Opportunity Act 1984](#) ss 35(2)(a)-(d), 35AP(1)(b), 66N(2), 66ZJ(2), 66ZJ(4).

However, note that the (SA) [Equal Opportunity Act 1984](#) includes 'the provision of coaching or umpiring in sport' in the definition of 'service' for the purpose of the Act: *ibid* s 5.

12 (CTH) [Sex Discrimination Act 1984](#) s [42\(2\)\(e\)](#)

(NT) [Anti-Discrimination Act 1992](#) s [56\(2\)](#) (only in relation to sex)

(QLD) [Anti-Discrimination Act 1991](#) s 111(2) (sex)

(TAS) [Anti-Discrimination Act 1998](#) s [29](#) (gender only)

(VIC) [Equal Opportunity Act 2010](#) s [72\(3\)](#)

(WA) [Equal Opportunity Act 1984](#) s 35(2)(e).

There are no equivalent provisions in the other jurisdictions.

13 (VIC) [Equal Opportunity Act 2010](#) s [72\(1A\)](#), [72\(1B\)](#) (as amended by the (VIC) [Equal Opportunity Amendment Act 2011](#)).

[80-640] Tribunal-granted temporary exemptions

The paragraph below is current to **07 March 2018**

Most anti-discrimination legislation enables the relevant Equal Opportunity Tribunal or Commission (the President of the Anti-Discrimination Board in New South Wales) to grant exemptions from the operation of the legislation for limited periods (three, five or in one instance, 10 years) and publication is usually required, normally in the relevant Gazette.¹ In the Commonwealth jurisdiction, tribunal-granted exemptions are not available for sexual or disability harassment, racial discrimination, advertising or victimisation, and the same applies to racial vilification in the Australian Capital Territory and advertising and victimisation in Western Australia.² Where there is a power to grant exemptions, it is subject to review by the Administrative Appeals Tribunal (or, in the Australian Capital Territory, Northern Territory or New South Wales, by the respective Civil and Administrative Tribunal).³ The Australian Capital Territory legislation provides criteria that require the Human Rights Commission, in granting temporary exemptions, to keep in mind the need to promote an acceptance of, and compliance with, the legislation, and the desirability, where relevant, of permitting certain discriminatory actions to redress past discrimination.⁴ The Northern Territory, South Australian and Tasmanian legislation contains a similar

reference to redressing the effect of past discrimination; a factor that has been present in some successful applications.⁵

The term 'tribunal-granted' is used to distinguish these exemptions from general and ground or area-specific exemptions included in the legislation. The tribunals will not, consistent with the purposes of the legislation, be over-ready to grant or renew exemptions,⁶ and will not grant such exemptions where satisfied that a permanent exemption in the legislation would already apply.⁷ In the area of employment, exemption has been refused for a proposal to employ topless women for promotional purposes,⁸ and for employment of console operators of a particular sex in a service station because of the need to clean toilets.⁹ An exemption related to age discrimination was granted to a recruitment agency in professional fields requiring minimum experience levels,¹⁰ but refused where a recruitment agency sought an exemption to allow it to take photographs of candidates.¹¹ In the area of education, exemptions have been granted to permit restriction of students of a horse riding course to persons of a particular height and weight,¹² to permit additional recruitment of girls to bring a boys' school to a satisfactory co-educational mix,¹³ but not granted where sought to enrol equal numbers of boys and girls.¹⁴ However, an application by the Catholic Education Office for an exemption to permit the offering of male-only teaching scholarships in order to encourage more men into the teaching profession was refused.¹⁵ The exemption was later granted after the Catholic Education Office revised its application to allocate equal numbers of scholarships to both men and women.¹⁶ In the area of goods and services, exemption has been granted to allow exclusion of males from a municipal swimming pool to enable assessment of the use by disadvantaged women in the area,¹⁷ and to allow operation of a single-sex fitness centre.¹⁸ An exemption related to age and gender was granted to allow differential charges for different groups.¹⁹ In the area of clubs, an exemption has been granted to exclude females, both as employees and customers, from a gay hotel and club,²⁰ and to permit the holding of a single-sex tennis tournament,²¹ but an exemption sought by a Filipino sporting association to restrict numbers of non-Filipinos in basketball competition to achieve majority Filipino players was refused.²² A series of exemptions has been granted to prevent the exclusion from employment of women in areas of the lead industry,²³ and to permit the appointment of female deputy school principals where there are two positions and there is a male deputy.²⁴ An exemption was granted to the Australian Olympic Committee to allow the alteration of its constitution to provide that women must hold positions of chair and deputy chair so as to ensure the representation of women.²⁵ Other exemptions, mainly in the employment area, have been granted,²⁶ including to enable contracting on the basis of nationality to undertake defence projects.²⁷

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 44-47 (five years, renewable; publication required); (CTH) [Disability Discrimination Act 1992](#) ss 55-58 (five years, renewable; publication required, but, the Commission may not grant exemption from the operation of ibid ss 31, 32 relating to disability standards); (CTH) [Age Discrimination Act 2004](#) ss 44-47 (five years, renewable; publication required)
- (ACT) [Discrimination Act 1991](#) ss 109, 110 (three years, renewable notifiable instrument under the (ACT) [Legislation Act 2001](#))
- (NT) [Anti-Discrimination Act 1992](#) s 59 (three years, renewable; publication required)
- (NSW) [Anti-Discrimination Act 1977](#) s 126 (10 years, renewable, by the President; publication required); see also ibid s 126A (Minister may certify a special needs program to promote special needs of groups affected by unlawful discrimination)
- (QLD) [Anti-Discrimination Act 1991](#) s 113 (five years, renewable; requires prior notice to Commissioner)
- (SA) [Equal Opportunity Act 1984](#) s 92 (three years, renewable; publication required)
- (TAS) [Anti-Discrimination Act 1998](#) ss 56, 58 (three years, renewable; publication required)

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) s 89 (five years, renewable; publication required). On the application of discretions see *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532 at [30] per Morris J.

(WA) [Equal Opportunity Act 1984](#) ss 135-137 (five years, renewable; publication required). For a description of the approach to the grant of exemptions under *ibid* s 135 see *Re Jupiter Holding Pty Ltd v Commissioner for Equal Opportunity* [2005] WASAT 202 at [33]; *Commissioner for Equal Opportunity v Adi Ltd* [2007] WASCA 261; [BC200710251](#) at [30], [72] per Martin CJ.

As to the relevant commissions and tribunals see [80-725]-[80-755].

- 2 (CTH) [Sex Discrimination Act 1984](#) s 44(1) (exemptions only available for *ibid* Divs 1, 2, and *ibid* ss 41(1)(e), 41B(1)(b)); (CTH) [Disability Discrimination Act 1992](#) s 55(1) (exemptions only available for *ibid* Pt 2 Divs 1, 2); (CTH) [Age Discrimination Act 2004](#) s 44(1) (exemptions only available for *ibid* Divs 2, 3)

(ACT) [Discrimination Act 1991](#) s 109(1) (exemptions only available for *ibid* Pts 3, 5, 7; *ibid* Pt 6 deals with racial, sexuality and HIV or AIDS vilification)

(WA) [Equal Opportunity Act 1984](#) s 135(1) (exemptions only available for *ibid* Pts II-IVB).

The other jurisdictions permit exemptions for any provision of the Act.

- 3 (CTH) [Sex Discrimination Act 1984](#) s 45; (CTH) [Disability Discrimination Act 1992](#) s 56; (CTH) [Age Discrimination Act 2004](#) s 45

(ACT) [Discrimination Act 1991](#) s 110 (reviewable by ACT Civil and Administrative Tribunal)

(NT) [Anti-Discrimination Act 1992](#) s 106(1).

(NSW) [Anti-Discrimination Act 1977](#) s 126(9)

(QLD) [Anti-Discrimination Act 1991](#) s 113A (Commissioner or interested party may appeal under the (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#)).

There are no equivalent provisions in the other jurisdictions.

- 4 (ACT) [Discrimination Act 1991](#) s 109(3).

- 5 (NT) [Anti-Discrimination Act 1992](#) s 59(3)

(SA) [Equal Opportunity Act 1984](#) s 92(6)

(TAS) [Anti-Discrimination Act 1998](#) s 56(2).

There are no equivalent provisions in the other jurisdictions.

See, for example, *Minister for Education v Cmr for Equal Opportunity* (1987) EOC ¶92-198, EOT(WA) (to allow appointment of one deputy principal in schools). See also *Practitioners' Guide to Equal Opportunity Law and Practice*, CCH, 1992 pp 460, 461 for notes of unreported cases; *Re an Application for Exemption by the Australian Journalists Assn* (1988) EOC ¶92-236, HREOC; *Approval of Submission of Amalgamation to Ballot of Municipal Officers' Assn of Australia* (1991) EOC ¶92-344; 38 IR 13, Industrial Relations Commission (CTH).

- 6 *Broken Hill Associated Smelters Pty Ltd v Human Rights and Equal Opportunity Commission* (1990) 12 AAR 98; (1990) EOC ¶92-302 (where the Commonwealth Administrative Appeals Tribunal partly overruled the Commission but granted only a brief extension of the exemption). See also *Re an Application for Exemption by National Australia Bank Ltd* (SA) (1989) EOC ¶92-248, EOT(SA) (discrimination on ground of race in making a special award involved).

- 7 See, for example, Notice to decline to grant a temporary exemption to Lourdes Hill College (HREOC, 12 May 2005) (exemption not granted as permanent exemption under (CTH) [Sex Discrimination Act 1984](#) s 35 and also *ibid* s 30(2)(g) would apply); Decision to decline to grant an application for temporary exemption sought by Plus 40 Pty Limited (HREOC, 30 August 2005) (application not granted because permanent exemption under either (CTH) [Age Discrimination Act 2004](#) s 33(b) or *ibid* s 33(c) or both, would apply).

- 8 *Prime Appointments Pty Ltd & Equal Opportunity Commissioner, Re* (1987) EOC ¶92-202 (no clear reason for not employing men in promotional roles).

- 9 *Application for Exemption by Thomas* (1980) EOC ¶53-790. As to exemptions in the area of work generally see [80-435]-[80-482].

- 10 *Re Koller* (1997) EOC ¶92-906, ADT(VIC).

- 11 *Re N2N People Pty Ltd* (2001) EOC ¶93-156; [2001] VCAT 44. Note that physical features is a prohibited ground of discrimination under the (VIC) [Equal Opportunity Act 2010](#).

(C) Discrimination

- 12** *Re Exemption Application* (2000) EOC ¶93-046.
- 13** *Re Baptist* (1997) EOC ¶92-905, ADT(VIC).
- 14** *Pulteney Grammar School v Equal Opportunity Tribunal* (2007) 250 LSJS 309 ; [\[2007\] SASC 308](#); [BC200706834](#) (exemption to enrol equal numbers of boys and girls was refused because the purpose of the (SA) [Equal Opportunity Act 1984](#) is equality of opportunity (not just elimination of discrimination) and there was no evidence that students' equality of opportunity was compromised).
- 15** Notice declining to grant an exemption sought under (CTH) [Sex Discrimination Act 1984](#) s 44: Catholic Education Office scholarships for male Trainee Teachers, Archdiocese of Sydney (HREOC, 27 February 2003).
- 16** Notice of Grant of Temporary Exemption to Catholic Education Office after new application offers equal number of male and female scholarships (HREOC, 19 March 2004) (expires 18 March 2008). As to exemptions in the area of education generally see [80-505]-[80-510].
- 17** *Re Application for Exemption of City of Brunswick* (1992) EOC ¶92-450. As to exemptions in the area of goods and services generally see [80-520]-[80-530].
- 18** *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC ¶92-782, EOB(VIC); Notice of Grant of Temporary Exemption to Ballarat Health and Fitness Pty Ltd for a male only gym in Ballarat and Notice declining to grant a request for exemption to employ men only (HREOC, 7 November 2005) (exemption granted for gym to offer services only to men, but not to employ only male instructors).
- 19** *Re Addis* (1997) EOC ¶92-898, ADT(VIC).
- 20** *Re an Application for Exemption by Morodara Pty Ltd and Fourth Elf Pty Ltd* (1998) EOC ¶92-920.
- 21** *Commissioner for Equal Opportunity v Parsons* (1990) EOC ¶92-278 ; [BC8900362](#), SC(SA) (directing a rehearing of a refusal to grant a very general exemption).
- 22** *Philippine Australian Sports Assoc of Victoria v Tolentino and Basketball Australia* (2001) EOC ¶93-151; [2001] VCAT 22. As to exemptions for clubs generally see [80-580].
- 23** *Broken Hill Associated Smelters Pty Ltd v Human Rights and Equal Opportunity Commission* (1990) 12 AAR 98 ; (1990) EOC ¶92-302, AAT; 'Broken Hill Associated Smelters for lead smelter' (June 1991, *Australian and New Zealand Equal Opportunity Reporter*, CCH, Sydney, ¶49-760); *Re Application for Exemption by Broken Hill Associated Smelters Pty Ltd* (1988) EOC ¶92-235, HREOC. See also *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 ; [118 ALR 80](#); (1993) EOC ¶92-548; [BC9305085](#), Fed C of A, Full Court.
- 24** *Minister for Education v Cmr for Equal Opportunity* (1987) EOC ¶92-198, EOT(WA). See also, for Victorian exemption for appointment of deputy principals, *Australian and New Zealand Equal Opportunity Law and Practice*, CCH, Sydney, ¶52-360.
- 25** *Re an Application for Exemption by Australian Olympic Committee* (1998) EOC ¶92-921, ADT(VIC).
- 26** These are published in *Australian and New Zealand Equal Opportunity Law and Practice*, CCH, Sydney, and are noted in ¶49. See also the following examples in *Australian and New Zealand Equal Opportunity Law and Practice*, CCH, Sydney: New South Wales Water Board in relation to its Aboriginal Employment Strategy (March 1992, ¶51-690); State Government Employees' Credit Union (NSW) for scholarships for women (March 1992, ¶51-690); Association of Women Theatre Workers (SA) for employment of women in theatre workshops (March 1984, ¶53-760). See also note 9 above.
- 27** *Commissioner for Equal Opportunity v Adi Ltd* [2007] WASCA 261 ; [BC200710251](#).

(vi) Harassment

(A) Introduction

[80-645] General

The paragraph below is current to **07 March 2018**

Anti-discrimination legislation both defines sexual harassment¹ and determines the areas in which it will be unlawful.² Disability harassment is made unlawful by the Commonwealth, in the area of employment,

education and in the provision of goods and services.³ In relation to race, the Commonwealth and Western Australian legislation in effect makes racial harassment unlawful, and in other jurisdictions racial vilification laws have a similar, though more limited, effect.⁴ Anti-vilification laws on the grounds of homosexuality or sexuality have also been enacted in the Australian Capital Territory, New South Wales and Queensland, on the grounds of HIV and AIDS in the Australian Capital Territory and New South Wales, and on the grounds of transgender status or gender identity in New South Wales and Queensland.⁵ In the Northern Territory, harassment on any of the prohibited grounds of discrimination will be unlawful as the legislation defines 'discrimination' to include harassment on the basis of an attribute.⁶

Notes

- ¹ See [80-655]-[80-675]. As to the areas of harassment see [80-650].
- ² As to sexual harassment as sex discrimination see [80-665].
- ³ See [80-680].
- ⁴ See [80-700], [80-705].
- ⁵ See [80-710].
- ⁶ See [80-690].

[80-650] Areas in which harassment is proscribed

The paragraph below is current to **07 March 2018**

In all jurisdictions, sexual harassment applies in the areas of employment and education.¹ In most jurisdictions, the sexual harassment provisions are such that the unlawful conduct applies to all areas in which the legislation makes sex discrimination unlawful.² In all jurisdictions, sexual harassment is unlawful in relation to accommodation³ and, except in Western Australia, the provision of goods and services.⁴ In New South Wales, South Australia and Western Australia, there is no explicit provision for harassment in relation to clubs (though South Australia does refer to harassment by the governing body of an association).⁵ Employment cases may be relevant to the education area,⁶ and there have been cases on grounds of sex discrimination that might have been pursued as involving harassment as discrimination.⁷ There have, however, been cases brought in the area of sexual harassment of, and by, students,⁸ and other cases that could be regarded as harassment on grounds of race, although brought as matters of racial discrimination.⁹

Racial harassment applies only 'otherwise than in private' in the Commonwealth jurisdiction,¹⁰ and in the areas of employment, education and accommodation in Western Australia.¹¹ Disability harassment under the Commonwealth legislation operates in the major areas of discrimination.¹²

In the Northern Territory, aside from the specific provisions relating to sexual harassment, the definition of 'discrimination' generally includes harassment on the basis of any attribute for which discrimination is made unlawful under the legislation.¹³

Tasmania provides for a broad range of attributes upon which harassment is unlawful, and a broad range of areas in which it is unlawful. Consequently, there are broad exceptions to the prohibition on conduct that offends, humiliates, intimidates, insults or ridicules, for fair reports, absolute privilege and good faith acts for public interest purposes such as science, art and religion.¹⁴

(C) Discrimination

Notes

- 1 (CTH) [Sex Discrimination Act 1984](#) ss 28A-28E (employment and related areas), [28F](#) (education)
(ACT) [Discrimination Act 1991](#) ss [59](#), [60](#)
(NT) [Anti-Discrimination Act 1992](#) ss 22(1), 28(a) (education), 28(b) (work)
(NSW) [Anti-Discrimination Act 1977](#) ss 22A-22D (employment and related areas), 22E (education)
(QLD) [Anti-Discrimination Act 1991](#) ss 13-23 (work), 37-39 (education), 117-120 (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': ibid s 6)
(SA) [Equal Opportunity Act 1984](#) s [87\(1\)-\(3\)](#), [87\(7\)](#), [87\(8\)](#)
(TAS) [Anti-Discrimination Act 1998](#) ss 17, [22\(1\)\(a\)](#) (employment), [22\(1\)\(b\)](#) (education and training)
(VIC) [Equal Opportunity Act 2010](#) ss 15, 93-97 (employment and related areas), [98](#) (education)
(WA) [Equal Opportunity Act 1984](#) ss 24 (employment), 25 (education).
As to sexual harassment generally see [80-655]-[80-675].
- 2 (CTH) [Sex Discrimination Act 1984](#) ss [28B-28L](#)
(ACT) [Discrimination Act 1991](#) ss [59-64](#)
(NT) [Anti-Discrimination Act 1992](#) s [22\(1\)](#)
(QLD) [Anti-Discrimination Act 1991](#) ss [117-120](#) (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': ibid s 6)
(TAS) [Anti-Discrimination Act 1998](#) ss [17\(1\)](#), [22\(1\)](#)
(VIC) [Equal Opportunity Act 2010](#) ss [15](#), 92-102.
The Western Australian legislation only prohibits sexual harassment in the areas of employment, education and accommodation, the South Australian sexual harassment provisions do not extend to partnerships, associations or in the disposal of land, and the New South Wales sexual provisions do not cover sexual harassment in registered clubs.
- 3 (CTH) [Sex Discrimination Act 1984](#) s [28H](#)
(ACT) [Discrimination Act 1991](#) s [63](#)
(NT) [Anti-Discrimination Act 1992](#) ss [22\(1\)](#), 28(c)
(NSW) [Anti-Discrimination Act 1977](#) s 22G
(QLD) [Anti-Discrimination Act 1991](#) ss 81-85, 117-120 (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': ibid s 6)
(SA) [Equal Opportunity Act 1984](#) s [87\(6\)\(c\)](#)
(TAS) [Anti-Discrimination Act 1998](#) ss [17\(1\)](#), [22\(1\)\(d\)](#)
(VIC) [Equal Opportunity Act 2010](#) s [100](#)
(WA) [Equal Opportunity Act 1984](#) s 26.
As to the area of accommodation see [80-550]-[80-565].
- 4 (CTH) [Sex Discrimination Act 1984](#) s [28G](#) (including the provision of facilities)
(ACT) [Discrimination Act 1991](#) s [62](#) (including the provision of facilities)
(NT) [Anti-Discrimination Act 1992](#) ss [22\(1\)](#), 28(d) (including the provision of facilities)
(NSW) [Anti-Discrimination Act 1977](#) s 22F
(QLD) [Anti-Discrimination Act 1991](#) ss [45](#), [46](#) (except assisted reproductive technology services: ibid s 45A), 117-120 (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': ibid s 6)

(C) Discrimination

(SA) [Equal Opportunity Act 1984](#) s s 87(6)(a), [87\(6aa\)](#) (goods), s 87(6)(b) (services), [87\(9\)](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [17\(1\)](#), [22\(1\)\(c\)](#) (including the provision of facilities)

(VIC) [Equal Opportunity Act 2010](#) s [99](#).

As to the area of the provision of goods and services see [80-520]-[80-530].

- 5 (CTH) [Sex Discrimination Act 1984](#) s [28K](#) (the provision relates to harassment by a member of the committee of management of a member or prospective member of the club)

(ACT) [Discrimination Act 1991](#) s [64](#) (the provision relates to harassment by a member of the committee of management of a member or prospective member of the club)

(NT) [Anti-Discrimination Act 1992](#) ss [22\(1\)](#), 28(e)

(QLD) [Anti-Discrimination Act 1991](#) ss 93-95, 117-120 (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': *ibid* s 6)

(SA) [Equal Opportunity Act 1984](#) s [87\(6g\)](#)

(TAS) [Anti-Discrimination Act 1998](#) ss [17\(1\)](#), [22\(1\)\(e\)](#)

(VIC) [Equal Opportunity Act 2010](#) s [98](#).

There are no equivalent provisions in South Australia or Western Australia. In New South Wales there is a prohibition in relation to sport:

(NSW) [Anti-Discrimination Act 1977](#) s 22I.

As to discrimination in the area of clubs see [80-570]-[80-585].

- 6 See, for example, *Breen v Director-General of Education* (1982) 2 IR 93; *Minister of Education v Gameau* (1984) EOC ¶92-012; (1981) 48 SAIR (Pt 1) 736 (appeal on merits *Minister of Education v Gameau* (1984) EOC ¶92-012; (1981) 48 SAIR (Pt 1) 736, Industrial Court (SA), Full Court); *Langley v University of New South Wales* (1984) EOC ¶92-018, CA(NSW); *Director-General of Education v Atkins* (1989) EOC ¶92-263; [BC8901924](#), CA(NSW); *A v B* (1991) EOC ¶92-367 (alleged harassment of matron of male boarding school by house master: dismissed).
- 7 *Connaughton v Melbourne High School Staff Assn* (1985) EOC ¶92-136, EOB(VIC); *Fares v Box Hill College of TAFE* (1992) EOC ¶92-391, EOB(VIC).
- 8 *Chambers v James Cook University of North Queensland* (1995) EOC ¶92-682, IRC of A (lecturer and students); *M v Australian National University* (unreported, IRC, Moore J, No AI 1331 of 1995, 20 August 1996) (lecturer allegedly harassing students); *Gauci v Kennedy* (2007) EOC ¶93-467; [\[2007\] FCA 1051](#); [BC200705515](#) (tutor allegedly being harassed by student); *Huang v University of New South Wales* [\[2005\] FMCA 463](#); [BC200503246](#) (leave refused: *Huang v University of New South Wales* [\[2006\] FCA 626](#); [BC200603632](#)) (student allegedly harassed by fellow student).
- 9 *Metwally v University of Wollongong* (1984) EOC ¶92-030, EOT(NSW). See also *Kwa v Secretary for Local Government* (1988) EOC ¶92-231, EOT(WA); *Kordos v Plumrose (Aust) Ltd* (1989) EOC ¶92-256, County Court (VIC).
- 10 (CTH) [Racial Discrimination Act 1975](#) s [18C](#). As to racial harassment see [80-685].
- 11 (WA) [Equal Opportunity Act 1984](#) ss 49A (employment and commission agents), 49B (education), 49C (accommodation).
- 12 (CTH) [Disability Discrimination Act 1992](#) ss [35](#) (employment), [37](#) (education), [39](#) (goods and services). As to disability harassment see [80-680]. As to the areas of discrimination see [80-405]-[80-590].
- 13 (NT) [Anti-Discrimination Act 1992](#) s [20\(1\)\(b\)](#)
- 14 (TAS) [Anti-Discrimination Act 1998](#) s [55](#).

(B) Sexual Harassment

[80-655] Definitions

The paragraph below is current to **07 March 2018**

(C) Discrimination

Sexual harassment is prohibited in all the legislation relating to discrimination on the ground of sex.¹ Sexual harassment does not, except in Tasmania,² explicitly extend to the grounds of marital status or pregnancy.

Legislation in the Northern Territory and Western Australia requires as components of sexual harassment unwelcome conduct of a sexual nature that results, or that the recipient believes on reasonable grounds may result, in disadvantage in employment (the 'detriment test').³ A broader test, and applies in similar terms in other jurisdictions (including the Northern Territory) requiring there to be an unwelcome or unsolicited act of a sexual nature that can reasonably be expected to make the recipient feel 'offended, humiliated or intimidated', thus substituting a reasonable person test for the earlier 'detriment' test.⁴

Notes

- 1** (CTH) [Sex Discrimination Act 1984](#) ss [28A-28L](#)
(ACT) [Discrimination Act 1991](#) ss [58-64](#)
(NT) [Anti-Discrimination Act 1992](#) s [22](#), Pt 4
(NSW) [Anti-Discrimination Act 1977](#) ss 22A-22J. Under former provisions of that Act harassment has been held to be an unlawful act as part of the definition of discrimination on grounds of sex: see *O'Callaghan v Loder* [[1983](#)] 3 NSWLR 89 ; (1984) EOC ¶92-023; (1983) 5 IR 320, SC(NSW) (confirmed *Aldridge v Booth* (1986) EOC ¶92-177, HREOC; (affirmed *Aldridge v Booth* (Cakeshop Case) ([1988](#)) 80 ALR 1 ; [15 ALD 540](#); (1988) EOC ¶92-222 per Spender J, Fed C of A)). See also [80-665].
(QLD) [Anti-Discrimination Act 1991](#) ss [117-120](#) (the unlawful conduct is not specified, as in the other legislation, as applying to any particular area, but is linked directly to 'the purposes of the Act': *ibid* s 6)
(SA) [Equal Opportunity Act 1984](#) s [87](#)
(TAS) [Anti-Discrimination Act 1998](#) s [17](#)
(VIC) [Equal Opportunity Act 2010](#) ss [15](#), 92-102
(WA) [Equal Opportunity Act 1984](#) ss 24-26.
- 2** (TAS) [Anti-Discrimination Act 1998](#) s [17\(1\)](#) (extends to race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities and disability).
- 3** (NT) [Anti-Discrimination Act 1992](#) s [22\(2\)\(f\)](#) (also includes the broader test: see note 4 below)
(WA) [Equal Opportunity Act 1984](#) s 24 (the 'detriment' test).
As to the detriment test see [80-670].
- 4** (CTH) [Sex Discrimination Act 1984](#) s [28A](#)
(ACT) [Discrimination Act 1991](#) s [58\(1\)](#) (unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated)
(NT) [Anti-Discrimination Act 1992](#) s [22\(2\)\(e\)\(ii\)](#) (also includes the detriment test: see note 4 above, and another test based on the intention of the person doing the alleged harassing to offend, humiliate or intimidate: *ibid* s 22(2)(e)(i))
(NSW) [Anti-Discrimination Act 1977](#) s 22A (in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated)
(QLD) [Anti-Discrimination Act 1991](#) s 119(f); see also *ibid* s 120 (includes another test based on the intention of the person doing the alleged harassing to offend, humiliate or intimidate: *ibid* s 119(e))
(SA) [Equal Opportunity Act 1984](#) s [87\(9\)](#) (a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) s [17\(3\)](#) ('offended, humiliated, insulted or ridiculed')

(VIC) [Equal Opportunity Act 2010](#) s [92](#) (in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated).

As to causing offence, humiliation or intimidation under the 'reasonable harassed person' test see further [80-660].

[80-660] Causing offence, humiliation or intimidation

The paragraph below is current to **07 March 2018**

The more recent definition of 'sexual harassment' (in legislation now in force in all jurisdictions except Western Australia),¹ is unwelcome conduct of a sexual nature in circumstances in which a reasonable person would have anticipated the subject would feel offended, humiliated or intimidated.² Whether conduct is unwelcome is a subjective question,³ but whether it is of a sexual nature and will lead to a person reasonably feeling offended, humiliated or intimidated is an objective question.⁴ Reasonableness is defined in two ways.⁵ Only the Northern Territory and Queensland legislation spell out the circumstances which may be relevant to causing the feeling of offence, humiliation or intimidation, with the limitation being reasonableness.⁶ Relevant circumstances in determining whether a person reasonably feels offended, threatened or humiliated include the sex, age, race or impairment of the harassed person, the relationship between that person and the person engaging in the conduct and other circumstances of the harassed person.⁷ Failure to have a formal policy against sexual harassment is neither 'conduct of a sexual nature' nor specific conduct in relation to the specific person or persons harassed.⁸

Notes

1 As to the nature of the various definitions see [80-655].

2 (CTH) [Sex Discrimination Act 1984](#) s [28A\(1\)](#)

(ACT) [Discrimination Act 1991](#) s [58\(1\)](#)

(NT) [Anti-Discrimination Act 1992](#) s [22\(2\)\(e\)\(ii\)](#)

(NSW) [Anti-Discrimination Act 1977](#) s 22A

(QLD) [Anti-Discrimination Act 1991](#) s 119(f)

(SA) [Equal Opportunity Act 1984](#) s [87\(9\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s [17\(3\)](#) (ibid s 17(1) prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities and disability)

(VIC) [Equal Opportunity Act 2010](#) s [92](#).

As to Western Australia see [80-670].

For examples of conduct of a sexual nature that has been found to lead to a person reasonably being offended, humiliated or intimidated or would be anticipated as such by a reasonable person see [80-670].

3 *Aldridge v Booth (Cakeshop Case)* [\(1988\) 80 ALR 1](#) ; [15 ALD 540](#); (1988) EOC ¶92-222 per Spender J, Fed C of A; *Horman v Distribution Group Ltd* [\[2001\] FMCA 52](#)  at [\[44\]](#) per Raphael FM (affirmed on appeal *Horman v Distribution Group Ltd* [\[2002\] FCA 219](#) ; [BC200200686](#)); *Wong v Su* [\[2001\] FMCA 108](#) ; [BC200107021](#) at [\[18\]](#) per Driver FM; *Daley v Barrington* [\[2003\] FMCA 93](#) ; [BC200301586](#) at [\[33\]-\[34\]](#) per Raphael FM.

(C) Discrimination

- 4 'Conduct of a sexual nature' is defined in:

(ACT) [Discrimination Act 1991](#) s 58(2)

(SA) [Equal Opportunity Act 1984](#) s 87(9)(b)

(VIC) [Equal Opportunity Act 2010](#) s 92

(WA) [Equal Opportunity Act 1984](#) s 24(4).

See also *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [\[2001\] FCA 418](#); [BC200101644](#) at [\[109\]](#) per Moore J; *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6 at [84]-[85] per Driver FM; *Horman v Distribution Group Ltd* [\[2001\] FMCAfam 52](#)  at [\[50\]](#) per Raphael FM (affirmed on appeal *Horman v Distribution Group Ltd* [\[2002\] FCA 219](#) ; [BC200200686](#)); *Stanley v Service to Youth Council Inc* (2014) 225 FCR 317 ; [317 ALR 102](#); [\[2014\] FCA 643](#); [BC201404840](#) at [\[80\]-\[89\]](#) per White J (conduct not of a sexual nature of it does not involve or evidence sexual attraction, instinct, activity or relationships). See also *Styles v Clayton Utz (No 3)* (2011) 255 FLR 364 ; [\[2011\] NSWSC 1452](#); [BC201109149](#) (complainant must have been aware of the aspect of the conduct that made it sexual).

- 5 See [80-655].

- 6 (NT) [Anti-Discrimination Act 1992](#) s 22(3)

(QLD) [Anti-Discrimination Act 1991](#) s 120(a)-(f).

- 7 (NT) [Anti-Discrimination Act 1992](#) s 22(3)(a)-(d)

(QLD) [Anti-Discrimination Act 1991](#) s 120(a)-(f). As examples of the relevance of the relationship between the person harassing and the harassed person and of other circumstances of the harassed person see *Tulk v Moore* (1996) EOC ¶92-870 (young women in need of work harassed by older male employer who was able to terminate their employment at any time, and occurred on an island away from families and usual support networks); *Hambleton v Gabriel the Professional Pty Ltd* (1996) EOC ¶92-791 (woman anxious to re-enter workforce and obtain employment for family's economic benefit sexually harassed by a prospective employer).

- 8 *Employment Services Australia Pty Ltd v Poniatowska* [\[2010\] FCAFC 92](#) ; [BC201005221](#) (inadequate response is not conduct of a sexual nature).

[80-665] Sexual harassment as sex discrimination

The paragraph below is current to **07 March 2018**

Although legislation in all jurisdictions has defined sexual harassment,¹ it has been held that certain behaviour constitutes unlawful discrimination on the grounds of sex, provided it involves, or could result, if refused, in less favourable treatment of the person on the ground of sex,² and includes conduct unwelcome to the recipient, or some other form of detriment.³ The interpretation giving rise to the finding that a complaint of sexual harassment constituted unlawful discrimination was based on New South Wales legislation prior to the 1997 inclusion of specific references to it, which did not contain the element of subjectivity.⁴ To involve unlawful discrimination there must be actual or constructive knowledge on the part of the employer that the conduct was unwelcome.⁵ It is now accepted that, although there are specific provisions defining sexual harassment, a claim of harassment based on the ground of sex discrimination may be established in some circumstances,⁶ and it is common for claims to involve breaches of both the sexual harassment provisions and the sex discrimination provisions.⁷

While some doubts have been expressed as to whether a claim of sex discrimination can be made out where the sexual harassment is perpetrated by a fellow employee rather than the employer,⁸ these doubts have been expressly disapproved in some cases.⁹ Conduct which falls short of sexual harassment may nevertheless be sufficient for a claim of sex discrimination if it constitutes less favourable treatment by reason of the person's sex.¹⁰

Notes

- 1 See [80-655].
- 2 *O'Callaghan v Loder* [1983] 3 NSWLR 89 ; (1984) EOC ¶92-023 at 75,498, 75,507; (1983) 5 IR 320, SC(NSW). The same was held in relation to the (CTH) *Sex Discrimination Act 1984* in *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1 ; 15 ALD 540; (1988) EOC ¶92-222 at 77, 93-5 per Spender J, Fed C of A (also noted that the Act might apply to homosexual harassment). See also *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 ; 85 ALR 503; (1989) EOC ¶92-250 at 77,427, 77,428 per French J, Fed C of A. See further *Bone v Powling* (1992) EOC ¶92-468, EOB(VIC) (homosexual harassment held to be sexual harassment).
- 3 *O'Callaghan v Loder* [1983] 3 NSWLR 89 ; (1984) EOC ¶92-023 at 75,505-7; (1983) 5 IR 320, SC(NSW). As to the need to show unwelcome conduct see *Hardy v Kelly* (1991) EOC ¶92-369, EOB(VIC); *Ashton v Wall* (1992) EOC ¶92-447, EOT(WA).
- 4 As to the element of subjectivity in the current definition of sexual harassment see [80-655].
- 5 *O'Callaghan v Loder* [1983] 3 NSWLR 89 ; (1984) EOC ¶92-023 at 75,506; (1983) 5 IR 320 per Matthews J.
- 6 See *Lyon v Godley* (1990) EOC ¶92-287, EOT(WA); *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217  at 233-5; 85 ALR 503 at 516-18; (1989) EOC ¶92-250 at 77,391, 77,392 per Lockhart J, Fed C of A; *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [2001] FCA 418; BC200101644 at [125]-[130] per Moore J; (expressly agreeing with the views of French J in *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 ; 85 ALR 503; (1989) EOC ¶92-250 and Spender J in *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1 ; 15 ALD 540; (1988) EOC ¶92-222, Fed C of A); *Wattle v Kirkland (No 2)* [2002] FMCA 135  at [67] per Driver FM; *Dee v Cmr of Police, NSW Police (No 2)* (2004) EOC ¶93-346 ; [2004] NSWADT 168 at [53]-[54] per the Tribunal (the Tribunal emphasising that a finding of sexual harassment does not automatically mean that a finding of sex discrimination will follow; the normal elements of sex discrimination must still be made out).
- 7 See, for example, *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [2001] FCA 418; BC200101644; *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6; *Horman v Distribution Group Ltd* [2001] FMCAfam 52  (affirmed on appeal *Horman v Distribution Group Ltd* [2002] FCA 219 ; BC200200686); *Wattle v Kirkland (No 2)* [2002] FMCA 135 ; *Asnicar v Mondo Consulting Pty Ltd* (2004) EOC ¶93-339 ; [2004] NSWADT 143; *Dee v Cmr of Police, NSW Police (No 2)* (2004) EOC ¶93-346 ; [2004] NSWADT 168.
- 8 See *Gilroy v Angelov* (2000) 181 ALR 57 ; (2001) EOC ¶93-118; [2000] FCA 1775; BC200007613 at [102] per Wilcox J; *Leslie v Graham* (2002) EOC ¶93-196 ; [2002] FCA 32; BC200200227 at [73] per Branson J.
- 9 *Hughes (formerly De Jager) v Car Buyers Pty Ltd* (2004) 210 ALR 645 ; 80 ALD 437; (2004) EOC ¶93-344; [2004] FMCA 526 at [41]-[43] per Walters FM; *Frith v Glen Straits Pty Ltd (t/as The Exchange Hotel)* (2005) 218 ALR 560 ; 191 FLR 18; (2005) EOC ¶93-380; [2005] FMCA 402 at [80] per Rimmer FM.
- 10 See, for example, *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 ; BC200107018 (supervisor's treatment did not amount to sexual harassment but was found to be less favourable treatment on the basis of the woman's sex as it was more objectionable and vexing to her than it would have been if she had been a man). See also *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 ; BC201005221 (a causal connection was alleged between sexual discrimination resulting from failure to properly address sexual harassment and termination of employment).

[80-670] 'Detriment' or unwelcome conduct

The paragraph below is current to 07 March 2018

(C) Discrimination

Older legislative definitions of 'sexual harassment' require, for a successful claim of sexual harassment,¹ that the conduct must not only be unwelcome but also that resistance to it is, on reasonable grounds, believed likely to disadvantage the person, or does actually cause disadvantage.² The test of reasonableness involves both a subjective and an objective test — both the particular employee and a reasonable person in the position of that employee would have to entertain a similar reasonable apprehension of detriment.³

Whether detriment under the older legislative definition, or conduct that may lead to a person reasonably feeling offended, humiliated or intimidated under the more recent legislative definition, sexual harassment has been construed widely to include kissing, touching or pinching, sexual propositions, gender-based insults and attempts at, or actual, sexual intercourse or other overt sexual connection,⁴ and may be implied, rather than be expressly covered by, the employment contract.⁵ Much depends on the quality and nature of the act.⁶

More specifically, it has been held that the following may constitute harassment:

- (1) questions of a sexually offensive kind, during an interview for appointment;⁷
- (2) a single action (rather than a series of actions);⁸
- (3) sexist remarks and untoward actions creating an alien working environment such as offensive telephone calls and the posting of offensive advertisements etc;⁹
- (4) the display of pornographic materials;¹⁰
- (5) sexual advances that deny 'quiet enjoyment' of employment;¹¹
- (6) direct sexual contact such as touching breasts, kissing, massaging and intercourse;¹²
- (7) persistent personal invitations in combinations with other acts;¹³ and
- (8) aggressive conduct following a rejection.¹⁴

Harassment of a homosexual nature that appears to be a requirement for holding a job would constitute unlawful sexual harassment.¹⁵ It has also been held that a dismissal for sexually harassing employees or customers is not necessarily unfair.¹⁶

Notes

¹ As to the nature of the various definitions see [80-655].

² (WA) [Equal Opportunity Act 1984](#) s 24(3).

See also (NT) [Anti-Discrimination Act 1992](#) s [22\(2\)\(f\)](#). The former (CTH) Sex Discrimination Act 1984 s 28(3) (amended) contained a similar provision.

³ *Spencer v Dowling* [\[1997\] 2 VR 127](#) ; (1996) EOC ¶92-851; [BC9603333](#), SC(VIC), Full Court.

⁴ *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023 at 75,505; (1983) 5 IR 320.

⁵ *O'Callaghan v Loder* [\[1983\] 3 NSWLR 89](#) ; (1984) EOC ¶92-023 at 75,500, 75,501; (1983) 5 IR 320.

(C) Discrimination

- 6 *Obieta v New South Wales Dept of Education and Training* [2007] FCA 86; [BC200700398](#) at [238] per Cowdroy J; *Gauci v Kennedy* (2007) EOC ¶93-467; [2007] FCA 1051; [BC200705515](#) at [22]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; [BC200107018](#) at [25] per Driver FM. As to work environment and culture see *Rich v Harrington* (2007) 245 ALR 106; [2007] FCA 1987; [BC200710886](#); *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92; [BC201005221](#).
- 7 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217; [85 ALR 503](#); (1989) EOC ¶92-250, HREOC; *Bennett v Everitt* (1988) EOC ¶92-244, HREOC. See also *Hambleton v Gabriel the Professional Pty Ltd* (1996) EOC ¶92-791 (unwelcome conduct during employment interview).
- 8 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217; [85 ALR 503](#); (1989) EOC ¶92-250 at 77,402 per Wilcox J. See also *Spencer v Dowling* [1997] 2 VR 127; (1996) EOC ¶92-851; [BC9603333](#), SC(VIC); *Johanson v Blackledge* (2001) 163 FLR 58; [2001] FMCA 6 (butcher selling a dog bone shaped to resemble a penis). Compare *Shiels v James* [2000] FMCA 2 (although act of flicking elastic bands on its own could not amount to conduct of a sexual nature, it did when forming part of broader pattern of sexual conduct).
- 9 *Hill v Water Resources Commission* (1985) EOC ¶92-127; 14 IR 158, EOT(NSW); *Horman v Distribution Group Ltd* [2001] FMCAfam 52 (affirmed on appeal *Horman v Distribution Group Ltd* [2002] FCA 219; [BC200200686](#)) (sexually explicit comments and insults); *Carroll v Zielke* (2002) EOC ¶93-177 (co-workers in cake shop made sexual comments about complainant's activities and decorated pastry items in the form of sexual organs); *Taylor v Sciberras* (2004) EOC ¶93-337; [2004] NSWADT 104 (ongoing threats and frequent telephone calls); *Styles v Murray Meats Pty Ltd* (2005) EOC ¶93-387; [2005] VCAT 914 (co-workers making sexist remarks and hanging meat from their pants in offensive ways).
- 10 *Horne v Press Clough Joint Venture* (1994) EOC ¶92-556 (complaint against the union); *Horne v Press Clough Joint Venture* (1994) EOC ¶92-591, EOT(WA) (complaint against the union and employer, damages); *Hopper v Mt Isa Mines Ltd* (1997) EOC ¶92-879, ADT(QLD); *Wilkinson v Buchan & Abre Pty Ltd* (2003) EOC ¶93-290, ADT(QLD).
- 11 *Lowen v Ivanov* (1986) EOC ¶92-169, EOB(VIC); *Lyon v Godley* (1990) EOC ¶92-287 at 77,894, 77,895, EOT(WA); *Alekovski v AAA Pty Ltd* (2002) EOC ¶93-219; [2002] FMCA 81 (harasser declaring his love for complainant, suggesting to discuss matters at his home, referring to complainant's relationship with her partner); *Bishop v Takla* (2004) EOC ¶93-333; [2004] FMCA 74; *Simpson v Boyson and Belli Park Stud Pty Ltd* (2004) EOC ¶93-316; [2003] QADT 19.
- 12 *Aldridge v Booth (Cakeshop Case)* (1988) 80 ALR 1; [15 ALD 540](#); (1988) EOC ¶92-222, Fed C of A; *Bennett v Everitt* (1988) EOC ¶92-244, HREOC; *Kiel v Weeks* (1989) EOC ¶92-245, HREOC; *Freestone v Kozma* (1989) EOC ¶92-249, HREOC; *Evans v Lee* (1996) EOC ¶92-822; [1996] HREOCA 8 (request for nude photographs of a client by a bank manager); *X v Y* [2000] NSWADT 122; *Elliott v Nanda* (2001) 111 FCR 240; (2001) EOC ¶93-135; [2001] FCA 418; [BC200101644](#) (touching breasts and bottom, attempting to kiss, massaging shoulders); *Leslie v Graham* (2002) EOC ¶93-196; [2002] FCA 32; [BC200200227](#) (attempt to have intercourse while away on work-related conference); *Caton v Richmond Club* (2003) EOC ¶93-293; [2003] NSWADT 202 (touching breasts, stroking arm and making sexual comments); *Dee v Cmr of Police, NSW Police (No 2)* (2004) EOC ¶93-346; [2004] NSWADT 168 (rubbing shoulders, hugging, massaging); *Beamish v Zheng* [2004] FMCA 60; [BC200401555](#) (physical compliments and sexual comments, questioning complainant's private life, attempting to touch breasts and offering to have intercourse). See also *Huang v University of New South Wales* [2008] FCA 1930; [BC200811505](#) (offensive comment about age and marital status of PhD student not harassment (instead she unreasonably considered sexual connotations in exchanges with her supervisors)).
- 13 *Doyle v Riley* (1995) EOC ¶92-748. See also *Gauci v Kennedy* (2007) EOC ¶93-467; [2007] FCA 1051; [BC200705515](#).
- 14 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; [BC200107018](#) at [30] per Driver FM.
- 15 *Bone v Powling* (1992) EOC ¶92-468, EOB(VIC). See also *Gabryelczyk v Hundt* (2005) EOC ¶93-388; [2005] NSWADT 94 (male apprentice subject to supervisor touching him on scrotum, making sexual propositions and calling him names such as 'homosexual'); *Lulham v Shanahan* (2003) EOC ¶93-296; [2003] QADT 11 (co-workers enquired about complainant's sexual preference, implied he was a paedophile and attended gay bars); *Bryce v City*

(C) Discrimination

Hall Albury Wodonga Pty Ltd (2004) EOC ¶93-349; [2004] VCAT 1519 (offensive sexual comments alluding to homosexuality).

- 16 *Nguyen v Vietnamese Community of Australia* (1994) EOC ¶92-644, IRC(NSW); *Aresca v Qantas Airways Ltd* (2002) EOC ¶93-187; *Copeland v Port Adelaide Central Mission Inc* (2003) EOC ¶93-268; *Duhbihur v Transport Appeal Board* (2005) 149 IR 126 ; (2005) EOC ¶93-411; [\[2005\] NSWSC 811](#); [BC200505858](#). Compare *Johnson v Dept of Justice* (2006) EOC ¶93-420 ; [2005] QIRComm 188 (although disrespectful, touching female co-workers and making comments while intoxicated outside work did not amount to sexual harassment and did not justify dismissal).

[80-675] Intent

The paragraph below is current to **07 March 2018**

Unlike the situation where sexual harassment is claimed as a matter of sex discrimination,¹ it is not necessary that the harasser be shown to have intended to sexually harass.² It is sufficient that the conduct was unwelcome to the person being harassed and the test does not require an enquiry into the subjective mind of the harasser.³ Further, the relevant reaction is that of the particular person harassed, not that of, for example, the majority of women,⁴ and it is not necessary that the person harassed was the conscious target of the conduct.⁵ However, once the conduct is established as unwelcome to the particular person harassed, the person's reaction of being offended, humiliated or intimidated by that conduct, or of apprehending detriment, must be a reasonable one or able to be anticipated by a reasonable person.⁶ Where an appearance of friendship may have developed, there must be grounds for the harasser having become aware that the sexual conduct being complained of was unwelcome.⁷ The Northern Territory and Queensland are the only jurisdictions to have provided an alternative test for unlawful sexual harassment which does rely on the intent of the harasser to offend the other person.⁸

Notes

- 1 See [80-665].
- 2 As to definitions of sexual harassment see [80-655].
- 3 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 ; [85 ALR 503](#); (1989) EOC ¶92-250 at 77,431 per Wilcox J. See also *Huang v University of New South Wales* [\[2008\] FCA 1930](#) ; [BC200811505](#) at [\[48\]](#) per Bennett J (the test is an objective one that does not take into account the motivation of the perpetrator or the individual) (citing *QB v Adult Multicultural Education Services* [2006] VCAT 1862  at [19]).

Some provisions provide that sexual harassment may occur if there is either an intent to harass, or a reasonable person would have felt harassed:
(NT) [Anti-Discrimination Act 1992](#) s 22(2)(e)
(QLD) [Anti-Discrimination Act 1991](#) s 119(e), 119(f).
- 4 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 ; [85 ALR 503](#); (1989) EOC ¶92-250 at 77,398 per Wilcox J.
- 5 *Johanson v Blackledge* (2001) 163 FLR 58 ; [2001] FMCA 6 (dog bone shaped into a penis intended for a different person but accidentally sold to complainant nevertheless found to constitute sexual harassment); *Font v Paspaley Pearls Pty Ltd* (2002) EOC ¶93-232 ; [2002] FMCA 142 (fact that harasser was gay and had no actual sexual designs on the female being harassed could not negate what was otherwise sexual harassment) (not followed *Frith v Glen Straits Pty Ltd (t/as The Exchange Hotel)* [\(2005\) 218 ALR 560](#) ; 191 FLR 18; (2005) EOC ¶93-380; [\[2005\] FMCA 402](#)).
- 6 As to reasonableness in feeling offended, humiliated or intimidated see [80-660]. As to reasonableness in apprehending detriment see [80-670].

(C) Discrimination

- 7 *O'Callaghan v Loder* [1983] 3 NSWLR 89 ; (1984) EOC ¶92-023; (1983) 5 IR 320 (decided prior to the subjective test provisions in the legislation); *Hardy v Kelly* (1991) EOC ¶92-369, EOB(VIC) (decided prior to the subjective test provisions in the legislation). See also *Wong v Su* [2001] FMCA 108 ; [BC200107021](#) (although conduct of sexual nature, no evidence that it was unwelcome as parties had voluntary sexual relationship that had continued over several years).
- 8 (NT) [Anti-Discrimination Act 1992](#) s 22(2)(e)(i) (with *ibid* s 22(2)(a)-(d))
(QLD) [Anti-Discrimination Act 1991](#) s 119(e).

(c) Disability, Racial and Other Forms of Harassment

[80-680] Disability harassment

The paragraph below is current to **07 March 2018**

The Commonwealth disability discrimination legislation extends the concepts of harassment beyond the ground of sex to cover explicitly the ground of disability.¹ The disability discrimination legislation does not define harassment, but provides that it is unlawful, in relation to a disability:

- (1) for a person to harass an employee, an applicant for employment, or a contract worker;²
- (2) for a member of staff to harass a student at, or applicant to, an educational institution;³ or
- (3) for a provider of goods, services or facilities to harass a person seeking to acquire or use them.⁴

It is also unlawful to harass in those areas a person who has an associate with a disability, in relation to a disability of the associate.⁵

Tasmania makes it unlawful to engage in conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of their disability.⁶

Notes

- 1 (CTH) [Disability Discrimination Act 1992](#) ss 35, 37, 39. However, note that the general definition of 'discrimination' in the (NT) [Anti-Discrimination Act 1992](#) s 20(1) includes harassment on the basis of any attribute for which discrimination is made unlawful under the legislation.
- 2 (CTH) [Disability Discrimination Act 1992](#) s 35. See, for example, *McDonald v Hospital Superannuation Board* (1999) EOC ¶93-025 (employee suffering from multiple sclerosis subject to adverse comments from colleague which were framed to cause discomfort or humiliation concerning his condition).
- 3 (CTH) [Disability Discrimination Act 1992](#) s 37.
- 4 *Ibid* s 39.
- 5 The effect of *ibid* ss 7, 8 extends the Act to cover associates, carers, assistants, assistance animals and disability aids (though those section headings refer only to 'discrimination').
- 6 (TAS) [Anti-Discrimination Act 1998](#) s 17(1).

[80-685] Racial harassment and offensive behaviour

The paragraph below is current to **07 March 2018**

Since 1995 the (CTH) [Racial Discrimination Act 1975](#) contains provisions prohibiting offensive behaviour based on racial hatred.¹ Although the description of the unlawful act is 'offensive behaviour', its content is stated in terms almost precisely the same as those applicable to one of the standard definitions of sexual harassment² — it occurs when an act is reasonably likely 'to offend, insult, humiliate or intimidate'.³ However, unlike the sex discrimination provision, an act of offensive behaviour must occur 'otherwise than in private' if it is to be unlawful.⁴ Western Australia has enacted specific racial harassment legislation, based on the 'detriment' test of harassment⁵ that operates in the area of employment, education and accommodation only.⁶ The jurisdictions which have legislated to proscribe racial vilification have expressed the law in terms of incitement to hatred, rather than of an act done because of the race of the person or group which is the target of the act.⁷

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) Pt IIA, ss 18B-18F.
- 2 See [80-655].
- 3 Ibid s 18C(1)(a). Compare (CTH) [Sex Discrimination Act 1984](#) s [28A\(1\)](#) (note the addition of 'insult' in the former).
- 4 (CTH) [Racial Discrimination Act 1975](#) s [18C\(1\)](#) (with a description in ibid s 18C(2) of actions that are taken not to be done in private). The operation of this provision was reformed by the (CTH) [Human Rights Legislation Amendment Act 2017](#) by reference to a 'reasonable member of the Australian community'.
- 5 See [80-655] note 3.
- 6 (WA) [Equal Opportunity Act 1984](#) ss 49A (employment), 49B (education), 49C (accommodation). The grounds referred to in ibid s 49D are the race, a characteristic that appertains generally to persons of the race, or a characteristic that is generally imputed to persons of the race, of the other person.
- 7 For legislation in those other jurisdictions see [80-700], [80-705].

[80-690] Harassment on other grounds

The paragraph below is current to **07 March 2018**

Tasmania prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.¹

Notes

- 1 (TAS) [Anti-Discrimination Act 1998](#) s [17\(1\)](#).

(vii) Incitement

[80-695] Incitement to unlawful acts

The paragraph below is current to **07 March 2018**

Aside from the provisions relating to racial, religious, sexuality and HIV or AIDS vilification,¹ two jurisdictions have provided that incitement is, in relation to one or more grounds, an unlawful act or **criminal** offence.² In all jurisdictions it is in itself an unlawful act to induce, cause, assist or instruct a person to do an act that is unlawful under the relevant legislation.³

Notes

- 1** See [80-700]-[80-710].
- 2** (CTH) [Racial Discrimination Act 1975](#) s [17](#) (unlawful); (CTH) [Disability Discrimination Act 1992](#) s [43](#) (**criminal** offence) (TAS) [Anti-Discrimination Act 1998](#) s [19](#) (unlawful by a public act to incite hatred towards, serious contempt for, or severe ridicule; applies to race, disability, sexual orientation or lawful sexual activity and religious belief, affiliation or activity).
- 3** (CTH) [Racial Discrimination Act 1975](#) s [17](#); (CTH) [Sex Discrimination Act 1984](#) s [105](#); (CTH) [Disability Discrimination Act 1992](#) s [43](#); (CTH) [Age Discrimination Act 2004](#) s [56](#). See also *Obieta v Human Rights and Equal Opportunity Commission* (2007) 94 ALD 117; [2007] FCA 85; [BC200700397](#) at [86]-[88] per Cowdroy J (referring to *Elliott v Nanda* (2001) 111 FCR 240; (2001) EOC ¶93-135; [2001] FCA 418; [BC200101644](#) at [163] where Moore J explained that (CTH) [Sex Discrimination Act 1984](#) s [105](#) (**liability** of a person who causes, instructs, induces, aids or permits another) applies where a person who is in a position to prevent unlawful conduct fails to do so).
(ACT) [Discrimination Act 1991](#) s [73](#) (in relation to *ibid* s 67A, Pts 3, 5, 7)
(NT) [Anti-Discrimination Act 1992](#) s [27](#)
(NSW) [Anti-Discrimination Act 1977](#) s 52
(QLD) [Anti-Discrimination Act 1991](#) ss [122](#), [123](#)
(SA) [Equal Opportunity Act 1984](#) s [90](#)
(TAS) [Anti-Discrimination Act 1998](#) s [21](#)
(VIC) [Equal Opportunity Act 2010](#) ss [105](#), [106](#)
(WA) [Equal Opportunity Act 1984](#) s 160.

(VIII) Racial, Homosexual and HIV or AIDS Vilification

[80-700] Racial, religious vilification and incitement

The paragraph below is current to **07 March 2018**

Under article 4(a) of the International Convention on the Elimination of all Forms of Racial Discrimination (the 'Racial Discrimination Convention'), there is an obligation to enact legislation to make it an offence to disseminate ideas based on racial superiority or hatred and to incite to racial hatred.¹ However, on ratification, Australia reserved its position in relation to implementation of article 4(a) of the Racial Discrimination Convention.² Under article 20 of the International Covenant on Civil and Political Rights, any propaganda for war shall be prohibited by law and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.³ The Commonwealth has legislated to proscribe offensive behaviour based on racial hatred,⁴ subject to exemptions.⁵ The uploading or posting of messages in an internet forum constitutes an act of publication.⁶ The words 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' in the Commonwealth legislation must be given their ordinary meanings, but only refer to serious incidents or effects and not mere slights.⁷ The test or standard is objective,⁸ but must take into

account the values, standards and circumstances of the group against whom the acts are directed.⁹ It is not necessary to prove that any one was actually offended, insulted, humiliated or intimidated.¹⁰

All other jurisdictions except the Northern Territory have enacted legislation that makes public incitement to acts of racial hatred, added to in some cases by ridicule and contempt, of varying degrees of severity either an unlawful act or a **criminal** offence or both.¹¹ In Western Australia the offence includes possession of material for dissemination with intent or likely to incite racial animosity or racist harassment.¹² A note in the Victorian legislation states that conduct for these purposes includes the use of internet or email to publish a statement.¹³ **Criminal** offences are in addition provided in the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria and Western Australia for serious racial vilification.¹⁴ Religious vilification is also prohibited in Queensland, Tasmania and Victoria.¹⁵ The fact that the term 'incite' has been used in both the unlawful act provisions and the separate offence has led, in New South Wales, to the view that 'incite' under the unlawful act provisions does not require proof of an intentional act.¹⁶ This approach has also been taken under the Commonwealth legislation.¹⁷

In New South Wales, an alderman was found to have incited others to hatred or serious contempt by making racist comments at a public launch and at a local council meeting.¹⁸ An employee was awarded substantial damages for racial abuse by his superior.¹⁹ Material placed on an internet website was found to have vilified the Jewish community in Australia in contravention of the racial hatred provisions of the Commonwealth legislation and an order was made that it be removed and preventing it from being republished.²⁰ In another case, leaflets distributed in letterboxes were found to be likely to offend, humiliate or intimidate members of the Jewish community when looked at objectively from the perspective of that group — it was not necessary to show that any particular person was actually offended.²¹ However, the actual effect of a public act, while not determinative, may be relevant in determining whether the act has the capacity to incite and also on the question of damages.²² A finding of unlawful racial vilification and an award of damages was made when an altercation broke out in a residential complex in the earshot of other residents and the offender made racially offensive insults, even though the complainant had provoked the altercation.²³

Notes

- 1 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 4, annexed to (CTH) [Racial Discrimination Act 1975](#) Sch.
- 2 Australia's declaration concerned its inability to treat as offences all the matters covered by (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 4(a) (dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement) noting acts of that kind are punishable only to the extent provided by the existing **criminal** law dealing with public order, public mischief, assault, riot, **criminal** libel, conspiracy and attempts. Australia also declared the competence of the Committee on the Elimination of Racial Discrimination to receive communications from individuals or groups claiming to be victims of a violation of Racial Discrimination Convention obligations.
- 3 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171). For authoritative interpretation of ibid art 20 by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art 20)* adopted at the Nineteenth Session, 29 July 1983 (available at <http://www.unhcr.org>).
- 4 (CTH) [Racial Discrimination Act 1975](#) Pt IIA, ss 18B-18F. See also [80-685]. For the definition of 'race' in discrimination legislation generally see [80-330]-[80-345]. On the **liability** of website 'host' for failure to remove offensive material within a reasonable time see *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475 ; [98 ALD 54](#); [\[2007\] FCA 1512](#); [BC200708449](#) (material caught by (CTH) [Racial Discrimination Act 1975](#) s [18C\(1\)\(a\)](#) but no relevant connection with race or ethnic origin as required by ibid s 18C(1)(b)).
- 5 For interpretation of questions of 'reasonableness', 'public interest' and 'good faith' in (CTH) [Racial Discrimination Act 1975](#) s [18D](#): see *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 ; [204 ALR 761](#); [\[2004\] FCAFC 16](#); [BC200400209](#) at [\[83\]-\[103\]](#) per French J, at [144] per Lee J; *Jones v Bible Believers' Church* [\[2007\]](#)

(C) Discrimination

- [FCA 55](#) ; [BC200700264](#). See also *Toben v Jones* (2009) 255 ALR 238 ; [2009] FCA 354; [BC200902696](#) at [95], [99] per Lander J (Court rejected the argument that the genuine academic purpose exemption under (CTH) [Racial Discrimination Act 1975](#) s 18D continued to apply and an injunction denied the respondent the right of free speech under ibid s 18D (relying on *Evans v New South Wales* (2008) 168 FCR 576 ; [104 ALD 234](#); [2008] FCAFC 130; [BC200806500](#) (where Court held invalid regulations that unlawfully infringe freedom of speech)), insofar as the injunctions act prospectively in relation to further publications they prevent publications which would be unlawful under the (CTH) [Racial Discrimination Act 1975](#) and do not to prevent any which are not unlawful; exemptions in ibid s 18D have no application to the question of contempt). The onus is on the party claiming exemption under (CTH) [Racial Discrimination Act 1975](#) s 18D: *Jones v Scully* (2002) 120 FCR 243 ; [71 ALD 567](#); [2002] FCA 1080; [BC200205008](#) at [127], [230] per Hely J; *Toben v Jones* (2009) 255 ALR 238 ; [2009] FCA 354; [BC200902696](#); *Clarke v Nationwide News Pty Ltd t/as Sunday Times* (2012) 201 FCR 389 ; [289 ALR 345](#); [2012] FCA 307; [BC201201708](#).
- 6 *Jones v Toben* (2002) 71 ALD 629 ; (2002) EOC ¶93-247; [2002] FCA 1150; [BC200205411](#) at [73]-[75] per Branson J (act of placing text and graphics on a website which is not password protected) (unaffected by *Toben v Jones* (2003) 129 FCR 515 ; [199 ALR 1](#); [2003] FCAFC 137; [BC200303363](#); applied in *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475 ; [98 ALD 54](#); [2007] FCA 1512; [BC200708449](#)). See also *Jones v Bible Believers' Church* [2007] FCA 55 ; [BC200700264](#).
- 7 *Jones v Scully* (2002) 120 FCR 243 ; [71 ALD 567](#); [2002] FCA 1080; [BC200205008](#) at [102]-[109] per Hely J; *Clarke v Nationwide News Pty Ltd t/as Sunday Times* (2012) 201 FCR 389 ; [289 ALR 345](#); [2012] FCA 307; [BC201201708](#) at [65]-[71] per Barker J.
- 8 *Jones v Scully* (2002) 120 FCR 243 ; [71 ALD 567](#); [2002] FCA 1080; [BC200205008](#) at [99] per Hely J; *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475 ; [98 ALD 54](#); [2007] FCA 1512; [BC200708449](#) at [21] per Gyles J.
- 9 *Eatock v Bolt* (2011) 197 FCR 261 ; [283 ALR 505](#); [2011] FCA 1103; [BC201107482](#) at [253] per Bromberg J; *Clarke v Nationwide News Pty Ltd t/as Sunday Times* (2012) 201 FCR 389 ; [289 ALR 345](#); [2012] FCA 307; [BC201201708](#).
- 10 *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475 ; [98 ALD 54](#); [2007] FCA 1512; [BC200708449](#) at [21] per Gyles J; *Jones v Scully* (2002) 120 FCR 243 ; [71 ALD 567](#); [2002] FCA 1080; [BC200205008](#) at [99] per Hely J.
- 11 (ACT) [Discrimination Act 1991](#) s 67A(1) (includes hatred, serious contempt or severe ridicule: unlawful act)
(NSW) [Anti-Discrimination Act 1977](#) s 20C(1) (includes hatred, serious contempt and severe ridicule: unlawful act)
(QLD) [Anti-Discrimination Act 1991](#) s 124A (includes hatred, serious contempt and severe ridicule). For unsuccessful application to join contributors to taxi service to racial vilification claim see *Black & White (Quick Service) Taxis Ltd v Sailor* [2008] QSC 077 ; [BC200802756](#).
(SA) [Racial Vilification Act 1996](#) s 4 (the act of racial vilification includes inciting hatred, serious contempt or severe ridicule but is confined to threatening physical harm to the person, or members of the group, or to their property; **criminal** but specific provision is made for damages). This is the same as serious vilification referred to in [80-705].
(TAS) [Anti-Discrimination Act 1998](#) s 19(a) (includes serious contempt or severe ridicule: unlawful act)
(VIC) [Racial and Religious Tolerance Act 2001](#) s 7(1) (includes serious contempt, revulsion or severe ridicule: unlawful act); note that the Act also prohibits religious vilification as well as racial vilification: see, for example, *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2005) EOC ¶93-377 ; [2004] VCAT 2510 (article and seminar found to incite hatred of the Islamic faith) (appeal allowed *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 206 FLR 56 ; [235 ALR 750](#); [2006] VSCA 284; [BC200610408](#) (matter discontinued).
(WA) **Criminal** Code ss 76-78 (racial hatred and racial harassment in the form of intending or likely to create, promote or increase animosity towards, harassment of, a racial group: **criminal** offences).
- 12 (WA) **Criminal** Code ss 79, 80, 80C, 80D.
- 13 (VIC) [Racial and Religious Tolerance Act 2001](#) ss 7, 24 note.
- 14 See [80-705].

(C) Discrimination

- 15 (QLD) [Anti-Discrimination Act 1991](#) ss 124A(1), [131A](#) (offences of serious religious vilification)
(TAS) [Anti-Discrimination Act 1998](#) s 19(d) (religious belief or affiliation (no offence of serious religious vilification))
(VIC) [Racial and Religious Tolerance Act 2001](#) ss [7\(1\)](#), [25](#) (offences of serious religious vilification).
- 16 *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 at [25]-[29], following the approach taken in *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC ¶92-701, EOT(NSW) and *R v D & E Marinkovic* (1996) EOC ¶92-841 (although the Tribunal noted previous decisions had not been consistent on that point).
- 17 See, for example, *Kelly-Country v Beers* (2004) 207 ALR 421; 181 FLR 352; [2004] FMCA 336; [BC200403414](#) at [85] (Brown FM noting that an act that would otherwise be unlawful is not excused if its perpetrator meant no offence by it).
- 18 *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC ¶92-701, EOT(NSW).
- 19 *Rugema v J Gadsten Pty Ltd (t/as Southcorp Packaging)* (1997) EOC ¶92-887, HREOC (damages of \$55,000 awarded due to employer's failure to take action to prevent racial abuse).
- 20 *Jones v Toben* (2002) 71 ALD 629; (2002) EOC ¶93-247; [2002] FCA 1150; [BC200205411](#) (affirmed on appeal *Toben v Jones* (2003) 129 FCR 515; 199 ALR 1; [2003] FCAFC 137; [BC200303363](#)). For similar holocaust denial constituting vilification see *Jones v Bible Believers' Church* [2007] FCA 55; [BC200700264](#).
- 21 *Jones v Scully* (2002) 120 FCR 243; 71 ALD 567; [2002] FCA 1080; [BC200205008](#). See also *Veloskey v Karagiannakis* [2002] NSWADTAP 18. Compare *Miller v Wertheim* (2002) EOC ¶93-223; [2002] FCAFC 156; [BC200202722](#) (special leave to the High Court of Australia refused) and *Miller v Wertheim* (unreported, HC, S226/2002, 20 June 2003) (while speech may have been reasonably likely to offend Orthodox Jewish community, in the circumstances the causal nexus with race was not established because the criticism was prompted by their divisive and destructive activities not because they were of the Jewish race).
- 22 *Veloskey v Karagiannakis* [2002] NSWADTAP 18; *McGlade v Lightfoot* (2002) 124 FCR 106; 73 ALD 385; [2002] FCA 1457; [BC200207066](#) at [44] per Carr J; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; [BC200006905](#) at [28] per Drummond J (affirmed on appeal *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56; (2001) EOC ¶93-141; [2001] FCA 123; [BC200100446](#)); *Jones v Scully* (2002) 120 FCR 243; 71 ALD 567; [2002] FCA 1080; [BC200205008](#) at [99]-[100] per Hely J.
- 23 *Kimble v Orr* [2003] NSWADT 49 (although the Tribunal noted that the award of damages would have been greater if the complainant had behaved less provocatively).

[80-705] Serious racial vilification

The paragraph below is current to **07 March 2018**

In some jurisdictions a more serious, **criminal** mode of vilification is provided for, that of serious racial vilification.¹ The essence of the offence in New South Wales, Queensland, South Australia (in South Australia this is the only form of racial vilification enacted) and Victoria is that there is incitement to threaten physical harm towards the property or persons of a racial group,² and in Western Australia, to create, promote or increase animosity towards, or harassment of, a racial group.³ The Victorian legislation also makes it an offence to intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, the persons of a racial group.⁴ In New South Wales, South Australia and Victoria the consent of the Attorney-General or the Director of Public Prosecutions is required for the prosecution of an offence,⁵ and in Queensland a written consent from the Crown Law Officer.⁶

(C) Discrimination

- 1 For the provisions proscribing racial vilification see [80-700].
- 2 (NSW) [Anti-Discrimination Act 1977](#) s 20D
(QLD) [Anti-Discrimination Act 1991](#) s 131A(1)
(SA) [Racial Vilification Act 1996](#) s 4 (under the South Australian legislation the act is referred to as 'racial vilification' rather than 'serious racial vilification').
(VIC) [Racial and Religious Tolerance Act 2001](#) s 24(1).
- 3 (WA) [Criminal](#) Code ss 77, 78, 79.
- 4 (VIC) [Racial and Religious Tolerance Act 2001](#) s 24(2).
- 5 (NSW) [Anti-Discrimination Act 1977](#) s 20D(2) (the consent of the Attorney-General is required for prosecution)
(SA) [Racial Vilification Act 1996](#) s 5 (the written consent of the Director of Public Prosecutions is required for prosecution)
(VIC) [Racial and Religious Tolerance Act 2001](#) s 24(4) (the written consent of the Director of Public Prosecutions is required for prosecution).
- 6 (QLD) [Anti-Discrimination Act 1991](#) s 131A(2).

[80-710] Homosexual and HIV or AIDS vilification

The paragraph below is current to **07 March 2018**

The Australian Capital Territory and Queensland have legislated to make vilification unlawful on the grounds of sexuality, and in New South Wales on the grounds of homosexuality.¹ The Australian Capital Territory and New South Wales have also legislated to make vilification unlawful when related to HIV or AIDS infection,² and the Australian Capital Territory, New South Wales and Queensland have each legislated to make transgender vilification unlawful (gender identity in the Australian Capital Territory).³ In each case, the provisions are modelled on those relating to racial vilification and there is provision for serious vilification.⁴ Vilification relating to sexuality or homosexuality, HIV or AIDS, and transgender status is constituted by a public act⁵ inciting hatred, serious contempt or severe ridicule of a person or group.⁶ As with racial hatred provisions, is it not necessary that the defendant intended to cause incitement, or to establish that anyone was actually incited.⁷

An exemption is available for academic, artistic, scientific or research purposes.⁸ In the case of HIV or AIDS vilification in New South Wales, the ground of vilification includes reference to a person 'thought to be' infected.⁹ The first reported case involved subjection of a man with an HIV-positive status to repeated acts of vilification by neighbours based on homosexual and HIV or AIDS status.¹⁰

Notes

- 1 (ACT) [Discrimination Act 1991](#) 67A(1)(g) (sexuality).
See further *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62 ; [236 ALR 385](#); [\[2006\] NSWCA 349](#); [BC200610346](#) (claim that (NSW) [Anti-Discrimination Act 1977](#) s 49ZT contravened the constitutional immunity for political speech) (followed *Owen v Menzies* (2010) 243 FLR 357 ; [\[2010\] QSC 387](#); [BC201007617](#) (similar claim under (QLD) [Anti-Discrimination Act 1991](#) s 124A(1)).
- 2 (ACT) [Discrimination Act 1991](#) s 67A(1)(c)
(NSW) [Anti-Discrimination Act 1977](#) ss 49ZXA-49ZXB.
- 3 (ACT) [Discrimination Act 1991](#) s 67A(1)(b)

(C) Discrimination

- (NSW) [Anti-Discrimination Act 1977](#) ss 38R-38S; see also *ibid* s 38T (transgender vilification offence)
- (QLD) [Anti-Discrimination Act 1991](#) s 124A(1).
- 4 (NSW) [Anti-Discrimination Act 1977](#) ss 38T, 49ZTA, 49ZXC
- (QLD) [Anti-Discrimination Act 1991](#) s [131A](#). See [80-700] (racial vilification), [80-705] (serious racial vilification).
- 5 (NSW) [Anti-Discrimination Act 1977](#) ss 38R, 49ZS, 49ZXA (inclusive definition of 'public act')
- (QLD) [Anti-Discrimination Act 1991](#) s [4A](#) (inclusive definition of 'public act').
- 6 (ACT) [Discrimination Act 1991](#) s [67A\(1\)](#)
- (NSW) [Anti-Discrimination Act 1977](#) ss 38T, 49ZT(1), 49ZB(1)
- (QLD) [Anti-Discrimination Act 1991](#) s 124A(1).
- 7 See *Sunol v Collier (No 2)* (2012) 289 ALR 128 ; 260 FLR 414; [2012] NSWCA 44; BC201201590 at [41] per Bathurst CJ.
- 8 (ACT) [Discrimination Act 1991](#) s [67A\(2\)\(c\)](#)
- (NSW) [Anti-Discrimination Act 1977](#) ss 38S(2)(c), 49ZT(2), 49ZXB(2)
- (QLD) [Anti-Discrimination Act 1991](#) s 124A(2).
- 9 (NSW) [Anti-Discrimination Act 1977](#) s 49ZXB(1).
- 10 *R v D & E Marinkovic* (1996) EOC ¶92-841. See also *Burns v Dye* [2002] NSWADT 32 .

(ix) Victimisation

[80-715] General

The paragraph below is current to **07 March 2018**

Anti-discrimination legislation in all jurisdictions makes it an unlawful or ***criminal*** act to victimise a complainant, a person who supports another in bringing a complaint under the legislation to the relevant statutory body, or a person giving evidence in a case.¹ It must be a 'substantial and operative' factor in the detriment subjected or threatened.² In most of the jurisdictions the protection in relation to allegations of committing an unlawful act is lost if the support for the complaint is not given in good faith and is not true (the requirement of truth is not included in Queensland; neither truth nor good faith are required in Tasmania).³ However, victimisation can occur even if unlawful discrimination is not established.⁴ It has been held under the Commonwealth legislation that where victimisation is dealt with as a ***criminal*** offence, it will be prosecuted by the Director of Public Prosecutions in a court of competent jurisdiction. However, a person may also make a complaint of victimisation to the Australian Human Rights Commission which will attempt to resolve the complaint by conciliation and, if unsuccessful, the matter will then be referred for hearing to the Federal Circuit Court or the Federal Court of Australia if application is made.⁵

A member of a club refused renewal of membership, who had made public statements and taken action critical of the club, has been held to have been victimised.⁶ A person dismissed, but not on racially discriminatory grounds, has been awarded compensation for victimisation, but not reinstated, after having made a series of complaints of racial discrimination that were found not to be substantiated.⁷ In another case, an employee's dismissal was not found to be in response to his earlier complaints of racial and religious discrimination, but the employer's refusal to provide him with a proper reference was found to be victimisation and the employer was ordered to provide one.⁸ However, alleged threats made to the father of an employee who had made discrimination complaints against his employer was not found to be victimisation of the employee himself.⁹ The 'detriment' must be a disadvantage of substance which is real and not merely trivial,¹⁰ and may include, for example, a transfer, a delay in allowing an employee to

transfer, preventing an employee from returning to work after being declared fit for duties, and refusing to re-engage a former employee.¹¹ The detriment must have a substantial connection with the action taken under the legislation if it is to succeed.¹² Male librarians have succeeded in a victimisation claim when female librarians reacted against a complaint of sex discrimination.¹³ However, when allegations made by a school pupil's parent were published in a local newspaper following an unsuccessful discrimination complaint against the school, the school principal's failure to return telephone calls, shouting on the telephone and public remarks were regarded as understandable responses and not an act of victimisation.¹⁴ Any information to police resulting in a search of the complainant's premises in connection with suspected theft may not give rise to victimisation if no proceedings have commenced (including conciliation) under the equal opportunity legislation.¹⁵ It is not necessary that the specific provisions of the legislation be invoked in a complaint if the complaint falls within the ambit of the legislation, because it is beneficial in nature and if victimisation is shown to have occurred, an unlawful act has occurred.¹⁶ However, in the Commonwealth jurisdiction, it has been held by the Federal Circuit Court that a claim of victimisation cannot be considered by that Court unless the complaint has first been made to, and terminated by, the Human Rights and Equal Opportunity Commission.¹⁷

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s 27(2) (**criminal** offence: relates to employment only); (CTH) [Sex Discrimination Act 1984](#) s 94 (**criminal** offence); (CTH) [Disability Discrimination Act 1992](#) s 51 (**criminal** offence); (CTH) [Australian Human Rights Commission Act 1986](#) ss 19A, 26(2), 30(1A) (**criminal** offence). See *Penhall-Jones v New South Wales* [2007] FCA 925 ; [BC200705185](#) at [85] per Buchanan J (under (CTH) [Disability Discrimination Act 1992](#) s 42(2) the ground or reason relied upon need not be the sole factor but it must be a substantial and operative factor — at least one circumstance in *ibid* s 42(2) must be a reason for the alleged detriment) (followed *Walker v Victoria* [2011] FCA 258 ; [BC201101493](#) (required causal connection between the complainant's act and the defendant's response not established). See also *Claveria v Pilkington Australia Ltd* [2007] FCA 1692 ; [BC200709540](#); *CSR Viridian Ltd (formerly Pilkington Australia Ltd) v Claveria* (2008) 171 FCR 554 ; 177 IR 147; [2008] FCAFC 177; [BC200809544](#) (unlawful termination of employment under (CTH) [Workplace Relations Act 1996](#) s 659(2)(e) (now (CTH) [Fair Work Act 2009](#) s 772(1)(e)) for reasons including complaint to trade union about work treatment).

(ACT) [Discrimination Act 1991](#) s 68 (protects conduct constituting victimisation in relation to a discrimination complaint enforced as a civil matter. Those victimised under *ibid* s 68 may complain; (ACT) [Human Rights Commission Act 2005](#) s 98 (which makes it a **criminal** offence to victimise someone for making a complaint, giving information, or producing a document or other thing to a person exercising a function under that Act.

(NT) [Anti-Discrimination Act 1992](#) s 23

(NSW) [Anti-Discrimination Act 1977](#) s 50

(QLD) [Anti-Discrimination Act 1991](#) ss 129, 130 (**criminal** offence)

(SA) [Equal Opportunity Act 1984](#) s 86

(TAS) [Anti-Discrimination Act 1998](#) s 18

(VIC) [Equal Opportunity Act 2010](#) ss 103, 104

(WA) [Equal Opportunity Act 1984](#) s 67.

As to the complaint bringing mechanisms see [80-725]-[80-775].

- 2 *Obieta v New South Wales Dept of Education and Training* [2007] FCA 86 ; [BC200700398](#) at [240] per Cowdroy J; *Huang v University of New South Wales* [2008] FCA 1930 ; [BC200811505](#) (all relevant actions complained of were taken prior to any complaint being made to HREOC). For failed victimisation claim when the appellant had not yet made a complaint at the relevant time see *Campagnolo v Benalla & District Football League Inc* [2009] VSC 228 ; [BC200905010](#). See also *Stevenson v Murdoch Community Services Inc* [2010] FCA 648 ; [BC201004301](#) at [95] per Gordon J (evidence that showed lack of awareness that a complaint had been filed); *Von Stalheim v Anti Discrimination Tribunal (Tas)* [2007] TASSC 9 ; [BC200701171](#) (victimisation claim under (TAS) [Anti-Discrimination Act 1998](#) s 18

(C) Discrimination

based on restraint proceedings failed as not shown to be motivated because of the complaint but in order to protect staff).

- 3 (CTH) [Sex Discrimination Act 1984 s 94\(3\)](#); (CTH) [Disability Discrimination Act 1992 s 42](#) (no defence on grounds of truth or good faith included); (CTH) [Australian Human Rights Commission Act 1986 s 26\(3\)](#)
- (ACT) [Discrimination Act 1991 s 68\(2\)\(h\)](#)
- (NT) [Anti-Discrimination Act 1992 s 23\(3\)](#)
- (NSW) [Anti-Discrimination Act 1977 s 50\(2\)](#)
- (QLD) [Anti-Discrimination Act 1991 s 130\(1\)\(a\)\(ii\)](#) (requirement of good faith only)
- (SA) [Equal Opportunity Act 1984 s 86\(3\)](#)
- (VIC) [Equal Opportunity Act 2010 s 104\(1\)](#)
- (WA) [Equal Opportunity Act 1984 s 67\(2\)](#).
- In Tasmania, neither truth nor good faith are required: see note 1 above.
- 4 *Wakim v Franklins Ltd* (1997) EOC ¶92-901, ADT(NSW) (racial discrimination complaint was successful); *Mahmoud Abo El Wafa v England* (1998) EOC ¶92-925; [1997] QADT 27; *Denmeade v Kempsey Shire Council (No 2)* (2003) EOC ¶93-302 ; [2003] NSWADT 225 (sexual harassment complaints not made out but employer's action of reading out woman's complaints to colleagues at a work meeting found to be victimisation); *Spencer v Greater Murray Area Health Service* (2005) EOC ¶93-400 ; [2005] NSWADT 138.
- 5 *O'Connor v Ross (No 1)* [\[2002\] FMCA 210](#) ; [BC200206367](#) at [\[11\]](#) per Driver FM; *Huang v University of New South Wales* [\[2005\] FMCA 463](#) ; [BC200503246](#) at [\[19\]](#) per Driver FM. The Federal Circuit Court has considered complaints of victimisation in a number of cases, for example, *Tadawan v South Australia* [2001] FMCA 25 ; *Alekovski v AAA Pty Ltd* (2002) EOC ¶93-219 ; [2002] FMCA 81; *Font v Paspaley Pearls Pty Ltd* (2002) EOC ¶93-232 ; [2002] FMCA 142. See also *Freestone v Kozma* (1989) EOC ¶92-249 at 77,378, HREOC. See further [80-725] (introduction), [80-730] (Commonwealth).
- 6 *Radalj v WA Yugoslav Club Inc* (1989) EOC ¶92-268, EOT(WA).
- 7 *Shaikh v Cmr, New South Wales Fire Brigades* (1996) EOC ¶92-808, EOT(NSW) (compensation awarded was \$40,000).
- 8 *Mahmoud Abo El Wafa v England* (1998) EOC ¶92-925; [1997] QADT 27.
- 9 *Bryce v City Hall Albury Wodonga Pty Ltd* (2004) EOC ¶93-349; [2004] VCAT 1519.
- 10 *Bogie v University of Western Sydney* (1990) EOC ¶92-313; *Bailey v Australian National University* (1995) EOC ¶92-744; *Sivananthan v Cmr of Police (NSW)* [2001] NSWADT 44 .
- 11 *Morrison-Liddy v Director, Dept of Technical and Further Education* (1989) EOC ¶92-246, EOT(SA); *McKenna v Victoria* (1998) EOC ¶92-927; [1998] VADT 83 (affirmed on appeal *Victoria v McKenna* (1999) 140 IR 256 ; (2000) EOC ¶93-080; [\[1999\] VSC 310](#); [BC9905608](#); *Borg v Cmr, Department of Corrective Services* (2002) EOC ¶93-198; [2002] NSWADT 42; *Spencer v Greater Murray Area Health Service* (2005) EOC ¶93-400 ; [2005] NSWADT 138; *Drury v Andreco-Hurll Refractory Services Pty Ltd (No 4)* [\(2005\) 225 ALR 339](#) ; (2005) EOC ¶93-413; [\[2005\] FMCA 1226](#); [BC200506491](#).
- 12 *Morrison-Liddy v Director, Dept of Technical and Further Education* (1989) EOC ¶92-246, EOT(SA); *McKenna v Victoria* (1998) EOC ¶92-927; [1998] VADT 83 (affirmed on appeal *Victoria v McKenna* (1999) 140 IR 256 ; (2000) EOC ¶93-080; [\[1999\] VSC 310](#); [BC9905608](#); *Borg v Cmr, Department of Corrective Services* (2002) EOC ¶93-198; [2002] NSWADT 42; *Spencer v Greater Murray Area Health Service* (2005) EOC ¶93-400 ; [2005] NSWADT 138.
- 13 *Edwards v Council of the Municipality of Kogarah* (1995) EOC ¶92-664.
- 14 *Damiano v Wilkinson* [\[2004\] FMCA 891](#) ; [BC200409641](#).
- 15 *Oyekanmi v National Forge Operations Pty Ltd* (1996) EOC ¶92-797, EOB(VIC). See also *Dunstan v von Doussa (No 2)* [\(2008\) 102 ALD 327](#) ; [\[2008\] FCA 827](#); [BC200804213](#) (claim of victimisation under (CTH) [Sex Discrimination Act 1984 s 94](#) in the Director of Public Prosecutions advocating against parole in exercise of statutory functions).

(C) Discrimination

- 16** *Regan v Kalgoorlie Taxi Car Owners' Assn Inc* (1996) EOC ¶92-844, EOT(WA). Compare *Twining v Curtis* (2009) 3 ACTLR 174; [2009] ACTSC 106; BC200908004 at [82] per Penfold J (it would be difficult to infer a duty not to pass a relevant report on to another person because of the risk that this would result in exposure to victimisation under (CTH) *Public Service Act 1999* s 16 (repealed)).
- 17** *Huang v University of New South Wales* [2005] FMCA 463; BC200503246; *Huang v University of New South Wales* (No 2) [2006] FMCA 220; BC200601387 (leave refused by the Federal Court of Australia: *Huang v University of New South Wales* [2006] FCA 380; BC200601865).

(x) Advertisements

[80-720] General

The paragraph below is current to **07 March 2018**

In all jurisdictions, the anti-discrimination legislation makes provision for advertising that displays an intention to commit an act which is unlawful, such advertising being either an unlawful act¹ or a ***criminal*** offence.² The provisions apply in all cases both to the originator of the advertisement and to the publisher.³

Notes

- 1** (CTH) *Racial Discrimination Act 1975* s 16
(ACT) *Discrimination Act 1991* s 69
(NT) *Anti-Discrimination Act 1992* s 25 (also a ***criminal*** offence: see note 2 below)
(TAS) *Anti-Discrimination Act 1998* s 20
(WA) *Equal Opportunity Act 1984* s 68.
- 2** (CTH) *Disability Discrimination Act 1992* s 44; (CTH) *Sex Discrimination Act 1984* s 86
(NT) *Anti-Discrimination Act 1992* ss ss 109, 109A (prohibits using misleading statements to induce another person to publish a discriminatory advertising)
(NSW) *Anti-Discrimination Act 1977* s 51
(QLD) *Anti-Discrimination Act 1991* ss 127, 128
(SA) *Equal Opportunity Act 1984* s 103
(VIC) *Equal Opportunity Act 2010* s 182.
- 3** See notes 1 and 2 above.

(xi) Machinery, Procedure and Remedies

(A) Basic Machinery

[80-725] Introduction

The paragraph below is current to **07 March 2018**

Anti-discrimination legislation works by providing a mechanism for receiving, investigating and attempting to conciliate complaints about discrimination, and by including a further recourse if the conciliation is not successful. In the case of the States and Territories, recourse is to a tribunal.¹ In the case of Commonwealth anti-discrimination legislation recourse is to the Australian Human Rights Commission (the 'Commission') which inquires into, and attempts to conciliate, complaints made under the Commonwealth anti-discrimination legislation.² Formerly, the Commission had the power to conduct public hearings and make determinations on complaints under the anti-discrimination legislation that had not been resolved by conciliation. While the determinations resulting from such inquiries were not binding as between the parties, the Commission or complainant was able to take action in the Federal Court of Australia (the 'Federal Court') to have the determination enforced and an order issued.³ Since 2000, the Commission no longer has the power to conduct hearings and make determinations.⁴ Instead, the Commission may terminate a complaint on a number of grounds, including where it is satisfied there is no reasonable prospect of the matter being resolved by conciliation or where the complaint involves a matter of public importance,⁵ which then enables any person affected by the complaint to commence proceedings in the Federal Court or the Federal Circuit Court for unlawful discrimination.⁶ The unlawful discrimination alleged in an application to the Federal Court or the Federal Circuit Court must be in substance the same as, or arise out of the same acts that were the subject of the unlawful discrimination complaint that was terminated by the Commission.⁷ Each of the State and Territory tribunals has power to issue interim determinations where action needs to be stayed pending conciliation and further recourse.⁸ The Commission and each of the State and Territory tribunals also have the power to issue exemptions (or exceptions) for limited periods where it decides that it is appropriate.⁹

Notes

- 1 See, for example, (NSW) [Anti-Discrimination Act 1977](#) ss 87A-89B (making complaints), 93A-94A (referral of complaints to the Tribunal), 90-91C (Tribunal process). As to machinery provisions in other States and Territories see generally [80-745]-[80-755].
- 2 (CTH) [Australian Human Rights Commission Act 1986](#) s 11(1)(aa), Pt II. See generally [80-730], [80-735].
- 3 See the decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ; [37 ALD 340](#); [127 ALR 1](#); [BC9506412](#) (Federal Court of Australia could not be empowered to enforce determinations of the Commission lodged with the Court). As to the separation of judicial powers under the Commonwealth Constitution see CONSTITUTIONAL LAW [\[90-5010\]-\[90-5025\]](#).

See *Medical Board of Queensland v Lip* [\[2007\] QSC 271](#) ; [BC200712347](#) at [\[26\]-\[47\]](#) per Daubney J (the authorities on the question whether, in making a decision, a Tribunal is exercising judicial power or administrative power were reviewed extensively). On the nature of a decision of Tasmanian Anti-Discrimination Tribunal after an inquiry and whether the decision is one of an administrative character: see *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 ; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) at [\[205\]-\[207\]](#) per Kenny J (when conducting an inquiry Tribunal was exercising judicial power). See also *Tasmania v Anti-Discrimination Tribunal* [\[2009\] TASSC 48](#) ; [BC200905577](#) at [\[10\]-\[16\]](#) per Porter J (decision of Anti-Discrimination Tribunal upon review of Commissioner's decision to dismiss complaint is of an administrative character); *Kentish Council v Wood* (2011) 21 Tas R 59 ; [\[2011\] TASFC 3](#); [BC201106136](#).
- 4 The changes were made by the (CTH) Human Rights Legislation Amendment Act (No 1) 1999 (repealed).
- 5 (CTH) [Australian Human Rights Commission Act 1986](#) s 46PH.
- 6 *Ibid* s 49PO(1).

Note *ibid* s 46PO(1) authorises an application to the Federal Court of Australia alleging unlawful discrimination by one or more of the respondents to the terminated complaint: see *Grigor-Scott v Jones* (2008) 168 FCR 450 ; [102 ALD 1](#); [\[2008\] FCAFC 14](#); [BC200804152](#) (no basis for the joinder of Mr Grigor-Scott as a respondent in the proceeding in the Federal Court (the 'Federal Court') even though he was responsible for publishing the relevant material, since the President did not at any stage identify Mr Grigor-Scott as the respondent to the complaint and referred at all times to

(C) Discrimination

Bible Believers' Church as the respondent) (distinguishing *Jones v Toben* (2002) 71 ALD 629 ; (2002) EOC ¶93-247; [2002] FCA 1150; BC200205411 at [74] per Emmett, Lander and Tracey JJ).

- 7 (CTH) [Australian Human Rights Commission Act 1986](#) s 49PO(3). See *Dye v Commonwealth Securities Ltd* [2010] FCA 720 ; BC201006239 at [105] per Katzmann J (to fall within (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO(3) it is not enough that an act is similar in kind to the acts complained of in the terminated complaint, nor is it sufficient that the act is alleged to be the act of the same individual). See also [80-735] note 12.
- 8 As to interim decisions see [80-780].
- 9 As to tribunal-granted exemptions see [80-640].

[80-730] Commonwealth

The paragraph below is current to **07 March 2018**

The Australian Human Rights Commission (the 'Commission')¹ is vested with power to receive complaints of racial, sexual, disability and age discrimination.² Complaints may be lodged by a person or persons believing that they have been discriminated against, by a person or persons in the class discriminated against, or by a person or union on behalf of one or more of the persons discriminated against.³ The Commission is responsible for referring complaints to the President,⁴ who must then inquire into the complaint and endeavour to effect a settlement of it by conciliation, and has been given powers to do so.⁵ The principles of natural justice or procedural fairness must be complied with in the conciliation process.⁶ If the President is satisfied that the matter has been adequately dealt with, or if the President is of the opinion that the complaint cannot be settled by conciliation, the President may terminate the complaint by giving written notice of that decision.⁷ Where the President has terminated a complaint and provided written notice of the termination, any person affected by the complaint may commence proceedings in the Federal Court of Australia (the 'Federal Court') or Federal Circuit Court for unlawful discrimination.⁸ The President may provide the Federal Court or the Federal Circuit Court with a written report on a complaint that has been terminated.⁹ The report is not to contain anything said or done in the course of conciliation proceedings.¹⁰ However, if the President finds a person has done a discriminatory act under an industrial instrument, it is to be referred to the Fair Work Commission.¹¹

Notes

- 1 As to the Commission generally see [80-50]-[80-120].
- 2 (CTH) [Australian Human Rights Commission Act 1986](#) ss 3(1) (definition of 'unlawful discrimination'), 11(1)(a), 46P(1).
- 3 Ibid s 46P(2). See *Administrative & Clerical Officers' Assn v Dept of Industrial Relations* (1989) EOC ¶92-253 (action by union on behalf of female members regarding maternity leave provisions).
- 4 (CTH) [Australian Human Rights Commission Act 1986](#) s 46PD.
- 5 Ibid s 46PF(1), 46PF(2).
- 6 *Koppen v Cmr for Community Relations* (1986) 11 FCR 360 ; 67 ALR 215; (1986) EOC ¶92-173 at 76,670, Fed C of A. Note also (CTH) [Australian Human Rights Commission Act 1986](#) s 46PK(3) (person presiding over conference must ensure that the conduct of the conference does not disadvantage either party to the complaint).
- 7 Ibid s 46PH(1)(d), 46PH(1)(i) (note that ibid s 46PH(1) lists a number of other bases on which the President may terminate a complaint, including where the President considers that there has been no unlawful discrimination or where the complaint was trivial, vexatious or lacking substance).
- 8 Ibid s 46PO(1), 46PO(2). See *Grigor-Scott v Jones* (2008) 168 FCR 450 ; 102 ALD 1; [2008] FCAFC 14; BC200804152 at [18]-[20] per Emmett, Lander and Tracey JJ (observation that (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO does not provide for a general statutory cause of action available to anyone who may have been at any time affected by the unlawful discrimination; it only lies against the respondents to the terminated

(C) Discrimination

complaint; the intention is to limit the complaint which is to be brought to the Court to the same complaint as was made to the Commission by the same complainants and against the same respondents).

9 Ibid s 46PS(1).

10 Ibid s 46PS(2).

11 Ibid s 46PW(3). An 'industrial instrument' means a fair work instrument within the meaning of the (CTH) [Fair Work Act 2009](#) and a transitional instrument, or a Division 2B State instrument (within the meaning of the (CTH) [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](#)). See also (CTH) [Fair Work Act 2009](#) ss 351 (an employer must not take adverse action against a person who is an employee, or prospective employee, because of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin), 356 (a term of a workplace instrument or an agreement or arrangement has no effect to the extent that it is an objectionable term). As to ibid s 351 see also *Hodkinson v Commonwealth* (2011) 248 FLR 409 ; [\[2011\] FMCA 171](#); [BC201101612](#) at [\[128\]](#); *Liquor Hospitality & Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221 ; 198 IR 143; [\[2010\] FCA 770](#); [BC201005117](#) at [\[51\]](#); *Barclay v Board of Bendigo Regional Institute of Technical & Further Education* (2011) 191 FCR 212 ; [\(2011\) 274 ALR 570](#); [\[2011\] FCAFC 14](#); [BC201100341](#) at [\[28\]](#) (causal nexus between adverse action and the exercise of a workplace right by another person).

[80-735] Inquiry by the Australian Human Rights Commission and complaints in the Federal Court of Australia

The paragraph below is current to **07 March 2018**

For the purposes of undertaking the inquiry required upon referral of a complaint to the President,¹ the President may require a person to provide information or produce documents relevant to the inquiry where the President has reason to believe that the person is capable of doing so.² If the President considers that two or more complaints arise substantially out of the same facts, the President may choose to conduct a single inquiry or conciliation.³ To assist in dealing with a complaint, the President may decide to hold a compulsory conference at which both the complainant and the respondent to the complaint are required to attend.⁴ The President may also require the attendance of other persons whose presence may be conducive to settlement or who can provide relevant information.⁵ The conference must be conducted in private and otherwise must not be conducted in a way that would disadvantage either party.⁶ Except in circumstances where a person with a disability is required to attend the conference, no party may be represented unless the person presiding over the conference consents to it.⁷ The President may decide to terminate a complaint on a number of bases, including where the President is satisfied that the matter has been adequately dealt with or there has been no unlawful discrimination, or if the President is of the view that the complaint cannot be settled by conciliation, is vexatious and without substance, or raises a matter of public importance that should be considered by the Federal Court of Australia or Federal Circuit Court (together, the 'Court').⁸ Additionally, the President may terminate a complaint at the request of the complainant if the other persons affected by it consent.⁹ Once the President has decided to terminate a complaint, the President must provide written notice and reasons for that decision to the complainant and, on request, to another party affected by the complaint.¹⁰

A person affected by a terminated complaint has 60 days from the time the President issues the termination notice to make an application to the Court alleging unlawful discrimination.¹¹ The complaint of unlawful discrimination must be the same as, or must arise out of the same acts, omissions or practices as were the subject of, the terminated complaint.¹² A party has a right to be represented in proceedings before the Court,¹³ and the Court may grant leave for a special-purpose Commissioner to appear where the proceedings may affect the human rights of others, have implications for the administration of the Commonwealth anti-discrimination legislation or where public interest considerations warrant it.¹⁴ The Court has the power to issue interim injunctions¹⁵ and, on final determination of the proceedings, if it is satisfied that unlawful discrimination has occurred, it may make such orders as it sees fit including directing discrimination to stop, requiring any reasonable act to redress loss or damage, ordering

(C) Discrimination

employment or reinstatement of an employee, awarding compensatory damages and varying the termination of a contract.¹⁶ An apology may also be ordered in appropriate circumstances.¹⁷

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s 46PF(1).
- 2 Ibid s 46PI. Note that failure to provide information or produce documents is an offence unless there is a reasonable excuse: *ibid* s 46PM.
- 3 Ibid s 46PF(2).
- 4 Ibid s 46PJ. Note that failure to attend a compulsory conference is an offence unless there is a reasonable excuse: *ibid* s 46PL.
- 5 Ibid s 46PJ(4). Note that failure to attend a compulsory conference is an offence unless there is a reasonable excuse: *ibid* s 46PL.
- 6 Ibid s 46PK(2), 46PK(3).
- 7 Ibid s 46PK(5), 46PK(6).
- 8 Ibid s 46PH(1).
- 9 Ibid s 46PE(2); see also *ibid* s 46PG (withdrawal of a complaint).
- 10 Ibid s 46PH(2), 46PH(3).
- 11 Ibid s 46PO(1), 46PO(2). For an example of an application made more than two years outside the statutory period provided under *ibid* s 46PO(2) (formerly 28 days) see *L v Commonwealth* [2009] FCA 4 ; [BC200900016](#) (application dismissed).
- 12 (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO(3). See, for example, *Huang v University of New South Wales* [2005] FMCA 463 ; [BC200503246](#); *Huang v University of New South Wales (No 2)* [2006] FMCA 220 ; [BC200601387](#) (leave refused by the Federal Court of Australia: *Huang v University of New South Wales* [2006] FCA 380 ; [BC200601865](#)) (Federal Circuit Court had no jurisdiction to deal with a victimisation claim which had not been terminated by the Commission). For a discussion of the effect of (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO(3) see also *Charles v Fuji Xerox Australia Pty Ltd* (2000) 105 FCR 573 ; 105 IR 153; [2000] FCA 1531; [BC200006505](#) at [37]-[43]; *Travers v New South Wales* [2000] FCA 1565 ; [BC200006658](#) at [8]; *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118 ; [BC201006733](#) at [46]-[48] per Marshall, Rares and Flick JJ (on how to determine the scope of a complaint made to the Commission); *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325 ; [BC200608062](#) at [68] per Weinberg J; *Crvenkovic v La Trobe University* [2009] FCA 374 ; [BC200903146](#) at [11] per Tracey J; *Turner v Victoria (Department of Human Services)* [2011] FCA 459 ; [BC201102836](#) at [7]-[22] per Bromberg J.
- 13 (CTH) [Australian Human Rights Commission Act 1986](#) s 46PQ.
- 14 Ibid s 46PV. See further [80-795].
- 15 Ibid ss 46PO(6), 46PP. See also *Setchell v Alkira Centre Box Hill Inc* [2009] FMCA 288 ; [BC200913310](#).
- 16 Ibid s 46PO(4). As to damages see *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [2008] FCAFC 69; [BC200803114](#) at [94] per French and Jacobson JJ (damages under (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO(4) are entirely compensatory, and in many cases the appropriate measure will be analogous to tortious; the discretionary character of the remedy allows an award which does not fully compensate for the loss suffered). As to the requisite certainty of remedial orders see: *Victoria v Turner* (2009) 23 VR 110 ; [2009] VSC 66; [BC200901163](#) at [259]-[261]. An order that the Department for Public Housing re-assess an application for priority housing could only be made by the court concerned if it is satisfied that there has been unlawful discrimination (see (CTH) [Australian Human Rights Commission Act 1986](#) s 46PO(4): *New South Wales Department of Housing v Moskalev* (2007) 158 FCR 206 ; [94 ALD 370](#); [2007] FCA 353; [BC200701597](#) at [25] per Cowdroy J. For the circumstances in which the court will grant declaratory relief see *Evans v New South Wales* (2008) 168 FCR 576 ; [104 ALD 234](#); [2008] FCAFC 130; [BC200806500](#) at [86] per Branson, French and Stone JJ.

(C) Discrimination

- 17 *Forest v Queensland Health* [2007] FCA 1236; BC200706536 (on a finding of disability discrimination, an order for an apology from the Minister for Health was unsuccessfully claimed but Collier J acknowledged that courts in human rights cases have sometimes ordered that apologies be made (see, for example, *Zheng v Beamish* (2004) EOC ¶93-324; [2004] FMCA 61; BC200401564). In many circumstances an apology may not be granted as it would serve little purpose: *Jones v Toben* (2002) 71 ALD 629; (2002) EOC ¶93-247; [2002] FCA 1150; BC200205411 at [106], *Jones v Scully* (2002) 120 FCR 243; 71 ALD 567; [2002] FCA 1080; BC200205008; *Jones v The Bible Believers' Church* [2007] FCA 55; BC200700264; *Rawcliffe v Northern Sydney Central Coast Area Health Service* (2007) EOC ¶93-466; [2007] FMCA 931; BC200705523; *Forest v Queensland Health* [2007] FCA 1236; BC200706536.

[80-740] Equal employment opportunity functions of the Australian Human Rights Commission

The paragraph below is current to **07 March 2018**

The Australian Human Rights Commission (the 'Commission')¹ has special functions relating to equal opportunity in employment or occupation in Australia, designed to give effect to obligations under the International Labour Organisation Convention on Discrimination in Employment and Occupation (the 'Convention').² The functions include receiving complaints of discrimination in employment according to definitions that correspond with those under the Convention.³ In many cases the grounds of discrimination are the same as those provided for in the four Commonwealth anti-discrimination Acts, but the Commission's special functions in this area are designed to give effect to its obligations under the Convention. The functions include:

- (1) conducting inquiries into acts or practices⁴ that may constitute discrimination,⁵ settlement of such matters by means of conciliation and associated reporting functions;⁶
- (2) examining enactments and proposed enactments upon request by the Minister, to ascertain whether they may be, have or would have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and associated reporting functions;⁷
- (3) promotion of an understanding and acceptance, and public discussion, of equality of opportunity and treatment in employment occupation in Australia;⁸
- (4) undertaking research and educational programs to promote equality of opportunity and treatment in employment and occupation;⁹
- (5) reporting on its own initiative or when requested by the Minister on any laws that should be made by Parliament, or action that should be taken by the Commonwealth on matters relating to equality of opportunity and treatment in employment and occupation;¹⁰
- (6) reporting to the Minister, upon request by the Minister, on any action that needs to be taken by Australia to comply with the provisions of the Convention;¹¹
- (7) examination of any relevant international instrument to ascertain whether there are any inconsistencies between that instrument and the Convention and reporting the results of any such examination to the Minister;¹²
- (8) preparing and publishing guidelines for the avoidance of acts or practices that may constitute discrimination under the Convention;¹³

(C) Discrimination

- (9) intervening, with the consent of the court, in legal proceedings involving discrimination issues;¹⁴ and
- (10) anything incidental or conducive to the performance of any of the preceding functions.¹⁵

The grounds on which this jurisdiction is exercised are stated in the regulations.¹⁶

If the Commission is satisfied that the matter relating to equal opportunity that has been complained of does not constitute discrimination, or that the person aggrieved by the act or practice does not wish the inquiry to be made or continued, the Commission may refuse to make, or may discontinue, an inquiry.¹⁷ It may also refuse to commence, or may discontinue, an inquiry where the act or practice occurred more than 12 months before the complaint was made¹⁸ or the Commission is of the opinion that:

- (1) the complaint is frivolous, vexatious, misconceived or lacking in substance;¹⁹
- (2) the subject matter of the complaint has been adequately dealt with by the Commission or another statutory authority, or by means of some other remedy;²⁰
- (3) some other more appropriate remedy is reasonably available;²¹ or
- (4) the complaint could be dealt with more effectively or conveniently by another statutory body.²²

The procedures relating to examination of enactments to ascertain whether they have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation are similar to those for legislative review relating to human rights issues.²³

Settlement of matters that give rise to an inquiry relating to equal opportunity is by means of conciliation.²⁴ In endeavouring to effect a settlement, the Commission must have regard to the right of every person to equality of opportunity and treatment in respect of employment and occupation and the need to protect that right.²⁵ The reporting functions in relation to employment related discrimination matters are similar to those relating to human rights matters.²⁶

Notes

- 1 As to the Commission generally see [\[80-50\]-\[80-120\]](#).
- 2 (CTH) [Australian Human Rights Commission Act 1986](#) ss [11\(1\)\(d\)](#), [31](#). The Convention, as it applies to Australia, is the (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31) which is reproduced in (CTH) [Australian Human Rights Commission Act 1986 Sch 1](#).
- 3 Ibid ss 30, 31(b), 32-35. See also definition of 'discrimination' in ibid s 3 which adopts similar terminology to that used in the (INT) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958; ILO Convention No 111; Aust TS 1974 No 12; 362 UNTS 31).
- 4 'Acts' and 'practices' are defined as acts done and practices engaged in:

- (1) by or on behalf of the Commonwealth or a State or Territory, or an authority of the Commonwealth or a State or Territory;
- (2) under a Commonwealth enactment or a law of a State or Territory;

(C) Discrimination

- (3) wholly within a State or Territory; or
- (4) partly within a State or Territory: (CTH) [Australian Human Rights Commission Act 1986](#) ss 3, 30.
- 5 Reference to an act or practice that constitutes discrimination includes a reference to an act that is a victimisation offence under *ibid* s 26(2): *ibid* s 30(1A).
- 6 *Ibid* s 31(b).
- 7 *Ibid* s 31(a). See also *ibid* s 3 (definition of 'enactment').
- 8 *Ibid* s 31(c).
- 9 *Ibid* s 31(d).
- 10 *Ibid* s 31(e).
- 11 *Ibid* s 31(f).
- 12 *Ibid* s 31(g).
- 13 *Ibid* s 31(h).
- 14 *Ibid* s 31(j). See further [80-795].
- 15 *Ibid* s 31(k).
- 16 (CTH) Australian Human Rights Commission Regulations 1989 reg 4. The grounds listed are: age, medical record, **criminal** record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference, trade union activity and one or more of these grounds 'which existed but which has ceased to exist'. Imputation of these grounds is also included: *ibid* reg 4(b).
- 17 (CTH) [Australian Human Rights Commission Act 1986](#) s 32(3)(a), 32(3)(b).
- 18 *Ibid* s 32(3)(c)(i).
- 19 *Ibid* s 32(3)(c)(ii).
- 20 *Ibid* s 32(3)(c)(iii), 32(3)(c)(v).
- 21 *Ibid* s 32(3)(c)(iv).
- 22 *Ibid* s 32(3)(c)(vi).
- 23 *Ibid* s 31(a). See further [\[80-95\]](#).
- 24 *Ibid* s 31(b)(i)
- 25 *Ibid* s 34.
- 26 *Ibid* s 35. See further [\[80-90\]](#).

[80-745] State and Territory machinery

The paragraph below is current to **07 March 2018**

All State and Territory anti-discrimination legislation provides for the appointment of a person entrusted with the handling of complaints under the relevant legislation. The person is variously known as the Commissioner for Equal Opportunity,¹ the Discrimination Commissioner,² the President of the Anti-Discrimination Board,³ the Commissioner of the Equal Opportunity and Human Rights Commission⁴ or the Anti-Discrimination Commissioner,⁵ (the 'Commissioner'). In each case, the legislation confers power on the Commissioner or the agency to receive and attempt to conciliate complaints and in some cases to conduct research and educational programs.⁶ The Commissioner is required to inquire into and, where possible, to conciliate a complaint and, where that fails, to refer the matter to the relevant tribunal.⁷ In the Australian Capital Territory, Queensland and Tasmania, the Commissioner must assist the parties in recording in writing any agreement reached during conciliation, have it signed by both parties and filed with the tribunal, upon which it becomes enforceable as an order of the tribunal.⁸ A similar provision exists in the Northern Territory, New South Wales and Victoria where a party to an agreement reached in conciliation requests it or the parties consent to it.⁹ There is a power to decline to hear or dismiss a complaint where it is vexatious or lacking in substance.¹⁰ In the Northern Territory, the Commissioner has

(C) Discrimination

power, where conciliation fails, to conduct a hearing and make an order.¹¹ Generally, a person may only be represented by a solicitor or counsel if the Commissioner approves.¹² In the Australian Capital Territory, Tasmania and Victoria, there is power to decline a complaint and refer it to another tribunal or court.¹³ There is some authority to the effect that before using such a power, a proper investigation must be made of the facts to determine that the discrimination aspects of the complaint can be effectively dealt with by the alternative body, for example, an industrial tribunal, and that a better remedy, for example, reinstatement, is available.¹⁴

Notes

- 1 (SA) [Equal Opportunity Act 1984](#) s 8
(WA) [Equal Opportunity Act 1984](#) s 75.
- 2 (ACT) [Human Rights Commission Act 2005](#) s 23. The Discrimination Commissioner has responsibility for exercising functions for the Commission in relation to discrimination (by reference to the (ACT) [Discrimination Act 1991](#)) while the Human Rights Commissioner has responsibility for human rights under the (ACT) [Human Rights Act 2004](#).
- 3 (NSW) [Anti-Discrimination Act 1977](#) ss 71, 80.
- 4 (VIC) [Equal Opportunity Act 2010](#) s 169 (Commissioner of the Victorian Equal Opportunity and Human Rights Commission (the 'Commission')). Complaints may be made to the Victorian Civil and Administrative Tribunal (the 'Tribunal') without the involvement of the Commission (ibid ss 122-126) (except where notified before commencement of that Act (ibid s 193) in which case the predecessor (VIC) Equal Opportunity Act 1995 applies. See further (VIC) [Equal Opportunity Act 2010](#) Pt 8 Divs 1 (covers dispute resolution by the Commissioner), 2 (applications to the Tribunal). Ibid Pts 9 (covers investigations and public enquiries (as amended by (VIC) [Equal Opportunity Amendment Act 2011](#))), 11 (covers functions and powers of the Commission). Note the (VIC) [Equal Opportunity Amendment Act 2011](#) altered the powers of the Commission to conduct investigations and public inquiries, and altered its governance structure in order to appoint a chairperson of the Board independent of the Commissioner. The governance structure of the Commission was established by the (VIC) Equal Opportunity Amendment (Governance) Act 2009 (repealed).
- 5 (NT) [Anti-Discrimination Act 1992](#) s 6
(QLD) [Anti-Discrimination Act 1991](#) s 234
(TAS) [Anti-Discrimination Act 1998](#) s 5.
- 6 (ACT) [Human Rights Commission Act 2005](#) ss 14, 47-52A, 54-67
(NT) [Anti-Discrimination Act 1992](#) ss 13, 78
(NSW) [Anti-Discrimination Act 1977](#) ss 89A, 89B (complaints), 119-122 (other functions of the Anti-Discrimination Board)
(QLD) [Anti-Discrimination Act 1991](#) ss 235, 236
(SA) [Equal Opportunity Act 1984](#) ss 94, 95
(TAS) [Anti-Discrimination Act 1998](#) ss 6, 7.
(VIC) [Equal Opportunity Act 2010](#) ss 111 (complaints), 157-8 (research and educative functions)
(WA) [Equal Opportunity Act 1984](#) ss 80-83.
- 7 (ACT) [Human Rights Commission Act 2005](#) ss 53-53E
(NT) [Anti-Discrimination Act 1992](#) ss 66A-66F (decision to accept or reject complaint), 78-81 (evaluation of complaint for referral to the Tribunal), 86 (complaint may be referred to the Tribunal if the Commissioner believes the complaint has a reasonable prospect of success at a hearing by the Tribunal). See also ibid s 66 (Commissioner must decide whether to accept or decline the complaint within 60 days of receiving the complaint).
(NSW) [Anti-Discrimination Act 1977](#) ss 90, 91A, 92A, 93A-93C
(QLD) [Anti-Discrimination Act 1991](#) ss 155, 158, 164A, 165-167. Ibid s 141(1) requires the Commissioner to decide whether to accept or reject a complaint within 28 days of receiving the complaint. See also *Queensland v Walters* [2007] 2 Qd R 451; [2007] QSC 012; BC200700245 (the first respondent made no decision either to accept or to

(C) Discrimination

reject the complaint within that period but eventually decided to accept it out of time. Failure to apply (QLD) [Anti-Discrimination Act 1991](#) s 141(1) in its strict terms does not mean that further dealing with the complaint was invalid. Failure to accept all of the complaint immediately did not have the effect of deemed rejection of those aspects of the complaint that were not then accepted).

(SA) [Equal Opportunity Act 1984](#) ss [94](#), [95](#)

(TAS) [Anti-Discrimination Act 1998](#) ss ss 69, [71](#) (resolve by conciliation or in any other way), [74](#), [75](#), [75A](#), [78](#)

(VIC) [Equal Opportunity Act 2010](#) ss [111-116](#)

(WA) [Equal Opportunity Act 1984](#) ss 84, 90, 91, 93.

8 (ACT) [Human Rights Commission Act 2005](#) s [62](#)

(QLD) [Anti-Discrimination Act 1991](#) s [164](#)

(TAS) [Anti-Discrimination Act 1998](#) s [76](#).

9 (NT) [Anti-Discrimination Act 1992](#) s [81](#) (no filing with Tribunal)

(NSW) [Anti-Discrimination Act 1977](#) s 91A(5)-(9) (allows registration with Tribunal)

(VIC) [Equal Opportunity Act 2010](#) ss [119](#), [120](#) (allows registration with Tribunal).

10 (ACT) [Human Rights Commission Act 2005](#) s 45(3)(a)

(NT) [Anti-Discrimination Act 1992](#) s [67](#)

(NSW) [Anti-Discrimination Act 1977](#) ss 89B(2)(a) (declining complaint where no part of conduct could amount to contravention of the Act), 92(1)(a)(i) (dismissing for vexatiousness at any stage of investigation). See also the (NSW) [Vexatious Proceedings Act 2008](#); *Attorney-General (NSW) v Croker* [\[2010\] NSWSC 942](#) ; [BC201006199](#).

(QLD) [Anti-Discrimination Act 1991](#) s [139](#) (must reject)

(SA) [Equal Opportunity Act 1984](#) s [95A\(1\)\(a\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s [64\(1\)\(a\)](#)

(VIC) [Equal Opportunity Act 2010](#) s 116(e) (having regard to all the circumstances, the Commissioner considers it is not appropriate to provide or to continue to provide dispute resolution); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [75](#)

(WA) [Equal Opportunity Act 1984](#) s 89.

11 (NT) [Anti-Discrimination Act 1992](#) ss [83](#), [88](#), [106](#) (appeal to Local Court).

There are no equivalent provisions in the other jurisdictions.

12 (ACT) [Human Rights Commission Act 2005](#) s 57(3) (Commission to be satisfied that the representation is likely to help the conciliation substantially)

(NSW) [Anti-Discrimination Act 1977](#) s 91B

(QLD) [Anti-Discrimination Act 1991](#) s 140(1)

(SA) [Equal Opportunity Act 1984](#) s [95\(6\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s [75\(3\)](#), [75\(4\)](#)

(VIC) [Equal Opportunity Act 2010](#) s [112](#) (principles of dispute resolution offered by the Commissioner include that the dispute resolution process is fair to all parties and consistent with the objectives of the Act); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [62](#) (representation allowed for example, if other party represented)

(WA) [Equal Opportunity Act 1984](#) s 92.

13 (ACT) [Human Rights Commission Act 2005](#) s [52A](#)

(QLD) [Anti-Discrimination Act 1991](#) s [140](#)

(TAS) [Anti-Discrimination Act 1998](#) s [64\(1\)\(e\)](#), [64\(1\)\(g\)](#)

(VIC) [Equal Opportunity Act 2010](#) s 116(c).

(C) Discrimination

There are no equivalent provisions in the other jurisdictions.

See also (NSW) [Anti-Discrimination Act 1977](#) s 89B (power to decline in certain circumstances).

14 *Re Jacob* (1996) 43 ALD 459 ; (1996) EOC ¶92-869, AAT(ACT).

[80-750] Inquiry by State and Territory tribunals

The paragraph below is current to **07 March 2018**

Tribunals are established under State and Territory legislation, often the anti-discrimination legislation itself, and vary in title. In two jurisdictions, there are specialist tribunals for discrimination matters: in Tasmania — the Anti-Discrimination Tribunal and in South Australia — the Equal Opportunity Tribunal. In the other jurisdictions, the tribunals are those established under other legislation having broader jurisdiction than that conferred by the anti-discrimination legislation: the Civil and Administrative Tribunals of the Australian Capital Territory, Northern Territory, New South Wales, Queensland, Victoria and Western Australia — the State Administrative Tribunal (the ‘tribunals’).¹ The presiding officer for a tribunal is required to have judicial status or the qualifications for appointment as a judge in most jurisdictions.² The tribunals have, in effect, many powers of a court and are able to hear and determine cases brought before them by the Commissioner or referred to them by the Minister, and to join parties.³ The Tasmanian Anti-Discrimination Tribunal also has the power to refer complaints for conciliation before or during an inquiry.⁴

In general, the legislation discourages the awarding of costs unless the proceedings are frivolous or there are special circumstances.⁵ Costs have been awarded in a case of pregnancy discrimination, the special circumstances leading to the award being no contributing cause by the complainant and unjustified action by the respondents.⁶

Whether there is a right to representation before the tribunal varies across jurisdictions.⁷ In most jurisdictions, the tribunals are not required to comply with the rules of evidence⁸ and, although required normally to conduct hearings in public, they have power to conduct hearings in private.⁹ The tribunals are expected to act according to the principles of natural justice in ordering procedures.¹⁰ Evidence cannot be given of anything said or done during the conciliation proceedings.¹¹

Although the power to award remedies is determined by the statutory limits of the State or Territory tribunals exercising jurisdiction, in addition to listed remedies the Tasmanian Anti-Discrimination Tribunal has power to make ‘any other order it thinks appropriate’.¹² Federal courts under the (CTH) [Sex Discrimination Act 1984](#) have wide discretion in awarding remedies (‘such orders as it thinks fit’).¹³ The addition of a further claim, such as for breach of an implied term of mutual trust and confidence, might not be entertained if it does not add to the range of remedies available.¹⁴

Notes

1 The ACT Civil and Administrative Tribunal (the ‘ACAT’) was established by the (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) and commenced operation on 2 February 2009. It gave the ACAT responsibility for resolving disputes previously dealt with in 16 different tribunals and jurisdictions. Transitional provisions are in (ACT) Civil and Administrative Tribunal (Transitional Provisions) Regulation 2009.

(NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) ss 7 (establishment of Tribunal), 30 (the tribunal has jurisdiction conferred on by any Act); (NT) [Anti-Discrimination Act 1992](#) ss 4 (definition of ‘Tribunal’), 86-89 (hearing by Tribunal)

(C) Discrimination

(NSW) [Anti-Discrimination Act 1977](#) s 4(1) (definition of 'Tribunal'); established under the (NSW) [Civil and Administrative Tribunal Act 2013](#)

(QLD) [Anti-Discrimination Act 1991](#) s 113, Sch Dictionary. The Queensland Civil and Administrative Tribunal was established under the (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) and the jurisdiction of the former Anti-Discrimination Tribunal was transferred to it.

(SA) [Equal Opportunity Act 1984](#) s 17

(TAS) [Anti-Discrimination Act 1998](#) s 12

(VIC) [Equal Opportunity Act 2010](#) s 4(1) (definition of 'Tribunal'); established under the (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#)

(WA) [Equal Opportunity Act 1984](#) s 4(1) (definition of 'Tribunal'); established under the (WA) [State Administrative Tribunal Act 2004](#).

See also [80-745].

- 2 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s 94 (a presidential member must be a lawyer of 5 years standing or more)

(NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) s 13

(NSW) [Civil and Administrative Tribunal Act 2013](#) s 13 (President can only be a Judge of the Supreme Court; Deputy President can be a judicial officer or experienced legal practitioner)

(QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) s 175 (President must be a Supreme Court judge)

(SA) [Equal Opportunity Act 1984](#) s 18 (appointment)

(TAS) [Anti-Discrimination Act 1998](#) s 12 (appointment)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) ss 10(1), 11(2) (President and Vice Presidents), 12 (Deputy Presidents need not be judges but must have been admitted to legal practice for at least five years)

(WA) [Equal Opportunity Act 1984](#) s 96 (presiding member must be judicial member or senior member); (WA) [State Administrative Tribunal Act 2004](#) s 3(1) (judicial member means President or Deputy President; senior member is non-judicial member appointed as senior member).

In the Northern Territory the Local Court is the designated tribunal: see note 1 above.

- 3 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) Pt 6

(NT) [Anti-Discrimination Act 1992](#) ss 88, 90

(NSW) [Anti-Discrimination Act 1977](#) ss 102-105, 107; (NSW) [Civil and Administrative Tribunal Act 2013](#) s 44(1) (joining parties)

(QLD) [Anti-Discrimination Act 1991](#) ss 174A, 177, 191, 209, 210; (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) Ch 2. Note the Queensland Civil and Administrative Tribunal may now join a third party to a proceeding under amended (QLD) [Anti-Discrimination Act 1991](#) s 177 ((QLD) Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009 (repealed)) where not a complainant or respondent to the complaint, addressing the narrow interpretation of former (QLD) [Anti-Discrimination Act 1991](#) s 177: see *Black & White (Quick Service) Taxis Ltd v Sailor* [2008] QSC 077; [BC200802756](#).

(SA) [Equal Opportunity Act 1984](#) ss 23, 24, 96

(TAS) [Anti-Discrimination Act 1998](#) ss 80 (directions conferences), 87-90

(VIC) [Equal Opportunity Act 2010](#) ss 125, 126 (Victorian Equal Opportunity and Human Rights Commission may apply to enforce order of the Tribunal); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) Pts 3, 4, s 60 (joinder of parties)

(WA) [Equal Opportunity Act 1984](#) ss 107, 122, 126, 127 (limit on damages \$40,000).

On damages awards see *Victoria v Turner* (2009) 23 VR 110; [2009] VSC 66; [BC200901163](#) at [216] per Kyrou J (noting that the authorities provide little guidance on the principles to be applied where the loss comprises depression (comparing *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 238-9, 256-8, 281; [85 ALR 503](#); (1989) EOC ¶92-

(C) Discrimination

250 and *Spencer v Dowling* [1997] 2 VR 127  at 143-5; (1996) EOC ¶92-851; [BC9603333](#)). A global approach to general damages is usually adopted for breaches of equal opportunity legislation: *Victoria v Turner* (2009) 23 VR 110 ; [2009] VSC 66; [BC200901163](#) at [216] per Kyrrou J.

4 (TAS) [Anti-Discrimination Act 1998](#) ss 80A, 94.

5 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s 48

(NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) s 132

(NSW) [Civil and Administrative Tribunal Act 2013](#) s 60 (warrants the award of costs in special circumstances)

(QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) ss 100-105. See also (QLD) [Queensland Civil and Administrative Tribunal Rules 2009](#) rr 83-87.

(SA) [Equal Opportunity Act 1984](#) s 26 (frivolous or vexatious; delay, obstruction or other good reasons)

(TAS) [Anti-Discrimination Act 1998](#) ss 95, 99A (if circumstances justify)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 109 (may only award costs if fair to do so having regard to various specified factors)

In Western Australia, see (WA) [State Administrative Tribunal Act 2004](#) s 87 (the Tribunal must consider specified factors).

As to costs see also [80-790]. On costs awards in the context of an offer of compromise see *Thompson v Big Bert Pty Ltd t/as Charles Hotel* (2008) 103 ALD 104 ; [2008] FCA 792; [BC200803955](#); *McDonald v Parnell Laboratories (Aust) (No 2)* (2007) 164 FCR 591 ; 175 IR 251; [2007] FCA 2086; [BC200711318](#).

6 *Skellern v Colonial Gardens Resort, Townsville* (1996) EOC ¶92-792 ; [1996] QADT 4. See also *Goff v Chelsea Girl Pty Ltd* (1994) EOC ¶92-647, DC(ACT); *Lynton v Maugeri* (1995) EOC ¶92-754, ADT(QLD). As to award of costs see also [80-790].

7 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s 30 (representation by a lawyer or other person permitted subject to provision which may be made in rules). See also (ACT) ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1) s 7; Notifiable Instrument NI2010-551, made by the ACT Civil and Administrative Tribunal under the (ACT) ACT Civil and Administrative Tribunal Procedure Rules 2009 (No 2)

(NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) s 130

(NSW) [Civil and Administrative Tribunal Act 2013](#) s 45 (representation only with leave of Tribunal)

(QLD) [Anti-Discrimination Act 1991](#) ss 163, 185; (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) s 43 (purpose is to have parties represent themselves unless the interests of justice require otherwise)

(SA) [Equal Opportunity Act 1984](#) s 24(4) (right to representation by legal counsel; with leave if by an officer or employee of a registered industrial association or by any other person)

(TAS) [Anti-Discrimination Act 1998](#) s 79A (representation with the permission of the Tribunal)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 62 (children and some bodies have a right to be represented and if they are, other parties may be represented)

(WA) [State Administrative Tribunal Act 2004](#) s 39 (right to representation by legal practitioner; other persons require agreement of Tribunal).

8 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) ss 8, 26

(NT) [Anti-Discrimination Act 1992](#) s 90(a)

(NSW) [Civil and Administrative Tribunal Act 2013](#) s 38 (generally not bound)

(QLD) [Anti-Discrimination Act 1991](#) s 208(1)

(SA) [Equal Opportunity Act 1984](#) s 23(2) (not bound)

(TAS) [Anti-Discrimination Act 1998](#) s 87(4)(a) (not bound)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 98(1)(b) (not bound)

(WA) [State Administrative Tribunal Act 2004](#) s 32(2)(a) (not bound).

(C) Discrimination

- 9 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) ss [37-40](#)
- (NT) [Anti-Discrimination Act 1992](#) s [108](#) (prohibit disclosure of information gained in the course of performing functions under the Act); (NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) ss ss 60, [62](#) (Tribunal hearings to be public unless otherwise ordered)
- (NSW) [Civil and Administrative Tribunal Act 2013](#) s 49 (hearings to be public unless ordered otherwise)
- (SA) [Equal Opportunity Act 1984](#) s 23(3), 23(4) (hearings)
- (TAS) [Anti-Discrimination Act 1998](#) ss [85\(1\)](#) (hearings), [88](#) (non-publication of evidence)
- (WA) [Equal Opportunity Act 1984](#) s 122 (prohibit publication of evidence); (WA) [State Administrative Tribunal Act 2004](#) s [61](#) (hearings).
- 10 *R v Equal Opportunity Board; Ex parte Burns* [\[1985\] VR 317](#) ; (1984) EOC ¶92-112, SC(VIC). Denial of natural justice is a question of law providing a basis of appeal under the (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) (*Luck v Renton* [\[2005\] VSCA 210](#) ; [BC200506951](#) at [\[17\]](#) per Maxwell P and Harper AJA). See also *Towie v Victoria* [\(2008\) 19 VR 640](#) ; [\[2008\] VSC 177](#); [BC200803908](#).
- (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) ss [7](#), [26](#)
- (NT) [Anti-Discrimination Act 1992](#) s 90(b) (equity, conscience and substantial merits of case)
- (NSW) [Civil and Administrative Tribunal Act 2013](#) s 38(2) (rules of natural justice), 38(4) (equity, conscience and substantial merits of case)
- (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) s [28](#)
- (SA) [Equal Opportunity Act 1984](#) s 23(2) (equity, conscience and substantial merits of case)
- (TAS) [Anti-Discrimination Act 1998](#) s 87(4)(a) (bound by rules of natural justice)
- (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 98(1)(a), 98(4) (bound by rules of natural justice, unless enabling Act provides otherwise)
- (WA) [State Administrative Tribunal Act 2004](#) s [32\(1\)](#) (bound by rules of natural justice, unless enabling Act provides otherwise), [32\(2\)\(b\)](#) (equity, conscience and substantial merits of case).
- 11 (ACT) [Human Rights Commission Act 2005](#) s [66](#); (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s [34](#)
- (NT) [Anti-Discrimination Act 1992](#) s [82](#)
- (NSW) [Anti-Discrimination Act 1977](#) s 91A(4)
- (QLD) [Anti-Discrimination Act 1991](#) s 208(2)
- (SA) [Equal Opportunity Act 1984](#) s [95\(9\)](#); see also *ibid* s 27(2)
- (TAS) [Anti-Discrimination Act 1998](#) s [77](#)
- (VIC) [Equal Opportunity Act 2010](#) s [117](#) (evidence of matters said or done in conciliation before Commissioner); see also (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [85](#) (evidence of matters said or done in compulsory conference)
- (WA) [Equal Opportunity Act 1984](#) s 93(3); see also (WA) [State Administrative Tribunal Act 2004](#) s [55](#) (evidence of matters said or done in compulsory conference).
- 12 (TAS) [Anti-Discrimination Act 1998](#) s [89\(1\)\(h\)](#).
- 13 (CTH) [Australian Human Rights Commission Act 1986](#) Pt IIB.
- 14 *Employment Services Australia Pty Ltd v Poniatowska* [\[2010\] FCAFC 92](#) ; [BC201005221](#). See also *Van Efferen v CMA Corporations Ltd* (2009) 183 IR 319 ; [\[2009\] FCA 597](#); [BC200904881](#); *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 ; (2008) EOC ¶93-483; [\[2007\] FCA 1903](#); [BC200711032](#).

[80-755] Review of State and Territory tribunal decisions

The paragraph below is current to **07 March 2018**

State and Territory tribunals have the power to enforce their own determinations.¹ In this respect they contrast with the non-judicial inquiry and conciliation machinery established by the Commonwealth for its anti-discrimination legislation, under which the Australian Human Rights Commission has no power to hold hearings or make determinations of complaints and enforceable proceedings are undertaken by the Federal Court of Australia or Federal Circuit Court acting as a court of first instance.² The State and Territory legislation contains provisions that specifically or by effect establish arrangements for an appeal from the decisions of the tribunal, sometimes on questions of law alone and sometimes on questions of fact and law.³

Notes

- 1 As to the status of tribunals see [80-725]. See also *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 ; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) (the Anti-Discrimination Tribunal exercises judicial power (not Commonwealth judicial power); it is not a 'court of a State' and cannot receive federal jurisdiction). See also *Australian Postal Commission v Dao (No 2)* [\(1986\) 6 NSWLR 497](#) ; [69 ALR 125](#); (1987) EOC ¶92-187, CA(NSW); *Radio 2UE Sydney Pty Ltd v Burns* [2005] NSWADTAP 69 ; *Commonwealth v Wood* (2006) 148 FCR 276 , (2006) EOC ¶93-427; [\[2006\] FCA 60](#); [BC200600408](#).
- 2 See [80-725]-[80-740].
- 3 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) Pt 8
 (NT) [Anti-Discrimination Act 1992](#) s 106 (appeal to Supreme Court on questions of law or fact or law and fact)
 (NSW) [Civil and Administrative Tribunal Act 2013](#) s 83 (appeal on a question of law, with leave to the Supreme Court)
 (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) Ch 2 Pt 8 (a person with a relevant interest may appeal to the Court of Appeal on a question of law; on questions of fact or mixed questions of law and fact appeals are to the Court of Appeal)
 (SA) [Equal Opportunity Act 1984](#) s 98 (appeal conducted as a review of Tribunal's decision or order: *ibid* s 98(4))
 (TAS) [Anti-Discrimination Act 1998](#) s 100 (appeal to Supreme Court on questions of law or fact)
 (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 148 (appeal to Supreme Court, with leave, on questions of law; appeal to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President)
 (WA) [Equal Opportunity Act 1984](#) s 134 (appeal to Supreme Court under (WA) [State Administrative Tribunal Act 2004](#) s 105, with leave, on a question of law only; appeal to the Court of Appeal if the decision was made by a judicial member or the Tribunal included a judicial member).

 See *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC ¶93-457 ; [\[2007\] QSC 075](#); [BC200702388](#) at [54]-[62] per Moynihan J (consideration of the nature of an appeal from a decision on a question of law and reviewed relevant authorities). On the confines of judicial review see *Graovac v Motor Accidents Authority* [\(2010\) 56 MVR 212](#) ; [\[2010\] NSWSC 938](#); [BC201006201](#); *Martin v Kelly* [\[2008\] NSWSC 577](#) ; [BC200804371](#). On jurisdictional error see also *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 ; [262 ALR 569](#); [\[2010\] HCA 1](#); [BC201000230](#) at [66]-[70] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

(B) Complaint Procedures

[80-760] Receipt and handling of complaints

The paragraph below is current to **07 March 2018**

The receipt and handling of complaints is central to the operation of the anti-discrimination legislation.¹ Complaints may be, or in some cases are required to be, in writing.² Complaints may be made by a person or persons aggrieved, or by an agent or person nominated for such person or persons authorised in writing by the aggrieved person.³ There is no requirement for full statement of relevant facts⁴ and it may be possible to add further relevant matters at the pleading stage, if the matter proceeds to hearing by a tribunal⁵ or occurs before the conciliation has commenced.⁶ The anti-discrimination legislation⁷ provides for the Commissioner, President or relevant body to decline complaints, at any stage during an inquiry, on grounds that they are frivolous, vexatious or lacking in substance.⁸ A complaint should not be rejected on pedantic or technical grounds, the essential requirement being that it convey the substance of the matter complained of.⁹ In all jurisdictions the legislation provides that complaints must be made within a specified time after the occurrence of the incident complained, and there is discretion to extend the time.¹⁰ Complaints received must be inquired into by the relevant Commissioner.¹¹ Where a complaint is received out of time, it must not be rejected because it may prove lacking in substance, but must be considered having in mind the remedial and beneficial purposes of the legislation,¹² and whether it will involve denial of natural justice to the defendant.¹³

A person claiming refugee status who has been detained on entry to Australia has a right to correspond confidentially with a human rights organisation and the custodial department must deliver a sealed envelope to the refugee claimant.¹⁴

Notes

- 1** As to the bodies receiving complaints see [80-725]-[80-755].
- 2** (CTH) [Australian Human Rights Commission Act 1986](#) ss 20(1)(b), [20\(1\)\(c\)](#) (allows a complaint even if not in writing), [46P\(1\)](#) (in writing)
 (ACT) [Human Rights Commission Act 2005](#) ss [44](#) (a complaint may be made orally if the commission is satisfied that exceptional circumstances justify it), [45](#), 47-52A (addresses complaint handling and referral procedures)
 (NT) [Anti-Discrimination Act 1992](#) s [64](#)
 (NSW) [Anti-Discrimination Act 1977](#) s 89, 89A
 (QLD) [Anti-Discrimination Act 1991](#) s [136](#) (must be in writing)
 (SA) [Equal Opportunity Act 1984](#) s [93\(1c\)](#) (must be in writing)
 (TAS) [Anti-Discrimination Act 1998](#) s [62](#) (must be in writing)
 (VIC) [Equal Opportunity Act 2010](#) (writing not specified in ibid Pt 8)
 (WA) [Equal Opportunity Act 1984](#) s 83 (must be in writing).
- 3** (CTH) [Australian Human Rights Commission Act 1986](#) s [46P\(2\)](#) (includes trade union); see also ibid s 46P(4) (Commission must provide appropriate assistance where required to reduce to writing). See *Grigor-Scott v Jones* (2008) 168 FCR 450 ; [102 ALD 1](#); [\[2008\] FCAFC 14](#); [BC200804152](#) (signatory to letter of complaint did not describe himself as complainant); *Jones v Toben* (2002) 71 ALD 629 ; (2002) EOC ¶93-247; [\[2002\] FCA 1150](#); [BC200205411](#) (difficulty of a proceeding brought by an applicant described as 'Jeremy Jones for himself and for the members for the time being of the Committee of Management of the Executive Council of Australian Jewry'); *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 ; [51 ALD 108](#); [160 ALR 138](#); [BC9800177](#) (the Executive Council was not a person and could not itself be a person aggrieved).

(C) Discrimination

(ACT) [Human Rights Commission Act 2005](#) s 44(1)(b)

(NT) [Anti-Discrimination Act 1992](#) s 60 (agent must be authorised by Commissioner)

(NSW) [Anti-Discrimination Act 1977](#) ss 87A-88 (includes particular provisions for complaints on behalf of others, by representative bodies and vilification complaints)

(QLD) [Anti-Discrimination Act 1991](#) s 134 (agent or person authorised in writing by commissioner)

(SA) [Equal Opportunity Act 1984](#) s 93(1), 93(1a) (where a person aggrieved is a child or has an intellectual disability, by a person who is in the opinion of the Commissioner a suitable representative)

(TAS) [Anti-Discrimination Act 1998](#) s 60 (including an agent and a trade union which represents the person)

(VIC) [Equal Opportunity Act 2010](#) s 113 (where the person is unable to complain because of impairment, by a person authorised by that person or if unable to authorise, by any other person on his or her behalf; where the person is a child, by the child, his or her parent or any other person if Commission satisfied that the child or parent consents)

(WA) [Equal Opportunity Act 1984](#) s 83 (including a trade union or organisation of employers of which the person is a member; where the person is unable to complain because of an intellectual impairment, by a person authorised by that person or if unable to authorise, by any other person on his or her behalf, who satisfies the Commissioner of the proper interest of that person).

- 4 O'Callaghan v Loder (1984) EOC ¶92-022, SC(NSW). See also *Commonwealth v Sex Discrimination Cmr* (1998) 90 FCR 179; [170 ALR 52](#); [1998] FCA 1607; [BC9806800](#); *Bolloway Community Services Aboriginal Corp v Eurobodalla Shire Council* (2000) EOC ¶93-055.

- 5 Ryan v Shire of Shark Bay (1992) EOC ¶92-441, EOT(WA). As to hearings by a tribunal see [80-735] (Commonwealth), [80-750] (State and Territory). See also:

(CTH) [Australian Human Rights Commission Act 1986](#) s 46PA (complainant may amend at any time with leave of President; does not limit any other powers to amend). See also [80-735] note 12.

(NT) [Anti-Discrimination Act 1992](#) s 64(2) (Commissioner may permit amendment at any time)

(NSW) [Anti-Discrimination Act 1977](#) s 91C (amendment at any time before complaint declined, terminated, otherwise resolved or referred to Tribunal)

(QLD) [Anti-Discrimination Act 1991](#) s 178 (Tribunal may allow amendment)

(TAS) [Anti-Discrimination Act 1998](#) s 84(1)(b) (Tribunal may amend complaint if considered just to do so).

There are no equivalent provisions in the Australian Capital Territory (although (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s 47 allows the Tribunal at any stage in dealing with an application, with the agreement of the parties to give leave to a party to amend a document), South Australia or Victoria.

- 6 Willis v State Rail Authority (NSW) (1992) EOC ¶92-416, EOT(NSW). See also note 5 above.

- 7 (CTH) [Australian Human Rights Commission Act 1986](#) s 20(2)(c)(ii), 46PH(1)(c)

(ACT) [Human Rights Commission Act 2005](#) ss 45(3), 78(2)(c)(ii)

(NT) [Anti-Discrimination Act 1992](#) s 67 ('may decline')

(NSW) [Anti-Discrimination Act 1977](#) s 92(1)(a)(i)

(QLD) [Anti-Discrimination Act 1991](#) ss 139 (the complaint must be rejected), [168](#)

(SA) [Equal Opportunity Act 1984](#) s 95A(1)(a)

(TAS) [Anti-Discrimination Act 1998](#) s 64(1)(a)

(VIC) [Equal Opportunity Act 2010](#) s 116(e) allows the Commissioner to discontinue a dispute if, having regard to all the circumstances, it is considered not appropriate to provide dispute resolution. Complaints may also be made direct to the Victorian Civil and Administrative Tribunal (ibid s 122) but without the benefit of certain confidentiality aspects of the complaint procedures under (VIC) [Equal Opportunity Act 2010](#). Note also (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 75. See *Towie v Victoria* (2008) 19 VR 640 ; [2008] VSC 177; [BC200803908](#) at [29] per Kyrrou J (a high threshold must be met for summary dismissal under (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 75). See also *State Electricity Commission v Rabel* [1998] 1 VR 102 ; (1997) EOC ¶92-875; [BC9606529](#) (principles

(C) Discrimination

applicable to striking out a complaint under similar provisions to (VIC) [Victorian Civil and Administrative Tribunal Act 1998 s 75](#); *Forrester v Aims Corp* [2004] VSC 506 ; [BC200409285](#) at [17]-[28] per Kaye J (referring extensively to principles applicable to an application under (VIC) [Victorian Civil and Administrative Tribunal Act 1998 s 75](#)).

(WA) [Equal Opportunity Act 1984](#) s 89.

- 8 Numerous cases have been dismissed on the grounds of being lacking in substance: see, for example, *Hill v University of New England* (1990) EOC ¶92-291, EOT(NSW); *Ellenbogen v Federated Municipal and Shire Council Employees' Union of Australia* (1989) EOC ¶92-252, HREOC; *Marshall v Executive and Members, 35th and 39th Students' Representative Councils, University of New England* (1986) EOC ¶92-166, EOT(NSW); *Navidad v Myre Fashions* (1987) EOC ¶92-189, EOB(VIC); *Wilson v Phoenix Contracting Services* (1998) EOC ¶92-936, ADT(Vic); *ACT Government and ACT Corrective Services v Ashraff Ezzat* (2001) EOC ¶93-169; *Chung v University of Sydney* [2001] FMCA 94 ; [BC200107939](#) (affirmed on appeal *Chung v University of Sydney* [2002] FCA 186 ; [BC200200697](#); special leave to High Court of Australia refused: *Chung v University of Sydney* (2002) 23(19) Leg Rep SL8 ); *Hassan v Hume* [2003] FMCA 476  (affirmed on appeal *Hassan v Hume* (2004) 80 ALD 272 ; [2004] FCA 886; [BC200404217](#)). Contrast *Rana v University of South Australia* (2004) 136 FCR 344 ; [2004] FCA 559; [BC200402473](#) (appeal against summary dismissal allowed; question should be whether the claim fails to disclose a reasonable cause of action). On the question of overlap between dismissing a proceeding because it is 'frivolous, vexatious, misconceived or lacking in substance' and 'otherwise an abuse of process' see *Towie v Victoria* (2008) 19 VR 640 ; [2008] VSC 177; [BC200803908](#). See further *Fancourt v Mercantile Credits Pty Ltd* (1983) 154 CLR 87  at 99; 48 ALR 1; 57 ALJR 621; [BC8300087](#) per Mason, Murphy, Wilson, Deane and Dawson JJ('[t]he power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried').

- 9 *Waters v Rizkalla* [1991] 1 VR 12 ; (1990) EOC ¶92-282, SC(VIC). See also *Commonwealth v Sex Discrimination Cmr* (1998) 90 FCR 179 ; 170 ALR 52; [1998] FCA 1607; [BC9806800](#); *Bolloway Community Services Aboriginal Corp v Eurobodalla Shire Council* (2000) EOC ¶93-055 (a complaint does not need to be as precise as a pleading or some other form of similar document and a broad interpretation should be given to what constitutes the complaint, but it must refer to the acts which are alleged to constitute the discrimination).

- 10 (CTH) [Australian Human Rights Commission Act 1986](#) ss 20(2)(c)(i), 46PH(1)(b) (12 months).

Note also *ibid* s 46PO(3) (which prevents a complainant from relying in a proceeding on any act of unlawful discrimination which occurred after the relevant complaint had been lodged with the Commission). See *Crvenkovic v La Trobe University* [2009] FCA 374 ; [BC200903146](#) (applying *Charles v Fuji Xerox Australia Pty Ltd* (2000) 105 FCR 573 ; 105 IR 153; [2000] FCA 1531; [BC200006505](#) at [37]-[39] per Katz J.

(ACT) [Human Rights Commission Act 2005](#) s 78(1)(a) (the Commission may close a complaint at any time if more than 2 years have elapsed since the circumstances that gave rise to the complaint happened)

(NT) [Anti-Discrimination Act 1992](#) s 65 (12 months with discretion to extend)

(NSW) [Anti-Discrimination Act 1977](#) s 89B(2)(b) (12 months)

(QLD) [Anti-Discrimination Act 1991](#) s 138 (12 months). See *Queensland (Queensland Health) v Ball* [2011] QSC 50 ; [BC201101647](#) (judicial review of decision to exercise discretion under (QLD) [Anti-Discrimination Act 1991](#) s 138(2) to accept a complaint).

(SA) [Equal Opportunity Act 1984](#) s 93(2) (12 months, with provision to extend on application under *ibid* s 93(2a))

(TAS) [Anti-Discrimination Act 1998](#) s 63 ((12 months) with extension 'if reasonable to do so')

(VIC) [Equal Opportunity Act 2010](#) s 116(a) (12 months)

(WA) [Equal Opportunity Act 1984](#) s 83(4), 83(5) (12 months) with extension for good cause.

- 11 See [80-730], [80-745].

- 12 *McAuliffe v Puplick* (1996) EOC ¶92-800, SC(NSW). Contrast the approach of Chesterman J in *Buderim Ginger Ltd v Booth* [2001] QSC 349 ; [BC200105821](#) at [19]-[21] who expressly disagreed with the view in *McAuliffe* that the merits of a complaint cannot be considered in determining whether there is good cause to accept a complaint out of time. Chesterman J's decision was overturned on appeal *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147 ; [2002] QCA 177; [BC200202615](#) at [23] per Atkinson J (with whom McPherson JA agreed) following the decision in *McAuliffe*, while de Jersey CJ at [2] found it unnecessary to consider that point. See also *Joint Coal Board v Anti-Discrimination*

(C) Discrimination

Board of NSW [2001] NSWSC 712 ; *BC200105023* at [12] (Brownie AJ finding it was not possible to draw a stark distinction between 'merits' and 'good cause' for the delay). Note that a consideration of the substantial merits of the case may be relevant at the stage of referral of a complaint to a Court or Tribunal: see, for example, the principles for exercising discretion to allow an out of time application to the Federal Court of Australia or Federal Circuit Court discussed in *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109  at [10] (approved *Budd v Secretary, Dept of Education, Employment and Workplace Relations* [2008] FCA 1540 ; *BC200809120* at [19] per Cowdroy J).

- 13 *Proceedings Commissioner v McCulloch* (1996) EOC ¶92-818, Complaints Review Tribunal (NZ) (delay did not prevent this case proceeding); *Borden v Walters* [1999] QSC 226 ; *BC9906085* at [34]-[38] per Mackenzie J; *Fraser v President, Anti-Discrimination Board* [2000] NSWSC 1083 ; *BC200007324* at [5] per Adams J; *Joint Coal Board v Anti-Discrimination Board of NSW* [2001] NSWSC 712 ; *BC200105023* at [16]-[19] per Brownie AJ.
- 14 *Human Rights & Equal Opportunity Commission v Secretary, Dept of Immigration & Multicultural Affairs* (1996) 67 FCR 83 ; *41 ALD 325*; *137 ALR 207*; *BC9602358*, Fed C of A.

[80-765] Procedural matters

The paragraph below is current to **07 March 2018**

In all the State and Territory tribunals except the Australian Capital Territory, the legislation expressly requires equitable¹ or fair conduct² of proceedings.³ The doctrines of natural justice and procedural fairness apply to conciliation proceedings, at least in relation to the perceived impartiality of the person presiding over a compulsory conference.⁴ Once the Commissioner (or tribunal in matters referred to it) commences dealing with a complaint, powers are available to require persons, including the parties, to attend for the purposes of conciliation, to produce papers or like information⁵ and, in some jurisdictions, to attend compulsory conferences.⁶ The Commissioner must take care that a complaint is not rejected without proper investigation,⁷ but (unlike in *criminal* matters) the requirements of natural justice do not expressly apply to the investigation process.⁸ Where the Commissioner is unable to conciliate a complaint, it must be referred to the tribunal for consideration if either the complainant or, in some cases, the respondent so requests, and in some cases unless the complainant does not wish the reference to be made.⁹ In South Australia, if a complaint concerns sexual harassment by a judicial officer or member of parliament the Commissioner must refer it to an appropriate authority, namely the Chief Justice (in the case of a judicial officer) or the Speaker of the House (in the case of a member of parliament).¹⁰ In Tasmania, a settlement agreement involving children or persons with a disability, who lack capacity to approve the settlement, must gain the approval of the Commissioner or Tribunal.¹¹

Notes

- 1 (NT) *Anti-Discrimination Act 1992* s 90(1)(b) (according to equity, good conscience and the substantial merits)
(NSW) *Civil and Administrative Tribunal Act 2013* s 38(4) (equity, conscience and substantial merits of case)
(SA) *Equal Opportunity Act 1984* s 23(2) (equity, good conscience and the substantial merits)
(WA) *State Administrative Tribunal Act 2004* s 32(2)(b) (equity, good conscience and the substantial merits).
- 2 (ACT) *ACT Civil and Administrative Tribunal Act 2008* s 7 (note also (ACT) *Human Rights Commission Act 2005* s 6(2)(j) (an independent, fair and accessible process for the resolution of discrimination complaints))
(NSW) *Civil and Administrative Tribunal Act 2013* s 38(2) (rules of natural justice)
(QLD) *Queensland Civil and Administrative Tribunal Act 2009* s 28(2), 28(3)(a) (the Tribunal must act fairly and according to the substantial merits of the case; must observe the rules of natural justice)
(TAS) *Anti-Discrimination Act 1998* s 87(4)(a) (natural justice)

(C) Discrimination

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s 98(1)(a) (natural justice)

(WA) [State Administrative Tribunal Act 2004](#) s [32\(1\)](#) (natural justice).

3 As to the tribunals see [80-730] (Commonwealth), [80-750] (States and Territories).

4 *Koppen v Cmr for Community Relations* (1986) 11 FCR 360; [67 ALR 215](#); (1986) EOC ¶92-173, Fed C of A. However, in relation to the investigatory process see *Re New South Wales Corporal Punishment in Schools Case; Determination on Preliminary Matters* (1986) EOC ¶92-160 per Matthews J, EOT(NSW) (see note 7 below). Note also:

(CTH) [Australian Human Rights Commission Act 1986](#) s [46PK\(3\)](#) (person presiding over conference must ensure that the conduct of the conference does not disadvantage either party to the complaint)

(VIC) [Equal Opportunity Act 2010](#) s 112(c) (the dispute resolution process offered by the Commissioner must be fair to all parties).

There are no directly provisions in the other jurisdictions.

5 (CTH) [Australian Human Rights Commission Act 1986](#) ss [21\(1\)](#), [46PI](#)

(ACT) [Human Rights Commission Act 2005](#) ss [51](#) (referral of complaints for conciliation), [59](#) (compulsory attendance at conciliation), 73-74 (power to ask for information or documents or require attendance); (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s [33](#) (preliminary conference)

(NT) [Anti-Discrimination Act 1992](#) ss [66B](#), [79](#), [84](#), [85](#)

(NSW) [Anti-Discrimination Act 1977](#) s 90B

(QLD) [Anti-Discrimination Act 1991](#) s [156](#) (production of information or documents)

(SA) [Equal Opportunity Act 1984](#) s [94\(2\)](#)

(TAS) [Anti-Discrimination Act 1998](#) s [97](#)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [80](#) (directions)

(WA) [Equal Opportunity Act 1984](#) s 86.

6 (CTH) [Australian Human Rights Commission Act 1986](#) s [46PJ](#)

(ACT) [Human Rights Commission Act 2005](#) ss [51](#) (referral of complaints for conciliation), [59](#) (compulsory attendance at conciliation), 73-74 (power to ask for information or documents or require attendance)

(QLD) [Anti-Discrimination Act 1991](#) s [159](#)

(TAS) [Anti-Discrimination Act 1998](#) s [75](#)

(VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) ss [83](#), [84](#) (compulsory conferences)

(WA) [Equal Opportunity Act 1984](#) s 87.

There is no provision for compulsory conferences in the Northern Territory, New South Wales or South Australia, but parties may be required to attend to conciliation proceedings:

(NT) [Anti-Discrimination Act 1992](#) ss [79](#), [80](#)

(NSW) [Anti-Discrimination Act 1977](#) s 91A(2), 91A(3)

(SA) [Equal Opportunity Act 1984](#) s [95\(4\)](#).

7 *Proudfoot v Human Rights and Equal Opportunity Commission* [\(1991\) 100 ALR 557](#); [22 ALD 775](#); (1991) EOC ¶92-354.

8 *Re New South Wales Corporal Punishment in Schools Case; Determination on Preliminary Matters* (1986) EOC ¶92-160, EOT(NSW) per Matthews J (investigation by the Anti-Discrimination Board).

See also:

(TAS) [Anti-Discrimination Act 1998](#) s [69](#) (Commissioner may investigate in a manner appropriate to circumstances, having regard to need to maintain confidentiality).

There are no equivalent provisions in the other jurisdictions.

(C) Discrimination

- 9 (CTH) [Australian Human Rights Commission Act 1986](#) ss [46PH\(1\)\(i\)](#) (President to terminate complaint if no prospect of successful conciliation), [46PO\(1\)](#) (a person affected by a terminated complaint may make application to Federal Court of Australia or Federal Circuit Court)
- (ACT) [Human Rights Commission Act 2005](#) s [51](#)
- (NT) [Anti-Discrimination Act 1992](#) ss [81\(2\)-\(3\)](#), [83](#) (parties to be notified if conciliation has ceased and the Commissioner will conduct an evaluation of the prospects of the action succeeding before the Tribunal, if requested to do so by the complainant). See *ibid* ss 84-85 for procedure of evaluation proceedings.
- (NSW) [Anti-Discrimination Act 1977](#) s 93A-93C (on request of complainant, mandatory referral and by request of either party if unresolved after 18 months, however, note special reference to Attorney-General in the case of serious racial vilification: *ibid* s 91)
- (QLD) [Anti-Discrimination Act 1991](#) ss 155(4), [164A](#), 165-167, [169](#), [170](#) (referral at different stages is mandatory on the Commissioner, but the complainant may cause the complaint to lapse)
- (SA) [Equal Opportunity Act 1984](#) s [95B](#) (mandatory referral, with Commissioner required if requested to assist complainant: *ibid* s 95C)
- (TAS) [Anti-Discrimination Act 1998](#) ss [78](#) (to be referred within 6 months, or a later period as agreed with complainant but the commissioner may decline to refer the complaint if satisfied that the complainant has failed to pursue the complaint or its resolution), [79](#), [80](#) (Commissioner to report to Tribunal before hearing and Tribunal to conduct directions conference)
- (VIC) [Equal Opportunity Act 2010](#) s [122](#) (application to the Tribunal may be made whether or not before Commissioner for dispute resolution)
- (WA) [Equal Opportunity Act 1984](#) ss 90, 93 (mandatory reference, with Commissioner required if requested to assist complainant: *ibid* s 93(2)).
- 10 (SA) [Equal Opportunity Act 1984](#) s [93AA](#).
- 11 (TAS) [Anti-Discrimination Act 1998](#) s [96A](#).

[80-770] Confidential transmission of complaints to tribunal

The paragraph below is current to **07 March 2018**

Where a complaint is referred to the relevant tribunal, the Commissioner is required to provide necessary details of the complaint, but may not disclose details of what took place during the conciliation proceedings, the confidentiality of which is preserved by the anti-discrimination legislation.¹ The primary focus of the exclusion is on what took place in the compulsory conference.²

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [46PS\(2\)](#) (the President 'may' provide a written report on a complaint that has been terminated)
- (ACT) [Human Rights Commission Act 2005](#) s [66](#); see also (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) s [34](#).
- (NT) [Anti-Discrimination Act 1992](#) ss [82](#) (confidentiality), [87A](#) (Commissioner must provide a report to the Tribunal)
- (NSW) [Anti-Discrimination Act 1977](#) ss 91A(4) (confidentiality), 93A-94A (referral)
- (QLD) [Anti-Discrimination Act 1991](#) ss 164A-175 (referral), 208(2) (confidentiality)
- (SA) [Equal Opportunity Act 1984](#) ss 27(2), [95\(9\)](#) (confidentiality), 95B-95D (referral)
- (TAS) [Anti-Discrimination Act 1998](#) ss [77](#) (confidentiality), 78-79 (referral)

(C) Discrimination

(VIC) [Equal Opportunity Act 2010](#) s [117](#) (evidence of matters said or done in conciliation before Commissioner); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [85](#) (evidence of matters said or done in compulsory conference)

(WA) [Equal Opportunity Act 1984](#) s 93(3); (WA) [State Administrative Tribunal Act 2004](#) s [55](#) (evidence of matters said or done in compulsory conference).

- 2 *Najdovska v Australian Iron & Steel Pty Ltd* (1985) EOC ¶¶92-120.

[80-775] Multiple and representative complaints

The paragraph below is current to **07 March 2018**

In all jurisdictions, specific provision is made for multiple, representative and, except in the Northern Territory, South Australia, Victoria and Western Australia, class complaints to be lodged.¹ There is a power² to join several complaints together,³ to amend a single complaint to be a representative complaint, and vice versa.⁴ It may be possible include a group which has not yet suffered discrimination but for whom remedial orders would be effective.⁵ Commonwealth legislation has refined the provisions relating to the representative complaint procedures by requiring identification of the members of the class, the nature of the complaints and the nature of the relief sought.⁶ While representative complaints may be made to the Australian Human Rights Commission, once that claim is terminated there is no provision for a representative application to be pursued in the Federal Circuit Court and such proceedings must therefore be pursued in the Federal Court of Australia.⁷ Further, while a complaint may be made on behalf of an aggrieved person to the Australian Human Rights Commission, on termination of the complaint only an 'affected person' may make an application to the Federal Court of Australia or Federal Magistrate's Court.⁸ Details as to parties and process are contained in the legislation of some of the other jurisdictions providing for representative complaints.⁹ Even if a complaint has been received or argued as a representative complaint, it may nevertheless justify the tribunal in awarding costs if the decision in the particular case is factually and legally complex, and involves a matter of public importance concerning the rights of (in the instant case) impaired applicants and the obligations of employers generally.¹⁰

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) s [46P\(2\)](#)
(ACT) [Human Rights Commission Act 2005](#) s [71](#)
(NT) [Anti-Discrimination Act 1992](#) s [60](#) (representative only where authorised by Commissioner; no provision for class complaints)
(NSW) [Anti-Discrimination Act 1977](#) ss 87A-88
(QLD) [Anti-Discrimination Act 1991](#) ss [146-152](#)
(SA) [Equal Opportunity Act 1984](#) s [93\(1\)](#), [93\(1a\)](#) (representative complaint only where representative is him/herself an aggrieved person, or where aggrieved person is a child or intellectually impaired; no provision for class complaints)
(TAS) [Anti-Discrimination Act 1998](#) ss [60\(1\)](#), [82](#)
(VIC) [Equal Opportunity Act 2010](#) s [113](#) (representative complaints with consent and where representative is him or herself an aggrieved person or on behalf of persons suffering from impairment or on behalf of a child); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) ss [59-60](#)
(WA) [Equal Opportunity Act 1984](#) s 83 (representative complaint only where representative is him or herself an aggrieved person or by trade union or on behalf of impaired person).
- 2 As to the tribunals see [80-730] (Commonwealth), [80-750] (States and Territories).

(C) Discrimination

- 3 *Najdovska v Australian Iron & Steel Pty Ltd* (1985) EOC ¶92-140; 12 IR 250, EOT(NSW); *Najdovska v Australian Iron & Steel Pty Ltd* (1986) EOC ¶92-176, EOT(NSW); *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC ¶92-417, HREOC. See also *Grigor-Scott v Jones* (2008) 168 FCR 450; [102 ALD 1](#); [\[2008\] FCAFC 14](#); [BC200804152](#) ((CTH) [Australian Human Rights Commission Act 1986](#) s [46PF\(3\)](#) contemplates that a person alleged to have done the alleged unlawful discrimination should always be a respondent to the complaint before the Commission).
- 4 (CTH) [Australian Human Rights Commission Act 1986](#) ss [46PA](#) (general power to amend complaint), [46PC\(1\)](#), [46PC\(2\)](#) (withdrawal or replacement of members from representative complaint)
- (NT) [Anti-Discrimination Act 1992](#) s [73](#) (Commissioner may join person as party)
- (NSW) [Anti-Discrimination Act 1977](#) ss 91C (general power to amend), 94 (severing complaints) (President), 101(4), 101(5) (Tribunal)
- (QLD) [Anti-Discrimination Act 1991](#) ss ss 148, [149](#) (Commissioner), [196](#), [197](#) (Tribunal)
- (TAS) [Anti-Discrimination Act 1998](#) ss [62A](#) (Commissioner), [84](#) (Tribunal)
- (WA) [Equal Opportunity Act 1984](#) s 116 (Tribunal).
- There are no express provisions in the Australian Capital Territory, Northern Territory, South Australia or Victoria relating to the power to amend a complaint to be a representative complaint and vice versa. See also *Pearce v Glebe Administration Board* (1985) EOC ¶92-131, EOT(NSW) (tribunal ruled that it was for it to determine whether a complaint is representative, and to determine the members of the class to be included).
- 5 *Leves v Haines* (1986) EOC ¶92-167, EOT(NSW); *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC ¶92-889, HREOC.
- 6 (CTH) [Australian Human Rights Commission Act 1986](#) s [46PB](#). Note that in identifying class it is not necessary to name them or specify how many there are or have their consent.
- 7 (CTH) [Federal Court of Australia Act 1976](#) Pt IVA.
- 8 (CTH) [Australian Human Rights Commission Act 1986](#) ss [46P\(2\)](#), [46PO\(1\)](#).
- 9 (NSW) [Anti-Discrimination Act 1977](#) ss 87B, 87C, 101 (may need to show consent of other people in class)
- (QLD) [Anti-Discrimination Act 1991](#) ss 146-152 (Commissioner), 194-200 (tribunal)
- (WA) [Equal Opportunity Act 1984](#) ss 114-116.
- There are no equivalent provisions in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania or Victoria.
- 10 *Willis v State Rail Authority (NSW) (No 3)* (1992) EOC ¶92-456, EOT(NSW).

(c) Interim Determinations, Onus of Proof and Costs

[80-780] Interim determinations and orders

The paragraph below is current to **07 March 2018**

In all jurisdictions the tribunal is authorised to make, normally on the application of the Commissioner, although in some cases a party may apply for, an interim determination or order where it is necessary to protect the interests of the parties while the complaint is being investigated, conciliated or heard.¹ An interim determination has been granted to continue complainants in employment even if an exemption, if found applicable, would remove the board's jurisdiction,² or to avoid compulsory retirement on age grounds,³ or redeployment to another position.⁴ However, if it is clear that the employment relationship has broken down with little prospect of being restored even if the employee's complaint were successful, an application for an interim injunction to prevent the termination may fail.⁵ If, in a subsequent hearing, the exemption is found applicable, the interim determination will be set aside and a complaint of discrimination could be an abuse of process.⁶ In the Northern Territory the Commissioner makes an interim decision.⁷ An interim order to keep a school open has been refused because the full year sought extended beyond the likely date of determination by the tribunal.⁸ An interim injunction was granted so as

(C) Discrimination

to ensure that the complainant was not prevented from competing on a netball competition for reasons relating to her pregnancy, given the medical evidence and the fact that the matter could not be resolved by damages alone.⁹ Tribunals tend to follow the principles laid down by the courts for the issue of interlocutory orders and hence will look to whether there is a serious question to be tried rather than a prima facie case, and to whether the effect would be mandatory or prohibitory, with a possible preference for the former.¹⁰

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) ss [46PO\(6\)](#) (interim injunction after proceedings commenced in Federal Circuit Court or Federal Court of Australia), [46PP](#) (interim injunction after complaint lodged with Commission but before the termination or withdrawal of a complaint; Commission, party or person affected may apply)
(ACT) Civil and Administrative Tribunal Act 2008 s 53 (interim order of Tribunal on application of a party before hearing)
(NT) [Anti-Discrimination Act 1992](#) s [101](#) (by the Commissioner alone, after hearing parties)
(NSW) [Anti-Discrimination Act 1977](#) s 105 (President of Board or a party may apply to tribunal); (NSW) [Civil and Administrative Tribunal Act 2013](#) s 80(2)(a) (appeals against interim orders of the Tribunal may be made with leave to Appeal Panel)
(QLD) [Anti-Discrimination Act 1991](#) ss [144](#) (before reference to Tribunal; Commissioner or complainant may apply); (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) s [58](#) (before making a final decision the Tribunal may make an interim order)
(SA) [Equal Opportunity Act 1984](#) s [96\(2\)](#) (the Tribunal only is empowered to make an order during proceedings)
(TAS) [Anti-Discrimination Act 1998](#) s [98](#) (by Tribunal, at any stage, or on application from a party or the Commissioner)
(VIC) [Equal Opportunity Act 2010](#) ss [121](#) (Tribunal may make interim orders to prevent prejudice to dispute resolution on application of complainant or Commissioner), [138](#) (Tribunal may make interim orders to prevent prejudice to investigation or public inquiry); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) Pt 10.
(WA) [Equal Opportunity Act 1984](#) ss 85, 126 (Commissioner or a party may apply).
See also *AB v Minister for Education and Training* (NSW) [\[2003\] FMCA 16](#) ; [BC200300113](#) (interim relief exists to prevent existing rights from being taken away not to create rights). As to the Commissioners and tribunals see [80-725]-[80-755].
- 2 *Zurek v Hospital Corp Australia Pty Ltd (t/as Warringal Private Hospital)* (1992) EOC ¶92-459, EOB(VIC). See also *Kinley v East Sydney Area Health Service* (1993) EOC ¶92-551, EOT(NSW) (nurse extended beyond retirement date while issue determined).
- 3 *Compulsory Retirement Claim* (1992) EOC ¶92-462, EOT(NSW); *Ivory v Griffith University* (1996) EOC ¶92-849, ADT(QLD) (affirmed *Ivory v Griffith University* (1997) EOC ¶92-880, ADT(QLD)).
- 4 *Proust v The President of the Equal Opportunity Board* [\[1990\] VR 738](#) ; (1990) EOC ¶92-275; [BC8900520](#).
- 5 *McIntosh v Australian Postal Corp* (2001) 140 IR 108 ; [\[2001\] FCA 1012](#); [BC200104367](#).
- 6 *Zurek v Hospital Corp Australia Pty Ltd (t/as Warringal Private Hospital)* (No 2) (1992) EOC ¶92-460, EOB(VIC).
- 7 (NT) [Anti-Discrimination Act 1992](#) s [101](#).
- 8 *Sinnapan v Victoria* (1993) EOC ¶92-498, EOB(VIC).
- 9 *Gardner v National Netball League Pty Ltd* [\(2003\) 197 ALR 28](#) ; 174 FLR 452; (2003) EOC ¶93-277; [\[2003\] FMCA 81](#).
- 10 *Fonua v Broken Hill Proprietary Co Ltd* (1994) EOC ¶92-605, EOT(NSW) (complainant alleging racial discrimination and no longer in employment). See also *Rainsford v Group 4 Correctional Services* [\[2002\] FMCA 36](#) ; [BC200201465](#) (however, note comment of McInnes FM at [35] that the Court should not regard itself as constrained solely by the common law principles for granting interim relief). As to interlocutory orders generally see PRACTICE AND PROCEDURE [\[325-2700\]-\[325-2895\]](#).

[80-785] Onus of proof

The paragraph below is current to **07 March 2018**

In hearings before the tribunals, the complainant has the responsibility of proving the elements defined as constituting either direct or indirect discrimination in relation to the ground or attribute selected.¹ The standard is the balance of probabilities² and the discriminatory element must be a (but not necessarily the primary) factor³ if the unlawfulness of the act is to be established.⁴

Notes

- 1 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [\[65\]](#) per French and Jacobson JJ, at [\[132\]](#) per Branson J. The relevant standard is the balance of probabilities: *Walker v Victoria* [\[2011\] FCA 258](#) ; [BC201101493](#) at [\[36\]](#), [\[181\]](#) per Tracey J (observing also the precision with which the requirements or conditions in the case of indirect discrimination must be specified) (following *New South Wales v Amery* (2006) 230 CLR 174 ; [226 ALR 196](#); [\[2006\] HCA 14](#); [BC200603095](#) at [\[128\]](#) per Kirby J). As to hearings before the tribunals see [\[80-735\]](#) (Commonwealth), [\[80-750\]](#) (State and Territory). Note also the following provisions:
 (CTH) [Sex Discrimination Act 1984](#) s [7C](#) (onus on respondent in indirect discrimination); (CTH) [Age Discrimination Act 2004](#) s [15\(2\)](#) (onus on respondent to provide requirement reasonable in indirect discrimination); (CTH) [Disability Discrimination Act 1992](#) ss [6\(4\)](#), [11\(2\)](#) (onus on respondent to provide requirement reasonable in indirect discrimination)
 (ACT) [Discrimination Act 1991](#) s [70](#) (the onus of establishing the exception, exemption, excuse, qualification or justification lies on the person seeking to rely on it)
 (NT) [Anti-Discrimination Act 1992](#) s [91\(1\)](#), [91\(2\)](#) (complainant to prove complaint, respondent to prove exemption, in each case of balance of probabilities)
 (NSW) [Anti-Discrimination Act 1977](#) s 104 (the onus of proving the exception in any proceedings before the Tribunal relating to a complaint lies on the respondent)
 (QLD) [Anti-Discrimination Act 1991](#) ss [204](#) (general principle: complainant to prove), [205](#) (respondent to prove requirement reasonable in indirect discrimination), [206](#) (respondent to prove exemption applies)
 (TAS) [Anti-Discrimination Act 1998](#) s [101](#) (exception or exemption)
 (VIC) [Equal Opportunity Act 2010](#) ss [9](#) (burden of proving reasonableness of requirement, condition or practice in indirect discrimination is on the person imposing it), [12\(6\)](#) (proof of special measures), [13\(2\)](#) (the person seeking to rely on the exception or exemption has the burden of proving that it applies)
 (WA) [Equal Opportunity Act 1984](#) s 123 (respondent to prove a claimed exception applies).
- 2 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [\(1992\) 110 ALR 449](#)  at [449](#), [450](#); 67 ALJR 170; [BC9202685](#) per Mason CJ, Brennan, Deane and Gaudron JJ. The test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 ; [1938] ALR 334; (1938) 12 ALJR 100; [BC3800027](#) does not create another standard of proof between the civil and the *criminal*. The balance of probabilities is the standard but the degree of satisfaction required in determining that that standard has been discharged may vary according to the seriousness of the allegations that are made: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#) at [\[110\]](#) per French and Jacobson JJ. See also *Palmer v Dolman* [\[2005\] NSWCA 361](#) ; [BC200510754](#); *Victoria v Turner* [\(2009\) 23 VR 110](#) ; [\[2009\] VSC 66](#); [BC200901163](#) at [\[112\]-\[118\]](#) per Kyrrou J.
- 3 (CTH) [Racial Discrimination Act 1975](#) s [18](#); (CTH) [Sex Discrimination Act 1984](#) s [8](#); (CTH) [Disability Discrimination Act 1992](#) s [10](#); (CTH) [Age Discrimination Act 2004](#) s [16](#) (age must be the dominant reason for doing the act)
 (ACT) [Discrimination Act 1991](#) s [4A](#)

(C) Discrimination

(NT) [Anti-Discrimination Act 1992](#) s 20(3)

(NSW) [Anti-Discrimination Act 1977](#) s 4A

(QLD) [Anti-Discrimination Act 1991](#) s 10(4) (attribute must be a substantial reason for the treatment — direct discrimination only)

(SA) [Equal Opportunity Act 1984](#) s 6(2) (must be substantial reason for the act)

(TAS) [Anti-Discrimination Act 1998](#) s 14(3)(a)

(VIC) [Equal Opportunity Act 2010](#) s 8(2)(b) (must be substantial reason for the act; direct discrimination only)

(WA) [Equal Opportunity Act 1984](#) s 5.

- 4 *Erbs v Overseas Corp Pty Ltd* (1986) EOC ¶92-181, HREOC; *O'Callaghan v Loder* (1984) EOC ¶92-024, EOT(NSW); *Heath v Nelac Nominees* (1992) EOC ¶92-419, EOT(WA); *DL (Representing the Members of People Living with AIDS (WA) Inc) v Perth City Council* (1992) EOC ¶92-422, EOT(WA); *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; [202 ALR 133](#); [\[2003\] HCA 62](#); [BC200306678](#) at [\[236\]](#) per Gummow, Hayne and Heydon JJ; at [\[13\]](#), [\[14\]](#) per Gleeson CJ; at [\[166\]](#) per McHugh and Kirby JJ; *Forbes v Australian Federal Police (Commonwealth of Australia)* [\[2004\] FCAFC 95](#); [BC200402343](#) at [\[68\]-\[70\]](#) per the court.

[80-790] Costs

The paragraph below is current to **07 March 2018**

As a general rule, the approach of State and Territory tribunals is that parties to discrimination proceedings bear their own costs. However, in the Commonwealth jurisdiction, it now appears to be accepted that the court will usually apply the principle that costs follow the event and the unsuccessful party will be required to pay the successful party's costs.¹ The court has, however, been willing to depart from this principle on occasions, for example, where there is a significant public interest element to the case,² the unsuccessful party is unrepresented³ or the successful party conducts proceedings in an unnecessarily prolonged manner.⁴ The Commonwealth has provided the possibility of assistance from the Attorney-General, on application by either a complainant or a respondent to a complaint.⁵ The States and Territories have empowered the tribunals to award costs either generally or in special circumstances.⁶ Legal aid may be granted to parties, subject to the normal rules.⁷

Notes

- 1 This is the case since the former Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission, which did not have the power to award costs) ceased to have the power to hear and determine complaints (as opposed to conducting inquiries and conciliation) and proceedings brought at first instance in the Federal Court of Australia or Federal Circuit Court are the first hearing. See, for example, *Tate v Rafin* (2001) EOC ¶93-125; [\[2000\] FCA 1582](#); [BC200006864](#) at [\[71\]](#) per Wilcox J; *Creek v Cairns Post Pty Ltd* [\[2001\] FCA 1150](#); [BC200104839](#); *Paramasivam v Wheeler* [\[2001\] FCA 231](#); [BC200100853](#) at [\[24\]](#) per Hill J (special leave to High Court of Australia refused: *Paramasivam v Wheeler* (2002) 23(5) Leg Rep SL1); *Jacomb v Australian Municipal, Administrative, Clerical and Services Union* [\[2004\] FCA 1600](#); [BC200408394](#) at [\[4\]](#) per Creenan J; *Fetherson v Peninsula Health (No 2)* (2004) 137 FCR 262; [79 ALD 424](#); [\[2004\] FCA 594](#); [BC200402589](#) at [\[8\]](#), [\[9\]](#) per Heerey J. Note that although there are no specific provisions relating to the power to award costs in the Commonwealth anti-discrimination legislation, the Federal Court of Australia has the general discretion to order costs under the (CTH) [Federal Court of Australia Act 1976](#) s 43, as does the Federal Circuit Court under the (CTH) [Federal Circuit Court of Australia Act 1999](#) s 79. For a detailed review of authorities on the power to award costs see *Tasmania v Anti-Discrimination Tribunal* (2008) 17 Tas R 227; [\[2008\] TASSC 23](#); [BC200803676](#).

(C) Discrimination

- 2 See, for example, *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306 ; [191 ALR 739](#); [\[2001\] FCA 1740](#); [BC200107734](#) at [\[97\]](#) per Wilcox J (applicant unsuccessful but case was arguable and served to clarify important issues of discrimination law); *Jacomb v Australian Municipal, Administrative, Clerical and Services Union* [\[2004\] FCA 1600](#) ; [BC200408394](#) at [\[10\]](#) per Crennan J (case had element of public interest and precedent value, but these factors were subservient to applicant's personal interest; applicant ordered to pay 75 per cent of respondent's costs). Compare *Physical Disability Council of NSW v Sydney City Council* [\[1999\] FCA 815](#) ; [BC9903263](#) (the speculative strength of the case and the manner of instituting proceedings outweighed the fact that the issues were interesting and arguable). See also *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [\[2007\] FCA 974](#) ; [BC200705019](#) (applicant found not to have standing (issue addressed at hearing) and a departure from usual costs orders not justified as matter in public interest).
- 3 See, for example, *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433 ; (2001) EOC ¶93-143; [2001] FMCA 15 (applicant unrepresented and unable to assess relative strengths and weaknesses of his case which involved technical issue of whether there was an actuarial basis for insurance policy position on people with HIV or AIDS).
- 4 See, for example, *Horman v Distribution Group Ltd* [\[2001\] FMCAfam 52](#)  at [\[77\]](#) per Raphael FM (affirmed on appeal *Horman v Distribution Group Ltd* [\[2002\] FCA 219](#) ; [BC200200686](#)).
- 5 (CTH) [Australian Human Rights Commission Act 1986](#) s [46PU](#). See also *A v B* (1991) EOC ¶92-367, HREOC (respondent refused assistance).
- 6 (ACT) [ACT Civil and Administrative Tribunal Act 2008](#) (parties to an application must bear their own costs with provision for other orders in particular circumstances)
- (NT) [Northern Territory Civil and Administrative Tribunal Act 2014](#) s [132](#)
- (NSW) [Civil and Administrative Tribunal Act 2013](#) s 60(2) (Tribunal may award costs)
- (QLD) [Queensland Civil and Administrative Tribunal Act 2009](#) ss [100-109](#) (each party usually bears its own costs subject to interests of justice)
- (SA) [Equal Opportunity Act 1984](#) s 26 (Tribunal may award costs in cases of frivolous or vexatious complaints; delay or obstruction)
- (TAS) [Anti-Discrimination Act 1998](#) s [95](#), [99A](#) (if circumstances justify)
- (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) s [109](#) (if fair, having regard to specified factors)
- (WA) [State Administrative Tribunal Act 2004](#) s [87](#).
- As to special circumstances see *Kwa v Secretary for Local Government* (1988) EOC ¶92-231, EOT(WA); *Willis v State Rail Authority (NSW) (No 3)* (1992) EOC ¶92-456, EOT(NSW); *Bree v Lupevo Pty Ltd* (2003) EOC ¶93-267 ; [2003] NSWADT 47; *Dee v Cmr of Police, NSW Police (No 2)* (2004) EOC ¶93-346 ; [2004] NSWADT 168 (partial costs awarded). As to refusal on withdrawal of complaint see *Casey v Entrad Corp Ltd* (1986) EOC ¶92-179, EOT(NSW).
- 7 As to legal aid generally see LEGAL PRACTITIONERS [\[250-1000\]-\[250-1235\]](#).

[80-795] Intervention in legal proceedings

The paragraph below is current to **07 March 2018**

The Australian Human Rights Commission is authorised to seek leave of a court to intervene in proceedings that involve human rights issues.¹ It does not intervene frequently,² and mostly on issues relating to areas of Commonwealth responsibility.³

Notes

- 1 (CTH) [Australian Human Rights Commission Act 1986](#) ss [11\(1\)\(o\)](#), [46PV](#).

(C) Discrimination

- 2 See, for example, *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300; *Re Jane* (1988) 85 ALR 409 ; [12 Fam LR 662](#); 94 FLR 1; (1989) FLC ¶92-007 (both cases relating to sterilisation of an intellectually disabled minor); *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 ; (2004) EOC ¶93-359; [\[2004\] FMCA 242](#) (issue of whether women were disadvantaged in contemporary society by requirement to work full-time); *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 ; [81 ALD 1](#); [\[2004\] FCA 1250](#); [BC200406283](#) (relating to issue of exemption for special measures designed to achieve substantive equality); *Access for all Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2005) EOC ¶93-372 ; [\[2004\] FMCA 915](#); [BC200408539](#) (standards developed by technical experts in building etc relevant to determining whether a requirement or condition is 'reasonable'); *Baird v Queensland* (2006) 156 FCR 451 ; [236 ALR 272](#); [\[2006\] FCAFC 162](#); [BC200609326](#); *Hurst v Queensland* (2006) 151 FCR 562 ; [235 ALR 53](#); [\[2006\] FCAFC 100](#); [BC200605714](#); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 ; [247 ALR 273](#); [\[2008\] FCAFC 69](#); [BC200803114](#); *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#); *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [2008] HCA 39; [BC200807527](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#); *Morton v Queensland Police Service* (2010) 271 ALR 112 ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#); *Bateman v Kavan* (2014) 296 FLR 234 ; [52 Fam LR 648](#); [\[2014\] FCCA 2521](#); [BC201411224](#) (parentage of a child born of sperm donor arrangement); *Re Jamie* (2013) 278 FLR 155 ; [50 Fam LR 369](#); [\[2013\] FamCAFC 110](#); [BC201350653](#); *Re Colin (Gender Dysphoria)* [\[2014\] FAMCA 449](#) ; [BC201451243](#) (two cases concerning consent for sex reassignment procedures for children); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 ; [292 ALR 243](#); [\[2012\] HCA 46](#); [BC201207588](#) (immigration detention).
- 3 See [\[80-100\]](#).

(D) **Liability** of Persons Other than the Primary Actor

[80-800] General

The paragraph below is current to **07 March 2018**

In all jurisdictions, anti-discrimination legislation provides that a person who incites, causes, encourages or requests another person to do an act that is unlawful under the legislation may have a complaint brought against them as well as the primary actor, with the consequence that **liability** may follow.¹ These provisions are distinct from those which, in most jurisdictions, provide for the vicarious **liability** of employers.² A union may, under these provisions, be found to have caused or permitted sexual harassment against its members.³ In the Commonwealth jurisdiction, except for racial discrimination, the provisions extend to cover those who 'permit' another to do an unlawful act under the legislation.⁴ The Commonwealth Employment Service was found liable for permitting a doctor to discriminate against a woman when it placed her in employment with the doctor in the knowledge that numerous complaints of sexual harassment against the doctor had been made.⁵ In a case of disability discrimination, a council was found liable for permitting the redevelopment of a cinema complex without requiring that wheelchair access be incorporated into the redevelopment plans.⁶

Notes

- 1 (CTH) [Racial Discrimination Act 1975](#) s 17; (CTH) [Sex Discrimination Act 1984](#) s 105; (CTH) [Disability Discrimination Act 1992](#) s 122; (CTH) [Age Discrimination Act 2004](#) s 56
- (ACT) [Discrimination Act 1991](#) s 73
- (NT) [Anti-Discrimination Act 1992](#) s 27
- (NSW) [Anti-Discrimination Act 1977](#) s 52

(C) Discrimination

(QLD) [Anti-Discrimination Act 1991](#) ss [122](#), [123](#)

(SA) [Equal Opportunity Act 1984](#) s [90](#)

(TAS) [Anti-Discrimination Act 1998](#) s [21](#)

(VIC) [Equal Opportunity Act 2010](#) ss [11](#), [105](#), [106](#)

(WA) [Equal Opportunity Act 1984](#) s 160.

2 See [80-415].

3 *Horne v Press Clough Joint Venture* (1994) EOC ¶92-556 (complaint against union); *Horne v Press Clough Joint Venture* (1994) EOC ¶92-591, EOT(WA) (complaint against union and employer, damages).

4 (CTH) [Sex Discrimination Act 1984](#) s [105](#); (CTH) [Disability Discrimination Act 1992](#) s [122](#); (CTH) [Age Discrimination Act 2004](#) s [56](#).

5 *Elliott v Nanda* (2001) 111 FCR 240 ; (2001) EOC ¶93-135; [\[2001\] FCA 418](#); [BC200101644](#).

6 *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 ; [56 ALD 387](#); [\[1999\] FCA 180](#); [BC9900605](#) (Madgwick J remitting the matter for determination); *Cooper obo North Cost Dial Inc v Coffs Harbour City Council* (2000) EOC ¶93-089.

(E) Offences Relating to Machinery

[80-805] General

The paragraph below is current to **07 March 2018**

In all the anti-discrimination legislation, offences are included for obstructing the relevant Commissioner or tribunal from carrying out its statutory functions, and in some jurisdictions for not attending a compulsory conference or conciliation proceeding.¹ In most jurisdictions, the legislation provides for the protection of the privacy of information held by the Commissioner.² In addition there are offences in some jurisdictions relating to victimisation.³ Except where a matter is specifically made the subject of a penalty, it is an unlawful act rather than an offence, and this is specifically provided for in some jurisdictions.⁴

Notes

1 (CTH) [Racial Discrimination Act 1975](#) s [27](#); (CTH) [Sex Discrimination Act 1984](#) (failure to disclose actuarial or statistical data; obstruction); (CTH) [Disability Discrimination Act 1992](#) s [107](#); (CTH) [Age Discrimination Act 2004](#) s [52](#) (failure to disclose actuarial or statistical data); (CTH) [Australian Human Rights Commission Act 1986](#) ss [23](#), [26](#), 46PL, [46PM](#), [46PN](#) (failing to give oath or affirmation, hindering an inquiry, failing to attend compulsory conference, failing to give information or documents, giving false and misleading statements)

(ACT) [Human Rights Commission Act 2005](#) ss [59](#) (compulsory attendance at conciliation), [73](#), [74](#) (failure to provide information or documents or attend to answer questions). Giving false information is an offence against the (ACT) [Criminal Code 2002](#) s [338](#).

(NT) [Anti-Discrimination Act 1992](#) ss ss 79, [98](#), [100](#), [101](#), [110](#), [110A](#) (all proceedings, conciliation orders)

(NSW) [Anti-Discrimination Act 1977](#) ss 90B, 91A, 111, 124 (failing to supply information or documents, appearance before President, compliance with tribunal order, obstruction), 125 (summary proceedings in a Local Court)

(QLD) [Anti-Discrimination Act 1991](#) ss 221-223 (including false or misleading information, obstruction, contempt), [226](#) (proceedings to be summary)

(SA) [Equal Opportunity Act 1984](#) ss 25, 94-96, [102](#) (including failure to provide documents, failure to attend for conciliation, contravention or orders, hindering Commissioner)

(C) Discrimination

(TAS) [Anti-Discrimination Act 1998](#) ss [88](#), [92](#), [97](#), [98](#), [105](#), [106](#) (publishing against order, contravening orders, failing to provide information or documents, giving false or misleading statements, obstructing proceedings)

(VIC) [Equal Opportunity Act 2010](#) ss [181](#) (proceedings to be summary), 185-186 (obstructing Commission, false or misleading information); (VIC) [Victorian Civil and Administrative Tribunal Act 1998](#) ss [133-139](#).

(WA) [Equal Opportunity Act 1984](#) ss 155-159 (including failure to provide actuarial or statistical data, obstruction, failing to attend conciliation or conference, failure to provide information, false or misleading information).

As to the tribunals see [80-730] (Commonwealth), [80-750] (States and Territories).

- 2 (CTH) [Racial Discrimination Act 1975](#) s [27F](#); (CTH) [Sex Discrimination Act 1984](#) ss [92](#), [112](#); (CTH) [Disability Discrimination Act 1992](#) s [127](#); (CTH) [Age Discrimination Act 2004](#) s [60](#); (CTH) [Australian Human Rights Commission Act 1986](#) s [49](#)

(ACT) [Discrimination Act 1991](#) s [121](#); (ACT) [Human Rights Commission Act 2005](#) s [99](#)

(NT) [Anti-Discrimination Act 1992](#) s [108](#)

(NSW) [Anti-Discrimination Act 1977](#) s 124A

(QLD) [Anti-Discrimination Act 1991](#) s [220](#)

(VIC) [Equal Opportunity Act 2010](#) s [176](#)

(WA) [Equal Opportunity Act 1984](#) s 167; see also *ibid* s 165 (particulars of certain complaints not to be communicated until investigation commenced).

There are no equivalent provisions in the other jurisdictions.

- 3 See [80-715].

- 4 (CTH) [Racial Discrimination Act 1975](#) s [26](#); (CTH) [Disability Discrimination Act 1992](#) s [41](#); see *Walker v Victoria* [2011] FCA 258 ; [BC201101493](#) (required causal connection between the complainant's act and the defendant's response not established, especially in view of burden of proof beyond reasonable doubt); (CTH) [Sex Discrimination Act 1984](#) s [85](#); (CTH) [Age Discrimination Act 2004](#) s [49](#)

(SA) [Equal Opportunity Act 1984](#) s [99](#)

(VIC) [Equal Opportunity Act 2010](#) s [188](#)

(WA) [Equal Opportunity Act 1984](#) s 154.

There is no equivalent explicit provision in the other jurisdictions.

Note the **Criminal** Codes in many jurisdictions set out matters of interpretation affecting **criminal liability**.

End of Document

(D) Affirmative Action

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(1\) EQUALITY AND DISCRIMINATION](#)

(D) AFFIRMATIVE ACTION

(I) Introduction

[80-810] General

The paragraph below is current to **07 March 2018**

'Affirmative action' is a term applied to measures of a positive kind taken to assist selected groups that are disadvantaged because of a particular attribute. It is otherwise known as positive discrimination (in Commonwealth legislation) or special measures. In legislative form, its purpose is to provide exceptions to what may otherwise be prohibited discrimination. All anti-discrimination legislation contains provisions that allow for measures to achieve equality.¹ The term is most usually applied in Australia in relation to programs other than the enforcement of anti-discrimination legislation, and the legislative provisions implementing affirmative action measures have been directed primarily at greater recognition of women in the area of employment.² In the area of public employment, some jurisdictions have extended affirmative action programs to members of groups other than women, for example, Aborigines and disabled persons.³ Affirmative action measures or programs may take the form of setting targets for the employment of a greater proportion of the disadvantaged group in a particular workplace, or of providing support for members of the disadvantaged group, for example, by training programs or review of definitions of merit.⁴ The term 'special measures' has been defined in international instruments.⁵ The Commonwealth has legislated with effect outside the public sector.⁶ Most jurisdictions provide specifically that measures designed to assist persons who are disadvantaged by reference to one of the grounds of unlawful discrimination are not to be regarded as unlawfully discriminatory.⁷

Notes

¹ See [\[80-600\]](#).

² See [\[80-815\]](#).

³ See [\[80-820\]](#), [\[80-830\]](#).

⁴ *Australia and New Zealand Equal Opportunity Law and Practice*, CCH, ¶15-100-18-250 (especially ¶15-100-15-200).

(D) Affirmative Action

- ⁵ 'Special measures' are defined in (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) arts 1(4), 2(2) annexed in (CTH) [Racial Discrimination Act 1975](#) Sch and in the (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York; 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980) art 4 annexed in (CTH) [Sex Discrimination Act 1984](#) Sch. Special measures by a State have been held to be valid as not inconsistent with the (CTH) [Racial Discrimination Act 1975](#): *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#). See also [\[80-600\]](#).
- ⁶ See [80-815]. See also [80-820] (Commonwealth public service employment).
- ⁷ See [\[80-600\]](#).

(II) Commonwealth

[80-815] Private employment

The paragraph below is current to **07 March 2018**

The Commonwealth has instituted affirmative action programs promoting gender equality in the workplace, both in enterprises employing 100 or more persons and in institutions of tertiary education.¹ The legislation requires an employer within its scope to prepare annually a public report about certain prescribed gender equality indicators which must be lodged with the Workplace Gender Equality Agency (the 'Agency').² This report has to include information on the workplace in relation to the following indicators:³

- (1) gender composition of the workforce;
- (2) gender composition of governing bodies;
- (3) equal remuneration between men and women;
- (4) availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;
- (5) consultation with employees on issues concerning gender equality in the workplace; and
- (6) sex-based harassment and discrimination in the workplace.

Non-compliance with the reporting requirements does not incur a penalty, but the Agency may name, by electronic or other means, employers who have not submitted reports or who have failed to provide further information requested by the Agency.⁴

The Minister in charge of the Act publishes minimum standards for gender equality in workplaces. If a relevant employer fails to meet the minimum standards in a reporting period, the Agency must offer to provide the employer with advice and assistance in relation to improving the employer's performance.⁵ If a relevant employer fails in 2 consecutive reporting periods to meet the minimum standards, then it is treated as a non-compliance with the requirements of the Act and the employer may also be named and details of the non-compliance published.⁶

Notes

- 1 (CTH) [Workplace Gender Equality Act 2012](#) ss 3 (definition of 'relevant employer'), [13](#).
- 2 Ibid ss 13, 13A.
- 3 The Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013.
- 4 (CTH) [Workplace Gender Equality Act 2012](#) s [19D](#).
- 5 Ibid s 19E.
- 6 Ibid ss 19C, 19D.

[80-820] Employment under the (CTH) Public Service Act 1999

The paragraph below is current to **07 March 2018**

The Commonwealth provides separately for the promotion of equal employment opportunity in departments and agencies (mainly statutory bodies) employing persons under the (CTH) [Public Service Act 1999](#) (the 'Act'), and (in contrast to the requirements in the private sector to prepare and submit programs and reports on their gender equality indicators).¹ The Act creates a legal framework based on general principles, grouped as 'APS Values' and 'APS Employment Principles'.² Under the Act, the Secretary of a department or the Head of an executive or statutory agency (each an 'Agency Head') is responsible within their department or agency for upholding and promoting the APS Values and Employment Principles.³ In addition, the Public Service Commissioner (the 'Commissioner') must issue directions in relation to each APS Value for the purpose of ensuring that those values are incorporated and upheld throughout the public service.⁴

The key APS Employment Principles relevant to equal employment opportunity include the principle that employment decisions are to be based on merit,⁵ the principle that workplaces are to be free from discrimination and are to recognise the diversity of the Australian community and foster diversity in the workplace,⁶ and the principle which promotes fair employment decisions with a fair system of review.⁷ Pursuant to this last principle, the Commissioner's directions prescribe that measures must be implemented which ensure that measures are to be taken to eliminate any employment-related discrimination existing in the department or agency on the basis of:⁸

- (1) being an Aboriginal or a Torres Strait Islander within the meaning of the (CTH) [Racial Discrimination Act 1975](#);
- (2) gender;
- (3) race or ethnicity; and
- (4) physical or mental disability.

In addition to the APS Values which promote diversity and equity in employment, the Act expressly requires an Agency Head to establish a workplace diversity program.⁹ The Commissioner's directions set out specific arrangements for the implementation of a workplace diversity program.¹⁰ Broadly, the program must include measures for ensuring that the corporate, business and human resource plans of the department or agency values and utilises the diverse skills and experience of its employees, that workplace structures assist employees in balancing their work, family and other caring responsibilities effectively, and that engagement decisions are made taking into account the diversity of the Australian community.¹¹ The Agency Head publish the workplace diversity program on the Agency's website¹² and

(D) Affirmative Action

must develop performance indicators to evaluate the effectiveness and outcomes of the program, as well as evaluate and report on the effectiveness and outcomes of the program annually.¹³ Further, the Agency Head must co-operate with the Commissioner by providing the information the Commissioner needs to evaluate and make an assessment of the effectiveness of the program for the purpose of preparing the Commissioner's annual report to parliament.¹⁴ At least once every 4 years, an Agency Head must review the department or agency's workplace diversity program to ensure that it continues to assist in giving effect to the APS Values and achieving specified outcomes.¹⁵ It is probable that action under the public sector programs, being discretionary and purposive, is only compellable in a very broad sense.¹⁶

Notes

- ¹ See [80-815].
- ² (CTH) [Public Service Act 1999](#) ss [10](#), [10A](#).
- ³ Ibid ss 7 (definition of 'Agency Head'), 12 (must uphold APS Values and APS Employment Principles), 18 (Agency Head must establish a workplace diversity program to assist in giving effect to the APS Employment principles), 20 (broad power of Agency Head).
- ⁴ Ibid s 11(1); (CTH) Australian Public Service Commissioner's Directions 2013 (repealed).
- ⁵ (CTH) [Public Service Act 1999](#) s [10A\(1\)\(c\)](#). See also (CTH) Australian Public Service Commissioner's Directions 2013 (repealed) cl 2.7.
- ⁶ (CTH) [Public Service Act 1999](#) s [10\(1\)\(f\)](#), [10\(1\)\(g\)](#). See also (CTH) Australian Public Service Commissioner's Directions 2013 (repealed) cl 3.1, 3.2.
- ⁷ (CTH) [Public Service Act 1999](#) s [10A\(1\)\(a\)](#).
- ⁸ (CTH) Australian Public Service Commissioner's Directions 2013 (repealed) Ch 3.
- ⁹ (CTH) [Public Service Act 1999](#) s [18](#).
- ¹⁰ (CTH) Australian Public Service Commissioner's Directions 2013 (repealed) Ch 3.
- ¹¹ Ibid cl 3.3.
- ¹² Ibid cl 3.4.
- ¹³ Ibid cl 3.5(1).
- ¹⁴ Ibid cl 3.5(2); (CTH) [Public Service Act 1999](#) s [44](#).
- ¹⁵ (CTH) Australian Public Service Commissioner's Directions 2013 (repealed) cl 3.6.
- ¹⁶ See *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 ; [18 ALD 495](#); [88 ALR 621](#); (1989) EOC ¶92-265, Fed C of A, Full Court (which considered s 22B of the now repealed (CTH) Public Service Act 1922). Note that an APS employee is entitled to review of any action relating to his or her employment (other than termination), initially within the department or agency, and then by the Merit Protection Commissioner under (CTH) [Public Service Act 1999](#) s [33](#).

[80-825] Other Commonwealth authorities

The paragraph below is current to **07 March 2018**

Commonwealth bodies not subject to the (CTH) [Public Service Act 1999](#) (the 'Act') are regulated by special provisions modelled closely on those for the private sector.¹ However, the authority programs apply to the groups designated under the Act (not just to women)² and the reports must be made to the responsible Minister.³ In addition, an authority may be required, if the Minister requests, to provide a 'special report' in relation to the development, implementation or review of the authority's program which

is to be tabled in parliament within 15 sitting days of receipt by the Minister.⁴ The Act only applies to authorities employing 40 or more persons.⁵

Notes

- 1 See [80-815].
- 2 (CTH) [Equal Employment Opportunity \(Commonwealth Authorities\) Act 1987](#) ss [3\(1\)](#) (definition of 'designated group'), [6](#).
- 3 Ibid s 9.
- 4 Ibid s 10.
- 5 Ibid s 3(1) (definition of 'authority' and 'relevant authority').

(III) State and Territory

[80-830] State and Territory programs

The paragraph below is current to **07 March 2018**

In Western Australia, equal opportunity program arrangements for public authorities have been incorporated in the equal opportunity legislation.¹ The coverage is broad, including State public service and authorities.² The object of these provisions is to promote, eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability.³ Under the legislation, a Director of Equal Opportunity in Public Employment is appointed⁴ whose functions include advising and assisting on management plans that each authority covered is required to prepare⁵ and making recommendations to the Minister on those plans.⁶

In Queensland, separate legislation has been enacted for the purpose of promoting equality of employment opportunity in the public service and in other particular agencies in the public sector.⁷ The legislation is aimed at promoting equal opportunity for members of 'target groups', namely Aboriginal and Torres Strait Islanders, migrants with English as a second language, women and persons with physical, intellectual or psychiatric disabilities.⁸

Each relevant agency must give the Public Service Commission (the 'Commission') chief executive an annual report about the outcome of its actions required with during the financial year in promoting equality of employment opportunity for employment matters that concern it and if the agency is given a recommendation by the Commission, it must ensure the recommended action is taken.⁹ In all States and Territories, the public service and related agencies are covered under the relevant public service legislation, in some cases with reference to equal opportunity legislation.¹⁰

Notes

- 1 (WA) [Equal Opportunity Act 1984](#) Pt IX.
- 2 (WA) [Equal Opportunity Act 1984](#) s 139 (includes the public service, public authorities, state railways, electricity, gas and power, and those declared by regulation).

(D) Affirmative Action

- 3 (WA) [Equal Opportunity Act 1984](#) s 140 (covers sex, marital status, pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment or age; gender reassignment and equal employment opportunity for all persons).
- 4 (WA) [Equal Opportunity Act 1984](#) s 142.
- 5 (WA) [Equal Opportunity Act 1984](#) ss 143, 145.
- 6 (WA) [Equal Opportunity Act 1984](#) s 143.
- 7 (QLD) [Public Service Act 2008](#) (which reinforces the status of equal opportunity in public service employment and incorporates provisions of the former (QLD) Equal Opportunity in Public Employment Act 1992 (repealed)).
- 8 (QLD) [Public Service Act 2008](#) s 30 (definition of 'EEO target group' and general EEO obligation).
- 9 Ibid ss 30-34.
- 10 (ACT) [Public Sector Management Act 1994](#) ss 8(b), 39-41, [65](#) (public service employees to have equal opportunity in appointments, engagements, promotions and transfers based on merit, Commissioner for Public Administration to develop equal employment opportunity and access and equity program for implementation throughout the public service, actions under Act to be exercised without discrimination that is unlawful under the (ACT) [Discrimination Act 1991](#), programs designed to encourage the appointment, promotion or transfer of women or people in a 'designated group' are not unlawful under that Act)

(NT) [Public Sector Employment and Management Act 1993](#) ss [2A\(1\)\(d\)](#) (object of Act is to promote fairness and equality of employment opportunity in the Public Sector), [5D](#) (merit principle), [5E](#) (equality of employment opportunity principle), [38B](#) (special measures may be implemented to achieve equality)

(NSW) [Government Sector Employment Act 2013](#) Pt 2 (ethical framework for the government sector), s 63 (workforce diversity)

(QLD) [Public Service Act 2008](#) ss [27](#) (merit principle), [28](#) (merit criteria), [30](#) (equality of opportunity, EEO target groups, unlawful discrimination)

(SA) [Public Sector Act 2009](#) ss [5\(5\)](#) (prevent unlawful discrimination against public sector employees or persons seeking employment in the public sector; employees fairly, justly and reasonably), [46](#) (merit based selection), [65](#) (employment opportunity programs)

(TAS) [State Service Act 2000](#) ss ss 7(1)(b), [7\(1\)\(c\)](#), [7\(1\)\(k\)](#) (State Service Principles include employment based on merit, workplaces free from discrimination and which utilise diversity, equity in employment), [8](#) (Head of Agency must uphold, promote and comply with State Service Principles)

(VIC) [Public Administration Act 2004](#) ss 3(d) (object of Act to ensure employment based on merit), 7(2) (head of public sector agency must promote public sector values), 7(1)(c) (value of impartiality), 7(1)(e) (value of respect, including freedom from discrimination, harassment and bullying), 8(a)-(c) (public sector agency head must establish employment processes that ensure employment decisions are based on merit, operate fairly and provide equal employment opportunity).

(WA) [Public Sector Management Act 1994](#) ss 8(a) (principle that election processes to be based on merit), 8(d) (principle that there be no unlawful discrimination), [21](#) (Public Sector Commissioner to publish standards, codes of ethics and codes of conduct in relation to public sector principles)

As to the merit principle in public sector appointment see PUBLIC ADMINISTRATION [\[345-250\]](#).

End of Document

(A) Right to Life Generally

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (2) RIGHT TO LIFE

(2) RIGHT TO LIFE

This chapter was updated by

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(A) RIGHT TO LIFE GENERALLY

[80-885] Introduction

The paragraph below is current to **07 March 2018**

Human life is protected by the imposition of ***criminal*** penalties for murder and manslaughter¹ but this is quite different from a right to life, such as that in article 6 of the International Covenant on Civil and Political Rights (the 'ICCPR').²

In certain circumstances, for example military service,³ killing is authorised, while in others, such as self-defence⁴ and provocation,⁵ such circumstances provide defences or penalty mitigation for the killing by one person of another. Certain laws modify the basic law of murder and manslaughter, for example, infanticide,⁶ abortion⁷ and culpable driving.⁸

Also, an individual has a right to refuse medical treatment for terminal illness.⁹

The ICCPR imposes on state parties the requirement that every human being has the inherent right to life protected by law and that no person is to be deprived arbitrarily of that life.¹⁰ The right to life is among the listed rights in the human rights charters of the Australian Capital Territory and Victoria.¹¹ The legislation of both jurisdictions allows for overseas decisions to be considered in interpreting a human right.¹²

(A) Right to Life Generally

Notes

- 1 As to homicide see CRIMINAL LAW [\[130-3000\]-\[130-3620\]](#).
- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).
- 3 See [\[80-925\]](#).
- 4 See [\[80-930\]](#).
- 5 See [\[80-935\]](#).
- 6 See [\[80-940\]](#).
- 7 See [\[80-945\]](#).
- 8 See [\[80-950\]](#).
- 9 See [80-900]-[80-910].
- 10 Ibid art 6 expands greatly on the (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) art 3 ('Everyone has the right to life, liberty and security of person') by providing:

- (1) 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'
- (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present (INT) Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; GA Res 260 (III); Aust TS 1951 No 2; 78 UNTS 277). This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
- (3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any state Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
- (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
- (5) Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.
- (6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.'

For authoritative interpretation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 6 by the Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 6: The Right to Life (Art 6)*, adopted at the Sixteenth session, 30 April 1982 (available at <http://www.unhcr.org>). It addresses matters of war, acts of genocide and other acts of mass violence causing arbitrary loss of life, arbitrary deprivation of life (punishment for deprivation of life by criminal acts, killing by security forces), disappearance of individuals, infant mortality, life expectancy, malnutrition, epidemics and the death penalty. See also UN Human Rights Committee, *CCPR General Comment No 14: Nuclear Weapons and the Right to Life (Art 6)*, adopted at the Twenty-third session, 9 November 1984). In relation to children in the context of the (INT) United Nations Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) see United Nations Committee on the Rights of the Child, *CRC General Comment No 3: HIV/AIDS and the Rights of the Child*, adopted at the Thirty-second session, 17 March 2003, CRG/GC/2003/3, A/59/41 (2004) (the right not to have life arbitrarily taken, to benefit from economic and social policies that allow survival into adulthood, HIV/AIDS prevention and care); United Nations Committee on the Rights of the Child, *CRC General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, adopted at the Thirty-third session, 1 July 2003, CRG/GC/2003/4, A/59/41 (2004) (honour killings). In the context of health note *Cabal and Pasini v Australia* HRC report, CCPR/C/78/D/1020/2002, A/58/40 Vol II (2003) (right to health not specifically protected by ICCPR but a failure to separate detainees with communicable diseases from other detainees could raise issues under ICCPR art 6 (at [7.7])).

- 11 (ACT) Human Rights Act 2004 s 9 states:

(A) Right to Life Generally

(1) 'Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.'

(2) This section applies to a person from the time of birth.'

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 9 states: 'Every person has the right to life and has the right not to be arbitrarily deprived of life.'

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 12** (ACT) [Human Rights Act 2004](#) s 31(1) ('International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right'). See also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [32\(2\)](#).

[80-890] Criminal liability for death

The paragraph below is current to **07 March 2018**

The **criminal** law relating to homicide does not constitute a right to life as such.¹ That law is the result of both common law and statutory developments.²

Nevertheless, the **criminal** law does provide protection, through the threat of state sanction, against many forms of killing. In the **criminal** code jurisdictions, failure to perform a duty, such as failure to take care with dangerous things that may endanger life, safety or health³ may constitute manslaughter if it leads to death.⁴ In the other jurisdictions, the common law obligation where negligence is involved is to a **criminal** rather than a civil standard.⁵

Criminal liability may also follow breach of the duty of care which parents or guardians owe towards children in their charge to safeguard life and health.⁶ There may also be an obligation of care towards a spouse, at least if he or she is unable to help himself or herself.⁷ In the case of the duty of a person to provide others in their charge with the necessities of life, that person will be held to have caused any consequences which result to the life or health of the other by reason of any omission to perform that duty.⁸ A similar duty of care follows a voluntary assumption of a duty of care,⁹ and particular issues arise in the context of the duties of healthcare providers.¹⁰ There is no duty on police officers to prevent the infliction of self-harm even though empowered to apprehend a person who 'appears to be mentally ill'.¹¹ The right to life is also protected by a range of primarily legislative measures directed at community-related concerns, such as public health laws, building codes, environmental laws, road safety laws and airworthiness standards.¹²

Notes

1 As to homicide see **CRIMINAL LAW** [\[130-3000\]-\[130-3620\]](#).

2 As to the distinction between common law and code jurisdictions see **CRIMINAL LAW** [\[130-5\]](#).

3 (NT) **Criminal** Code s 151

(QLD) **Criminal** Code s 289

(TAS) **Criminal** Code s 150

(WA) **Criminal** Code s 266.

4 For manslaughter by unlawful and dangerous **act**, see **CRIMINAL LAW** [\[130-3620\]](#) (Australian Capital Territory), [\[130-3430\]](#) (Northern Territory, Queensland and Western Australia — voluntary **act**); and by **criminal** negligence see [\[130-](#)

(A) Right to Life Generally

[3420](#)] (Australian Capital Territory), [\[130-3400\]](#) (Northern Territory, Queensland and Western Australia), by certain **acts** see [\[130-3400\]](#) (Tasmania), by culpable homicide see [\[130-3000\]](#) (Tasmania), by unlawful **act** see [\[130-3410\]](#) (Tasmania).

- 5 See *Callaghan v R* (1952) 87 CLR 115  at 120-4; [1952] ALR 941; (1952) 26 ALJ 456; [BC5200580](#) per Dixon CJ, Webb, Fullagar and Kitto JJ (higher standard required for manslaughter) *Patel v R* (2012) 247 CLR 531 ; [290 ALR 189](#); [\[2012\] HCA 29](#); [BC201206135](#) [\[17\]-\[19\]](#) per French CJ, Hayne, Keifel and Bell JJ (suggests that the standard of negligence required to amount to manslaughter is the same in both code and common law jurisdictions).

- 6 (NT) **Criminal** Code s 149
(QLD) **Criminal** Code s 286
(TAS) **Criminal** Code s 145
(WA) **Criminal** Code s 263.

As to the common law jurisdictions see *R v Cowan* [1955] VLR 18  at 20-2 per Lowe J.

- 7 See *R v Cowan* [1955] VLR 18  at 20-2 per Lowe J (charge to jury in manslaughter case).
- 8 As to the common law jurisdictions see *R v Russell* [1933] VLR 59  at 80; [1933] ALR 76 per McArthur J. As to the code jurisdictions see:
- (NT) **Criminal** Code s 149
(QLD) **Criminal** Code s 285
(TAS) **Criminal** Code s 144
(WA) **Criminal** Code s 262.

See also **CRIMINAL LAW** [\[130-3420\]](#) (common law jurisdictions), [\[130-3400\]](#) (Northern Territory, Queensland and Western Australia), [\[130-3000\]](#) (Tasmania).

- 9 See *R v Taktak* (1988) 14 NSWLR 226  at 238, 239; 34 A Crim R 334 at 346 per Yeldham J, CCA(NSW).
- 10 See *H Ltd v J* (2010) 107 SASR 352 ; 240 FLR 402; [\[2010\] SASC 176](#); [BC201004098](#) (declaration made that aged care facility is under no duty to nourish a diabetic wishing to end life by ceasing food and insulin intake, (SA) **Criminal Law Consolidation Act 1935** applies where there is a duty to provide food, water or medical treatment but duty negated by direction of patient); *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84 ; [\[2009\] WASC 229](#); [BC200907548](#) (refusal of nutrition by patient would not result in **criminal liability** for those responsible for care under (WA) **Criminal** Code s 262 as it does not impose a duty to provide the necessities of life against the patient's wishes); *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 ; [\[2009\] NSWSC 761](#); [BC200907152](#) (unconscious patient previously indicated he would refuse dialysis). For the position of a psychotic patient see *Australian Capital Territory v JT* (2009) 4 ACTLR 68 ; (2009) 232 FLR 322; [\[2009\] ACTSC 105](#); [BC200907782](#).
- 11 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 ; [254 ALR 432](#); [\[2009\] HCA 15](#); [BC200902940](#) at [\[87\]](#) per Gummow, Hayne and Heydon JJ (no duty on police officers to prevent infliction of self-harm (even though empowered to apprehend a person who 'appears to be mentally ill'), owing to common law primacy of personal autonomy).
- 12 See **AVIATION** [\[35-275\]-\[35-310\]](#), [\[35-455\]](#), **BUILDING AND CONSTRUCTION** [\[65-165\]](#), **ENVIRONMENT** [\[180-1\]](#), **PUBLIC HEALTH** [\[350-1\]](#), **TRANSPORT** [\[425-1\]](#).

[80-895] Abolition of the death penalty

The paragraph below is current to **07 March 2018**

Australia is a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights which obliges contracting states to take all necessary measures to abolish the death penalty within their jurisdiction.¹ This has only recently been effected by Commonwealth legislation for the entirety of Australian domestic law.²

(A) Right to Life Generally

The Australian Government is prevented from extraditing anyone to a country where the offence charged attracts the death penalty in the absence of a suitable undertaking that the death penalty will not be imposed.³ Similarly Commonwealth legislation providing for mutual assistance in **criminal** matters requires such assistance to be refused if it relates to the prosecution or punishment concerning an offence in respect of which the death penalty may be imposed in the foreign country.⁴ The Australian Federal Police (the 'AFP') has issued a practical guide to be used by AFP officers when death penalty issues arise in international police to police liaison, to provide greater clarity about the circumstances in which the AFP is permitted to cooperate with other countries.⁵ It has been held that, while there are inconsistencies in Australia's approach to **criminal** justice cooperation with countries imposing the death penalty, the functions and powers given by the (CTH) [Australian Federal Police Act 1979](#) cannot be read restrictively in light of Australia's opposition to the death penalty and in light of its international obligations.⁶

Notes

- 1 (INT) Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (New York, 15 December 1989; Aust TS 1991 No 19). Entry into force for Australia and generally: 11 July 1991.
- 2 (CTH) [Crimes Legislation Amendment \(Torture Prohibition and Death Penalty Abolition\) Act 2010](#) abolished the death penalty throughout Australia, by amending (CTH) [Death Penalty Abolition Act 1973](#) to apply to State **criminal** laws. This ensures the death penalty cannot be reintroduced anywhere in Australia and will thereby safeguard Australia's ongoing compliance with the (INT) Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (New York, 15 December 1989; Aust TS 1991 No 19).
- 3 (CTH) [Extradition Act 1988](#) s 22(3)(c) (eligible person is only to be surrendered if, where the offence is punishable by death, the extradition country has given an undertaking that the death penalty will not be imposed). In a related context, for claim that husband's deportation to Malaysia (where he faced the death penalty) would violate his right to life see *GT v Australia*, Communication No 706/1996, CCPR/C/61/D/706/1996 (note in particular individual opinions of Scheinin (dissenting in concluding violation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 7 (prohibition of **torture** or cruel, inhuman or degrading treatment). See also Klein and Kretzmer (dissenting in concluding violation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 6 (right to life)).
- 4 (CTH) [Mutual Assistance in Criminal Matters Act 1987](#) s 8(1A). See also *ibid* s 8(1B) (discretion where no charge has yet been made).
- 5 *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (2009), Australian Federal Police.
- 6 See *Rush v Cmr of Police* (2006) 150 FCR 165; [229 ALR 383](#); [\[2006\] FCA 12](#); [BC200600082](#), Finn J rejected, *inter alia*, an argument that the powers provided by the (CTH) [Australian Federal Police Act 1979](#) should be construed restrictively in the context provided by the (CTH) [Death Penalty Abolition Act 1973](#), the Mutual Assistance [Act](#), Australian government policy opposing the death penalty and Australia's signing of the Second Optional Protocol to the (INT) International Convention on Civil and Political Rights Aiming at the Abolition of the Death Penalty (New York, 15 December 1989; Aust TS 1991 No 19); nor was there a substantive legitimate expectation as Australian citizens that the Australian Government and its agencies would not **act** in a way as to expose them to the risk of the death penalty. Nonetheless, his Honour concluded (at [1]) that 'there is a need for the Minister administering the (CTH) [Australian Federal Police Act 1979](#) and the Commissioner of Police to address the procedures and protocols followed by members of the Australian Federal Police when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country'.

[80-900] Euthanasia

The paragraph below is current to **07 March 2018**

(A) Right to Life Generally

In the common law and **criminal** code jurisdictions, a person who commits a fatal **act** knowing that death or grievous bodily harm is a probable consequence is regarded as having intended those consequences and is guilty of murder.¹ The intentional killing of another even for humane or compassionate reasons (euthanasia) would amount to murder.² However, it is lawful at common law to withdraw invasive treatment initiated without the consent of the patient and which confers no benefit; the principle of the sanctity of life, which is not absolute, is not violated and the duty of care no longer applies in such circumstances.³

In 1995 the Northern Territory enacted legislation⁴ that allowed a person suffering a terminal illness and unacceptable levels of pain or distress to request a medical practitioner to go beyond ceasing medical treatment and give the patient assistance in the termination of his or her life.⁵ Various protections were included which related to:

- (1) the availability of palliative care options;⁶
- (2) the need for two medical practitioners to be satisfied as to the seriousness of the illness;⁷ and
- (3) the need for a qualified psychiatrist to confirm that the patient is not suffering from a treatable clinical depression in respect of the illness.⁸

Two delay periods were built in before the practitioner could assist the patient to end his or her life.⁹ However, the Commonwealth Parliament in 1997 enacted legislation¹⁰ that stated that the power of the Legislative Assembly in relation to the making of laws does not extend to the making of laws which permit or have the effect of permitting the form of deliberate killing of another called euthanasia.¹¹ The legislation amended the Australian Capital Territory self-government legislation in similar terms.¹² In respect of both Territories, the Commonwealth legislation preserves the power of the Assembly to make laws with respect to the withdrawal or withholding of medical or surgical measures to prolong life but not so as to permit intentional killing.¹³ No other jurisdiction has successfully passed legislation providing for voluntary euthanasia.¹⁴

Notes

- 1 *R v Crabbe* (1985) 156 CLR 464 ; [58 ALR 417](#); 59 ALJR 417; [BC8501130](#). As to the requisite mental element see **CRIMINAL LAW** [\[130-3240\]-\[130-3315\]](#). As to the distinction between common law and **criminal** code jurisdictions see **CRIMINAL LAW** [\[130-5\]](#).
- 2 See **CRIMINAL LAW** [\[130-3530\]](#).
- 3 *Airedale NHS Trust v Bland* [\[1993\] AC 789](#) ; [\[1993\] 1 All ER 821](#); [\[1993\] 2 WLR 316](#) , HL (youth of 17 years suffering serious irreversible damage following the collapse of a stadium). See also [80-910]. See further **MEDICINE** [\[280-3500\]-\[280-3510\]](#).
- 4 (NT) [Rights of the Terminally Ill Act 1995](#) (of no force or effect given (CTH) [Euthanasia Laws Act 1997 Sch 1](#)). Legislation to similar effect, the Medical Treatment (Amendment) Bill 1995 was also introduced in the Australian Capital Territory but has so far failed to receive the endorsement of the Assembly. See also [80-900].
- 5 (NT) [Rights of the Terminally Ill Act 1995](#) s 4 (of no force or effect given (CTH) [Euthanasia Laws Act 1997 Sch 1](#)).
- 6 (NT) [Rights of the Terminally Ill Act 1995](#) s 8.
- 7 Ibid s 7(1)(b), 7(1)(c).
- 8 Ibid s 7(1)(c).

(A) Right to Life Generally

- 9 Ibid s 7(1)(i), 7(1)(n).
- 10 (CTH) [Euthanasia Laws Act 1997 Sch 1](#).
- 11 Ibid s 1, Sch 1 (amending the (CTH) Northern Territory (Self-Government) [Act](#) 1978 by introducing a new [ibid](#) s 50A).
- 12 (CTH) [Euthanasia Laws Act 1997](#) s 1, Sch 2 (amending the (CTH) Australian Capital Territory (Self-Government) [Act](#) 1988 by introducing a new [ibid](#) s 23(1A)).
- 13 (CTH) [Euthanasia Laws Act 1997](#) s 1, Sch 1 (adding section 50A(2) to the (CTH) Northern Territory (Self-Government) [Act](#) 1978) and (CTH) [Euthanasia Laws Act 1997](#) s 1, Sch 2 (adding section 23(1B) to the (CTH) Australian Capital Territory (Self-Government) [Act](#) 1988).
- 14 (SA) Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill 2010 (Legislative Council introduction and first reading 16 September 2010).

[80-910] Cessation of treatment

The paragraph below is current to **07 March 2018**

In some jurisdictions, it is lawful for a doctor **acting** on instructions given in the form of a written certificate by a person with a terminal illness or medical direction, to refrain from giving more than palliative care.¹ The medical practitioner must inform a competent patient, or the patient's agent, of the nature and cause of the illness, the alternative forms of treatment available and other relevant matters.² In the Australian Capital Territory, the ([ACT](#)) [Medical Treatment \(Health Directions\) Act 2006](#) allows an adult to make a health direction to refuse, or require the withdrawal of, medical treatment generally or a particular kind of medical treatment.³ The health professional must not give effect to the health direction unless they believe the person is properly informed, has weighed the options and has confirmed the decision to refuse medical treatment or have it withdrawn.⁴ A health direction cannot be made by a person for whom a guardian is appointed or anyone who has impaired decision-making capacity.⁵ If the person's capacity is impaired, and a guardian is appointed or a health attorney is asked to give a consent after a health direction is made, any power of the guardian or health attorney to consent to medical treatment for the person must be exercised in a way that is consistent with the health direction.⁶ However, the health attorney need not **act** consistently with the health direction if it is not reasonable to do so.⁷ In the Northern Territory, an adult who has planning capacity⁸ may make an advance personal plan making consent decisions about future health care decisions.⁹ A medical practitioner treating a person suffering from a terminal illness and who is aware of the direction is under a duty to observe the direction,¹⁰ and may rely on the direction even though it may have the effect of hastening the death of the person.¹¹

In Queensland, a terminally ill person giving power of attorney may, by way of an advance health directive, give a direction to withhold or withdraw a life-sustaining measure where the commencement or continuation of the measure would be inconsistent with good medical practice, and where they have no reasonable prospect of regaining capacity for health matters.¹² However, the statute makes it clear that the provisions do not authorise euthanasia or affect particular provisions of the [Criminal](#) Code.¹³ Further, if a health provider has reasonable grounds to believe that a direction in an advance health directive is uncertain or inconsistent with good medical practice or that circumstances, including advances in medical science, have changed to the extent that the terms of the direction are inappropriate, the health provider does not incur any **liability** if they do not **act** in accordance with the direction.¹⁴

In South Australia, the (SA) [Advance Care Directives Act 2013](#) enables a person of sound mind to direct at any time the medical treatment he or she wants in the event of being in the terminal phase of a terminal illness and unable to give such a direction.¹⁵ A person may also appoint a substitute decision-maker who can in effect take all the actions the person could have taken if competent.¹⁶

(A) Right to Life Generally

In Victoria, the (VIC) [Medical Treatment Act 1988](#) requires a refusal of medical treatment certificate to be in the prescribed form,¹⁷ and permits a registered medical practitioner and another person to witness a refusal of treatment certificate if satisfied that the patient so wishes, in whatever form the wishes are conveyed.¹⁸ An offence of medical trespass operates if a practitioner, aware of the refusal, undertakes the refused treatment.¹⁹ A person may appoint an agent or be a represented person under the (VIC) [Guardianship and Administration Act 1986](#) as ordered by the Victorian Civil and Administrative Tribunal²⁰ but there are limitations on their powers in the interests of the patient.²¹

In Western Australia, the recently amended (WA) Guardianship and Administration **Act** 1990 allows for the making of advance health directives containing treatment decisions in respect of the person's future treatment.²² A treatment decision in an advance health directive is invalid if at the time the directive is made its maker does not understand the nature of the treatment decision or the consequences of making the treatment decision.²³ A treatment decision in a directive operates only in respect of the treatment to which it applies and only in the circumstances specified in the directive²⁴ subject to provision for enduring guardians and persons responsible in certain circumstances.²⁵

The medical practitioner is protected in all legislating jurisdictions, if complying in good faith with the wishes of the patient or agent and no offence or professional misconduct is committed, and no civil **liability** arises.²⁶

Notes

- 1 (ACT) [Medical Treatment \(Health Directions\) Act 2006](#). See also (ACT) [Powers of Attorney Act 2006](#) (NT) [Advance Personal Planning Act 2013](#) (SA) [Advance Care Directives Act 2013](#). (VIC) [Medical Treatment Act 1988](#) (WA) [Acts Amendment \(Consent to Medical Treatment\) Act 2008](#), amending the (WA) [Guardianship and Administration Act 1990](#), (WA) [Civil Liability Act 2002](#) and (WA) **Criminal** Code to provide for enduring powers of attorney, enduring powers of guardianship and advance health directives. See also MEDICINE [\[280-3025\]](#), [\[280-3030\]](#).
See also *H Ltd v J* (2010) 107 SASR 352 ; 240 FLR 402; [\[2010\] SASC 176](#); [BC201004098](#) (duty on aged care facility to nourish a diabetic negated by direction of patient wishing to end life by starvation of food and insulin); *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84 ; [2009] WASC 229; [BC200907548](#) (refusal of nutrition by patient would not result in **criminal liability** under (WA) **Criminal** Code s 262 for those responsible for care); *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88 ; [2009] NSWSC 761; [BC200907152](#).
As to the jurisdiction to order cessation of life supporting treatment of child under (CTH) [Family Law Act 1975](#) s 67ZC see *Baby D, Re (No 2)* [\[2011\] FamCA 176](#) ; [BC201150126](#).
- 2 (ACT) [Medical Treatment \(Health Directions\) Act 2006](#) s 11(2) (NT) [Advance Personal Planning Act 2013](#) s 43(f), 43(g) (SA) [Consent to Medical Treatment and Palliative Care Act 1995](#) s 15. (VIC) [Medical Treatment Act 1988](#) s 5(1)(c). (WA) [Acts Amendment \(Consent to Medical Treatment\) Act 2008](#), amending the (WA) [Guardianship and Administration Act 1990](#) ss 110Q (an advance health directive is not valid unless the maker is encouraged to seek legal or medical advice), 110R(2) (a treatment decision in an advance health directive is invalid if, at the time the directive is

(A) Right to Life Generally

made, its maker does not understand the nature of the treatment decision or the consequences of making the treatment decision).

- 3 (ACT) [Medical Treatment \(Health Directions\) Act 2006](#) s 7. See also *ibid* ss 8-10.
- 4 *Ibid* s 11.
- 5 *Ibid* s 7(3).
- 6 *Ibid* s 18(1), 18(2).
- 7 *Ibid* s 18(3).
- 8 (NT) [Advance Personal Planning Act 2013](#) ss 4, 6, 8(1).
- 9 *Ibid* s 8.
- 10 *Ibid* ss 41, 45-49.
- 11 *Ibid* ss 45(3), 46(3), 47(3), 48(3), 49(3).
- 12 (QLD) [Powers of Attorney Act 1998](#) s 36.
- 13 *Ibid* s 37.
- 14 *Ibid* s 103.
- 15 (SA) [Advance Care Directives Act 2013](#) s 11.
- 16 *Ibid* ss 21, 23.
- 17 (VIC) [Medical Treatment Act 1988](#) s 5(2).
- 18 *Ibid* s 5(1).
- 19 *Ibid* s 6.
- 20 *Ibid* s 5A.
- 21 *Ibid* ss 5B(2) (agent or guardian), 5C(3), 5C(4) (Tribunal).
- 22 (WA) [Acts Amendment \(Consent to Medical Treatment\) Act 2008](#) (amending the (WA) [Guardianship and Administration Act 1990](#) ss 110P, 110Q (formalities)).
- 23 *Ibid* s 110R.
- 24 *Ibid* s 110S.
- 25 *Ibid* s 110ZJ.
- 26 (ACT) [Medical Treatment \(Health Directions\) Act 2006](#) s 16
(NT) [Advance Personal Planning Act 2013](#) ss 45-49
(SA) [Consent to Medical Treatment and Palliative Care Act 1995](#) s 16 (*ibid* s 17 similarly exonerates the practitioner if death is hastened while administering treatment with the intention of relieving pain or distress)
(VIC) [Medical Treatment Act 1988](#) s 9 (practitioner or person under the practitioner's direction)
(WA) [Guardianship and Administration Act 1990](#) s 110ZK.

[80-915] Cessation of life

The paragraph below is current to **07 March 2018**

In all jurisdictions, legislation has been enacted to define the point where a person is no longer considered alive.¹ Death is defined as occurring when either the functioning of the brain or the circulation of blood irreversibly ceases.² The purpose is to clarify the uncertain situation as previously determined by the common law,³ in light of the capacity of modern medical technology to maintain some aspects of life for very long periods. Also, the provisions cover the procedures which have to be followed if tissue or organs are to be removed without committing an offence.⁴

Notes

- 1 See [80-885].
- 2 (ACT) [Transplantation and Anatomy Act 1978](#) s 45
(NT) [Transplantation and Anatomy Act 1979](#) s 23
(NSW) [Human Tissue Act 1983](#) s 33
(QLD) [Transplantation and Anatomy Act 1979](#) s 45
(SA) [Death \(Definition\) Act 1983](#) s 2
(TAS) [Human Tissue Act 1985](#) s 27A
(VIC) [Human Tissue Act 1982](#) s 41.
(WA) [Interpretation Act 1984](#) ss 5 (definition of 'death'), 13C.
For the meaning of 'death' see also PUBLIC HEALTH [\[350-4001\]](#).
- 3 At common law, the ascertainment of death was left to the medical profession and was normally regarded as occurring when the heart stopped beating: Australian Law Reform Commission, *Human Tissue Transplants*, Report No 7, AGPS, Canberra, 1977 at [123]; Brett, Waller and Williams, *Criminal Law: Text and Cases*, 7th ed, Butterworths, Sydney, 1997 at [5.18].
- 4 (ACT) [Transplantation and Anatomy Act 1978](#) Pt 3
(NT) [Transplantation and Anatomy Act 1979](#) Pt 3
(NSW) [Human Tissue Act 1983](#) Pt 4
(QLD) [Transplantation and Anatomy Act 1979](#) Pt 3
(SA) [Transplantation and Anatomy Act 1983](#) Pt 3
(TAS) [Human Tissue Act 1985](#) Pt III
(VIC) [Human Tissue Act 1982](#) Pt IV
(WA) [Human Tissue and Transplant Act 1982](#) Pt III.
As to tissue transplantation generally see MEDICINE [\[280-4505\]](#)-[\[280-4605\]](#).

End of Document

(B) Exceptions — Right to Life

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(2\) RIGHT TO LIFE](#)

(B) EXCEPTIONS — RIGHT TO LIFE

[80-920] Right to take own life

The paragraph below is current to **07 March 2018**

Suicide is not an offence in most jurisdictions.¹ In most jurisdictions it is an offence to assist a suicide, or an attempted suicide, or to counsel a person to commit suicide.² At the federal level, legislation makes it an offence to use a 'carriage service' (which includes the internet, emails, mobile and fixed telephones, faxes, radio and TV) to access, transmit or make available material that counsels or incites suicide.³ If an individual possesses, produces or supplies such material, with intent to make it available on the internet, then they are also guilty of a criminal offence.⁴

The right to take one's own life can be curtailed in South Australia as citizens are entitled to use reasonable force to prevent a person from committing suicide.⁵

Notes

1 (ACT) [Crimes Act 1900](#) s [16](#)

(NSW) [Crimes Act 1900](#) s 31A

(SA) [Criminal Law Consolidation Act 1935](#) s [13A](#)

(VIC) [Crimes Act 1958](#) s [6A](#).

In the criminal code jurisdictions the definition of 'homicide' requires the killing of another person:

(NT) Criminal Code ss 156, 161, 161A

(QLD) Criminal Code s 293 (no separate offence and all offences relate to the killings of another person), 300

(TAS) Criminal Code s 153

(WA) Criminal Code ss 277-280.

See further CRIMINAL LAW [\[130-3360\]](#). See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 ; [254 ALR 432](#); [2009] HCA 15; [BC200902940](#) at [\[87\]](#) per Gummow, Hayne and Heydon JJ (no duty of care on police officers to prevent

(B) Exceptions — Right to Life

suicide, owing to common law primacy of personal autonomy). See also *IL v R* (2017) 345 ALR 375 ; 91 ALJR 764; [2017] HCA 27; [BC201706044](#) (offence of 'self-murder').

- 2 (ACT) [Crimes Act 1900](#) s 17

(NT) Criminal Code s 162

(NSW) [Crimes Act 1900](#) s 31C

(QLD) Criminal Code s 311

(SA) [Criminal Law Consolidation Act 1935](#) s 13A(5)

(TAS) Criminal Code s 163

(VIC) [Crimes Act 1958](#) s 6B(2)

(WA) Criminal Code s 288.

See further CRIMINAL LAW [\[130-3360\]](#) (suicide), [\[130-3370\]](#) (suicide pacts).

- 3 (CTH) [Criminal Code Amendment \(Suicide Related Material Offences\) Act 2005](#) which amended the (CTH) Criminal Code s 474.29A (using a carriage service for suicide related material is an offence).
- 4 Ibid s 474.29B (possessing, controlling, producing, supplying or obtaining suicide related material for use through a carriage service).
- 5 (SA) [Criminal Law Consolidation Act 1935](#) s 13A(2).

[80-925] Military service

The paragraph below is current to **07 March 2018**

Under normal circumstances, service personnel are subject to the same law with respect to taking the life of another person.¹ However, where there is a declared war or an authorised warlike situation, the member of the armed forces may in the course of military duties kill another without attracting penalties. This occurs under the prerogative or executive power² but the actions of members of the forces are subject to international law, and particularly to the Geneva Conventions and Protocols, and the Rome Statute of the International Criminal Court in relation to which remedies are provided under Commonwealth legislation.³

Notes

- 1 *Burdett v Abbot* (1812) 4 Taunt 401  at 449; [128 ER 384](#) at 403; *Groves v Commonwealth* (1982) 150 CLR 113 ; [40 ALR 193](#); 56 ALJR 570; [BC8200060](#) (Commonwealth is liable for the negligence of a serving member of the armed forces); *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518  at 538, 546 per Mason CJ, Wilson and Dawson JJ, at 554-64 per Brennan and Toohey JJ; [84 ALR 1](#); 63 ALJR 250 (history of relationship between civil and military law considered). As to the law of armed conflict see DEFENCE [\[150-1850\]-\[150-1965\]](#).
- 2 *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [\[1965\] AC 75](#)   at [99-101](#)  per Lord Reid, at 115-18 per Viscount Radcliffe, at 145, 146 per Lord Pearce; [\[1964\] 2 All ER 348](#); [\[1964\] 2 WLR 1231](#) .
- 3 (CTH) [Geneva Conventions Act 1957](#) as amended by the (CTH) Geneva Conventions Amendment Act 1991; (CTH) Criminal Code Ch 8 (Offences against humanity and related offences) Div 268 (Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court) and the (CTH) [International Criminal Court Act 2002](#). As to the law of armed conflict see DEFENCE [\[150-1850\]-\[150-1965\]](#). As to the Geneva Conventions and amending Protocols see FOREIGN RELATIONS [\[215-1070\]-\[215-1095\]](#). As to the operation of the

(B) Exceptions — Right to Life

(INT) Rome Statute of the International Criminal Court (Rome, 17 July 1998; UN Doc A/CONF 183/9; 37 ILM 999 (1998)) domestically generally see FOREIGN RELATIONS [\[215-5\]](#).

[80-930] Self-defence

The paragraph below is current to **07 March 2018**

The rules relating to self-defence have the effect of reducing to some extent the protection afforded a person's right to life as protected by the law of unlawful homicide.¹ Where a person acts reasonably in self-defence when assailed and death follows for the assailant, the person assailed may be either not guilty of any offence or, where the use of defending force is excessive but the elements of murder are not present, the charge will be manslaughter rather than murder.² This is provided for by legislation in all jurisdictions.³ Victorian law codifies the defence,⁴ and includes a provision that, in cases involving family violence, a lack of immediacy will not necessarily mean that the accused did not believe that his or her actions were necessary and a use of force greater than that used or threatened will not mean that conduct was unreasonable in the circumstances.⁵

Notes

- 1 As to self-defence see CRIMINAL LAW [\[130-1100\]-\[130-1130\]](#).
- 2 *R v McKay* [\[1957\] VR 560](#)  (dissenting judgment of Smith J followed in *R v Bloem* [\[2008\] VSC 266](#) ; [BC200806520](#) at [\[13\]](#) per Whelan J (the test in prevention of a crime and apprehension of criminals is the same as that in self-defence for manslaughter)); *R v Howe* (1958) 100 CLR 448 ; [1958] ALR 753; (1958) 32 ALJ 212; [BC5800190](#); *Viro v R* (1978) 141 CLR 88 ; [18 ALR 257](#); 52 ALJR 418; *Zecevic v DPP (Vic)* (1987) 162 CLR 645 ; [71 ALR 641](#); 61 ALJR 375; 25 A Crim R 163 (which distinguishes *R v Howe* (1958) 100 CLR 448 ; [1958] ALR 753; (1958) 32 ALJ 212; [BC5800190](#) and *Viro v R* (1978) 141 CLR 88 ; [18 ALR 257](#); 52 ALJR 418 on the question of lack of reasonable grounds for the extent of force that may be used in self-defence). Note that questions of misdirection of *Zecevic v DPP (Vic)* (1987) 162 CLR 645 ; [71 ALR 641](#); 61 ALJR 375; 25 A Crim R 163 considered in *Cortivo v R* [\[2010\] ACTCA 14](#) ; [BC201005523](#); *R v Hendy* (2008) 191 A Crim R 81 ; [\[2008\] VSCA 231](#); [BC200810259](#); *R v Portelli* [\(2004\) 10 VR 259](#) ; 148 A Crim R 282; [\[2004\] VSCA 178](#); [BC200406523](#).
- 3 (ACT) [Criminal Code 2002](#) ss [42](#), [411](#)
(NT) Criminal Code s 29
(NSW) [Crimes Act 1900](#) ss 418-422
(QLD) Criminal Code s 271 (ibid s 272 protects the original assailant)
(SA) [Criminal Law Consolidation Act 1935](#) s [15](#)
(TAS) Criminal Code s 46
(VIC) [Crimes Act 1958](#) s [322K](#)
(WA) Criminal Code s 248. On the scope of ibid s 248 see *Tomarchio v Pocock* [\[2002\] WASCA 156](#) ; [BC200203157](#).
As to the distinction between common law and criminal code jurisdictions see CRIMINAL LAW [\[130-5\]](#).
- 4 (VIC) [Crimes Act 1958](#) s [322N](#).
- 5 (VIC) [Crimes Act 1958](#) s [322M](#). The defence was completely codified by (VIC) Crimes Amendment (Abolition Of Defensive Homicide) Act 2014 (repealed) which also introduced new jury directions for cases of defensive homicide in family violence cases.

[80-935] Provocation

The paragraph below is current to **07 March 2018**

A defendant may not be convicted of murder if the defence of provocation applies.¹ A finding of manslaughter must be made instead.² The defence of provocation requires both an objective test of the circumstances claimed in giving rise to provocation and a subjective test as to whether the person was actually provoked to the point of losing self-control. The defence is provided for by the legislation of only some jurisdictions,³ and by the common law in South Australia.⁴ The conduct must be seen in its whole context⁵ and may even consist of words alone;⁶ and the loss of control, though not specifically defined, may not necessarily arise only from anger or resentment.⁷

New South Wales has significantly restricted the availability of the defence of provocation. The provocative conduct of the deceased must amount to a serious indictable offence, in addition to the objective test of causing an ordinary person to lose control.⁸

Victoria has abolished the defence of provocation in cases of homicide,⁹ Evidence of a loss of provocative behaviour of the deceased may still be taken into account by a judge in pleas of mitigation of sentence.¹⁰

Some jurisdictions have specifically legislated to provide that a non-violent sexual advance cannot, by itself, constitute a conduct capable of raising the defence of provocation.¹¹ However, unless the legislation excludes it, non-violent sexual advances are capable of raising the defence.¹²

Notes

1 As to provocation see CRIMINAL LAW [\[130-1080\]-\[130-1095\]](#).

2 *Johnson v R* (1976) 136 CLR 619 ; [11 ALR 23](#); 51 ALJR 57. See further CRIMINAL LAW [\[130-1100\]](#), [\[130-1080\]-\[130-1095\]](#). As to manslaughter as an alternative verdict to murder see CRIMINAL LAW [\[130-3060\]](#).

3 See:

(ACT) [Crimes Act 1900](#) s [13](#)

(NT) Criminal Code s 158

(NSW) [Crimes Act 1900](#) s 23 (only applies to 'extreme' provocation – see changes made by (NSW) Crimes Amendment (Provocation) Act 2014)

(QLD) Criminal Code ss 268, 269, 304

(WA) Criminal Code ss 245, 246, 281.

In the case of Tasmania, see (TAS) Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (repealed) which abolished the defence in light of the sentencing options available).

4 *Moffa v R* (1977) 138 CLR 601 ; [13 ALR 225](#); 51 ALJR 403.

5 *Parker v R* (1963) 111 CLR 610 ; [1963] ALR 524; (1963) 37 ALJR 3 (appeal *Parker v R* (1964) 111 CLR 665 ; [\[1964\] AC 1369](#) ; [1964-65] NSWLR 361; [1964] ALR 1153, PC).

(B) Exceptions — Right to Life

- 6 *Moffa v R* (1977) 138 CLR 601 ; [13 ALR 225](#); 51 ALJR 403.
- 7 *Van den Hoek v R* (1986) 161 CLR 158  at 166-8; [69 ALR 1](#); 61 ALJR 19; 23 A Crim R 98 per Mason J.
- 8 (NSW) [Crimes Act 1900](#) s 23(2)(b), 23(2)(d). See also changes made by (NSW) Crimes Amendment (Provocation) Act 2014.
- 9 (VIC) [Crimes Act 1958](#) s [3B](#). The amendments were in response to Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004. The report noted in particular the entrenched gender-bias within the defence of provocation: pp 27-30.
- 10 See, for example, Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004, pp xxvii, xxviii.
- 11 See:
(ACT) [Crimes Act 1900](#) s [13\(3\)](#)
(NT) Criminal Code s 158(5)
(NSW) [Crimes Act 1900](#) s 23(3)(a).
- 12 *Lindsay v R* (2015) 255 CLR 272 ; [146 ALD 456](#); [2015] HCA 16; [BC201503399](#).

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(C) Special Offences — Right to Life

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(2\) RIGHT TO LIFE](#)

(C) SPECIAL OFFENCES — RIGHT TO LIFE

[80-940] Infanticide and child destruction

The paragraph below is current to **07 March 2018**

The offences of infanticide and child destruction were created to modify the law of murder because of the special problems associated with child birth and the technicalities of the law of murder.¹ The statutory crime of infanticide is designed to mitigate the crime of murder where a mother kills her infant as a result of suffering certain forms of post-natal stress.² The statutory crime of child destruction is designed to cover the situation of a child being killed where neither the offence of abortion nor the offence of murder or manslaughter is applicable.³ The offence occurs in relation to childbirth including where the child is unborn but capable of being born alive.⁴

Notes

- 1** See further CRIMINAL LAW [\[130-3320\]-\[130-3330\]](#) (infanticide), [\[130-3340\]-\[130-3350\]](#) (child destruction). The modifications do not appear to have been based on considerations of rights but to enhance the protection of the mother.
- 2** (NSW) [Crimes Act 1900](#) s 22A(1)
(TAS) Criminal Code s 165A
(VIC) [Crimes Act 1958](#) ss [5A](#) (child homicide not manslaughter (child must be under 6 years), 6(1) (infanticide instead of murder (child must be under 2 years))).
In Western Australia, the offence of infanticide formerly in (WA) Criminal Code s 281A was abolished by (WA) [Criminal Law Amendment \(Homicide\) Act 2008](#).
In New South Wales and Tasmania the child must be under the age of 12 months. Victoria raised this age to 2 years in 2005: see, for example, (VIC) [Crimes Act 1958](#) s 6(1).
There are no equivalent provisions in the other jurisdictions.
- 3** The crime is not recognised in New South Wales and South Australia although in New South Wales, (NSW) [Crimes Act 1900](#) s 22 provides that where a woman delivered of a child has wilfully contributed to the death of a child, whether during delivery, or at or after its birth, is guilty of an offence.
- 4** (ACT) [Crimes Act 1900](#) s [42](#)
(NT) Criminal Code s 170

(QLD) Criminal Code s 313

(WA) Criminal Code s 290.

(VIC) [Crimes Act 1958](#) Pt 3 was repealed by (VIC) [Abortion Law Reform Act 2008](#).

(TAS) Criminal Code s 165 (offence of child destruction was repealed by (TAS) [Reproductive Health \(Access to Terminations\) Act 2013](#)).

[80-945] Abortion

The paragraph below is current to **07 March 2018**

In all jurisdictions, except the Australian Capital Territory and Tasmania, it is an offence to procure a miscarriage (abortion) that results in death of the foetus or child unless there is some element of necessity, particularly in the form of the existence of a medical emergency that affects the life of the mother or the foetus/child.¹ In Victoria and Tasmania, abortions up to 24 and 16 weeks respectively are allowed, with no test of necessity.² The offences relating to abortion are intended self-abortion, intended procurement of the miscarriage of another, and knowing supply of instruments, drugs or other noxious substances designed to assist in the first two offences.³ There has been pressure, in the interests of the mother, to extend the circumstances that prevent a miscarriage being unlawful with the consequence that the standard of 'necessity' as defined in *R v Davidson*, which referred to danger to the mother,⁴ has been given a wider interpretation in relation to economic or social factors.⁵ Some statutes similarly extend necessity to cover situations where the woman concerned would suffer serious personal, psychological, family or social consequences if the abortion were not performed.⁶

In article 6(1) of the International Covenant on Civil and Political Rights 1966 (the 'ICCPR'), the words 'human being' have been construed to mean a 'person in being'.⁷ However, the United Nations Human Rights Committee (the 'Committee') has explained that the right to life should not be understood in a restrictive manner, and has noted with concern the relationship between restrictive abortion laws, clandestine abortions, and threats to women's lives.⁸ The Committee has concluded that provisions criminalising abortion, even when pregnancy is the result of rape, are also incompatible with article 3 of the ICCPR on equal enjoyment of rights and article 7 of the ICCPR on freedom from **torture** and other cruel, inhuman, or degrading treatment.⁹ Critics argue, however, that while the right to life clearly protects the interests of pregnant women, the 'right to life' of a foetus should predominate.¹⁰

The 'right to life' as defined in the (**ACT**) Human Rights **Act** 2004 is explicitly drafted so as to apply only to a person from the time of birth.¹¹

Notes

1 *R v Davidson* [1969] VR 667 . As to the crime of procuring abortion see CRIMINAL LAW [130-1265]-[130-1295]. As to lawful abortions see CRIMINAL LAW [130-1300]-[130-1310].

(SA) [Criminal Law Consolidation Act 1935](#) s 82A.

2 (VIC) [Abortion Law Reform Act 2008](#) s 4

(TAS) [Reproductive Health \(Access to Terminations\) Act 2013](#) s 4.

3 (NT) Criminal Code s 208A; (NT) [Termination of Pregnancy Law Reform Act 2017](#)

(NSW) [Crimes Act 1900](#) ss 82-84

(QLD) Criminal Code ss 224-226

(C) Special Offences — Right to Life

(SA) [Criminal Law Consolidation Act 1935](#) ss 81, 82

(VIC) [Crimes Act 1958](#) ss 65, 66 (attempts to procure abortion by unqualified person; common law offence of procuring a woman's miscarriage abolished); (VIC) [Abortion Law Reform Act 2008](#)

(WA) Criminal Code s 199; (WA) [Health \(Miscellaneous Provisions\) Act 1911](#) s 334.

The (**ACT**) Crimes (Abolition of Offence of Abortion) **Act** 2002 (repealed) removed the statutory offence of abortion.

The (TAS) [Reproductive Health \(Access to Terminations\) Act 2013](#) repealed the old abortion offences and created (TAS) Criminal Code ss 178D, 178E making it an offence for anyone other than a medical practitioner or the pregnant woman to terminate a pregnancy, or to terminate a pregnancy without the consent of the pregnant woman.

- 4 *R v Davidson* [1969] VR 667  at 671 per Menhennitt J (necessity was defined as requiring an honourable and reasonable belief that the abortion is necessary to 'preserve the woman from some serious danger'). As to the defence of necessity see CRIMINAL LAW [130-1305].
- 5 *R v Wald* (1971) 3 DCR (NSW) 25  at 28, 29 per Levine Chairman Quarter Sessions (the jury could decide whether 'any economic, social or medical ground or reason' existed to give rise to 'a serious danger to her physical or mental health'). For recent judicial discussion of the New South Wales case law, see *R v Sood* (Ruling No 3) [2006] NSWSC 762 ; [BC200607347](#).
- 6 See, for example:
(NT) [Medical Services Act 1982](#) s 11
(WA) [Health Act 1911](#) s 334.
- 7 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) .
- 8 For example, Human Rights Watch, *International Human Rights Law and Abortion in Latin America*, July 2005 cite the following examples of concluding observations:

- (1) Bolivia: UN Doc CCPR/C/79/Add 74 (1997) at [22];
- (2) Cameroon: UN Doc CCPR/C/79/Add 116 (1999) at [13];
- (3) Chile: UN Doc CCPR/C/79/Add 104 (1999) at [15];
- (4) Colombia: UN Doc CCPR/CO/80/COL (2004) at [13];
- (5) Costa Rica,: UN Doc CCPR/C/79/Add 107 (1999) at [11];
- (6) Ecuador: UN Doc CCPR/C/79/Add 92 (1998) at [11];
- (7) Guatemala: UN Doc CCPR/CO/72/GTM (2001) at [19];
- (8) Mali: UN Doc CCPR/CO/77/MLI (2003) at [14];
- (9) Morocco: UN Doc CCPR/CO/82/MAR (2004) at [29];
- (10) Peru: UN Doc CCPR/CO/70/PER (2000) at [20];
- (11) Poland: UN Doc CCPR/C/79/Add 110 (1999) at [11];
- (12) Poland: UN Doc CCPR/CO/82/POL (2004) at [8];
- (13) Senegal: UN Doc CCPR/C/79/Add 82 (1997) at [12];
- (14) Sri Lanka: UN Doc CCPR/CO/79/LKA (2003) at [12]; and
- (15) Venezuela: UN Doc CCPR/CO/71/VEN, (2001) at [19].

This may be supplemented by the United Nations Human Rights Committee concluding observations in relation to Monaco: UN Doc CCPR/C/MCO/CO/2 (2008) at [10]; Nicaragua: UN Doc CCPR/C/NIC/CO/3 (2008) at [13].

- 9 Human Rights Watch, *International Human Rights Law and Abortion in Latin America*, July 2005, p 8.

10 Human Rights Watch, *International Human Rights Law and Abortion in Latin America*, July 2005, p 9.

11 (ACT) [Human Rights Act 2004](#) s 9. Note the equivalent is not found in the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 9.

[80-947] Human cloning and embryonic research

The paragraph below is current to **07 March 2018**

Recent legislative developments have responded to scientific advances in embryonic research and cloning, attempting to balance the medical promise of such work with concerns that an embryo is a person or a potential person and should therefore be preserved and given the same protection from harm as that given to human beings in general. As a result of an agreement reached by the Council of Australian Governments on 5 April 2002, complementary legislation has been enacted in all jurisdictions.¹ The (CTH) [Research Involving Human Embryos Act 2002](#) (the '[Act](#)') allows research to be conducted on excess embryos available from assisted reproductive treatments provided that strict licensing conditions are met, and that the consent of interested parties (such as the woman for whom the embryo was created, her spouse and each person who provided the egg or sperm from which the embryo was created) is obtained. The term 'human embryo' is defined to mean a live embryo that has a human genome or an altered human genome, that has been developing for less than 8 weeks.² The [Act](#) also establishes a Committee within the National Health and Medical Research Council (the 'NHMRC'), the NHMRC Embryo Research Licensing Committee, for the purposes of performing functions and exercising powers under the [Act](#), and provides for a centralised, publicly available database of information about all licences issued by the NHMRC Licensing Committee.³

Notes

- 1 (CTH) [Research Involving Human Embryos Act 2002](#); (CTH) [Prohibition of Human Cloning for Reproduction Act 2002](#) (ACT) [Human Cloning and Embryo Research Act 2004](#) (NSW) [Research Involving Human Embryos \(New South Wales\) Act 2003](#) (QLD) [Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003](#) (SA) [Research Involving Human Embryos Act 2003](#); (SA) [Prohibition of Human Cloning for Reproduction Act 2003](#) (TAS) [Human Embryonic Research Regulation Act 2003](#); (TAS) [Human Cloning for Reproduction and Other Prohibited Practices Act 2003](#) (VIC) [Research Involving Human Embryos Act 2008](#); (VIC) [Prohibition of Human Cloning for Reproduction Act 2008](#) (WA) [Human Reproductive Technology Act 1991](#).

See also discussion in *Farnell v Chanbua* (2016) 56 Fam LR 84 ; (2016) FLC ¶93-700; [2016] FCWA 17; BC201650477.

- 2 (CTH) [Research Involving Human Embryos Act 2002](#) s 7. Identical provisions exist in all jurisdictions.
- 3 Ibid Pt 2 Div 3 (reporting and confidentiality).

[80-950] Culpable driving

The paragraph below is current to **07 March 2018**

The statutory offence of culpable driving has been introduced in the common law jurisdictions¹ and the offence of dangerous driving in the criminal code jurisdictions² to provide penalties where a death or grievous bodily harm has occurred as a result of a vehicular accident. The main elements of the offences are that the culpable driver was guilty of some form of gross negligence or recklessness or was under the influence of a drug, and it is seen as providing for penalties where in the past juries have been unwilling to convict of manslaughter.³

Notes

- 1 (ACT) [Crimes Act 1900 s 29](#)
(NSW) [Crimes Act 1900 s 52A](#) (dangerous driving)
(SA) [Criminal Law Consolidation Act 1935 s 19A](#)
(VIC) [Crimes Act 1958 s 318](#).
- 2 (NT) Criminal Code s 174F
(QLD) Criminal Code s 328A(4)
(TAS) Criminal Code s 167A
(WA) Criminal Code s 284.
- 3 *Callaghan v R* (1952) 87 CLR 115  at 120; [1952] ALR 941; (1952) 26 ALJ 456 per the court.

[80-955] Genocide

The paragraph below is current to **07 March 2018**

In international law¹ genocide is a crime.² Australia has ratified the Convention of the Prevention and Punishment of the Crime of Genocide (the 'Convention'),³ but there are no statutes in force specifically to implement the Convention.⁴ Commonwealth legislation in 2002 incorporated the Rome Statute of the International Criminal Court which includes provision of remedies for the commission of genocide as well as other international crimes. These offences do not apply retrospectively.⁵

Claims have been made that adoption and other practices related to the Aboriginal people, denial of effective recognition of their right to land,⁶ and some statements about them,⁷ have amounted to genocide. A law authorising removal of Aboriginal children from their parents was found not to amount to genocide,⁸ although the Human Rights and Equal Opportunity Commission's *Bringing them Home* report had concluded otherwise.⁹ The Federal Court of Australia has also found, by majority, that although genocide is a peremptory norm of international law, it has not been incorporated into the common law.¹⁰

Notes

- 1 As to international crimes see FOREIGN RELATIONS [\[215-405\]](#).
- 2 (INT) Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948; GA Res 260 (III); Aust TS 1951 No 2; 78 UNTS 277) (the 'Genocide Convention'). Ibid art II defines 'genocide' as involving the intent to destroy a national, ethnic, racial or religious group as such by killing or causing serious harm to members of the group, inflicting conditions calculated to cause physical destruction, imposing birth control measures, or forcibly transferring children of the group to another group. See also ibid art III (genocide, conspiracy to commit genocide,

(C) Special Offences — Right to Life

attempt to commit genocide and complicity in genocide are punishable). As to the Genocide Convention see FOREIGN RELATIONS [\[215-665\]](#).

- 3 (CTH) [Genocide Convention Act 1949](#) s 4 (the [Act](#) simply authorises ratification of the Convention).
- 4 The Australian Government has taken the view that existing laws sufficiently enable Australia to comply with its obligations under the Genocide Convention. See Commonwealth, *Parliamentary Debates*, Senate, 15 August 1974, 965 (Donald Willesee, Minister for Foreign Affairs). For a critique of this position, see Mitchell A, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v Thompson', [2000] MULR 2; (2000) 24 *Melbourne University Law Review* 15; Scott S V, 'Why wasn't genocide a crime in Australia? Accounting for the half century delay in Australia implementing the Genocide Convention in Australia' [2004] 22 *Australian Journal of Human Rights* pp 159-178.
- 5 See (CTH) Criminal Code Ch 8 Div 268 (Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court). Genocide is covered by ibid Ch 8 Div 268.3-268.7 (genocide by killing, by causing serious bodily or mental harm, by deliberately inflicting conditions of life calculated to bring about physical destruction, by imposing measures intended to prevent births, by forcibly transferring children). See generally FOREIGN RELATIONS [\[215-665\]](#).
- 6 Comments made in some of the judgments could justify such a view: see, for example, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#). Particular comments were made on violent (CLR) at 19, 21 (on violence) per Brennan J (with whom Mason CJ and McHugh J concurred), at 30 (on the denial of human rights by the common law) per Brennan J, at 104 (on oppression, conflict, degradation and devastation), 106 (on wild beasts, obliteration and extirpation), 107 (on dispossession) per Deane and Gaudron JJ. See also Wilson, Sir R, *Bringing them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, April 1997.
- 7 As to the laws against racial vilification see [\[80-700\]](#), [\[80-705\]](#). Under the (INT) Convention on the Prevention and Punishment of the Crime of Genocide 1948, an [act](#) of genocide includes 'direct and public incitement to genocide' (ibid art III(c)) and the crime includes 'causing serious bodily or mental harm to the group' with intent to destroy the group as a whole or in part: ibid art II(b). See also ibid art II(c) ('Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'). As to the Genocide Convention see FOREIGN RELATIONS [\[215-665\]](#).
- 8 *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991 at 999, 1017, 1067; [BC9703253](#) per Brennan CJ, Dawson and Gummow JJ respectively (as a matter of construction of the (NT) Aboriginals Ordinance 1918 (repealed)), at 1026, 1036, 1059 per Toohey, Gaudron and McHugh JJ respectively (having regard to the intent of the administrators), at 1037 per Gaudron J ((CC) Commonwealth Constitution s 122 does not confer power to pass laws authorising genocide).
- 9 See Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1995, Part 4 (International Human Rights Law).
- 10 *Nulyarimma v Thompson* (1999) 96 FCR 153 ; [165 ALR 621](#); [\[1999\] FCA 1192](#); [BC9905436](#) per Wilcox and Whitlam JJ, Merkel J dissenting. Note also Australian jurisdiction is confined: *Desai v Keelty* [\[2009\] FCA 317](#) , [BC200902316](#) (no jurisdiction to declare that alleged persecution of the staff and students of the BOSS School in India by the Indian judiciary amounts to a genocide).

End of Document

(A) Introduction — Liberty and Security of Person

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (3) LIBERTY AND SECURITY OF PERSON

(3) LIBERTY AND SECURITY OF PERSON

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(A) INTRODUCTION — LIBERTY AND SECURITY OF PERSON

[80-1010] Introduction

The paragraph below is current to **07 March 2018**

Personal liberty has been described as the most basic human right or freedom.¹ The legal concept of liberty and security of person is based on the protection the common law extends, largely through the criminal law and its processes, to the freedom of each individual to move about without restriction. It has been described by Blackstone as 'the power of loco-motion, of changing situation, or removing one's person to whatever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.'² At the core of the concept is the protection of individuals from arbitrary arrest³ and from arbitrary detention.⁴

Arrest,⁵ involving the deprivation of liberty, is most commonly associated with the criminal process but may also be related to civil actions. Arrest need not involve the touching or restraint of a person, provided words are spoken that bring to the person's notice that he or she is under compulsion and provided he or she assents to the compulsion.⁶ Detention,⁷ the holding of a person under some form of restraint, is also most usually associated with the criminal process but may in addition be enforced under a wide range of Commonwealth and State legislation.⁸

The right to liberty and security of person as contained in the common law is negative in content and its essence is to prevent arbitrariness or unlawfulness in arrest or detention. It does not take the form of the definition and enforcement of positive rights to personal freedom of movement.⁹ The right is secured by the imposition by the courts of limits on the exercise of powers of arrest and detention, that is, by declaring arrest or detention, unless authorised by law, to be unlawful, and by interpreting legislation consistently with a presumption against deprivation of liberty.¹⁰

The High Court of Australia has found that, with certain exceptions, there is a constitutional immunity for citizens from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.¹¹ This restriction on Commonwealth power has informed the approaches taken to the drafting of anti-terrorism provisions providing for detention of persons suspected of possessing knowledge about broadly defined 'terrorism offences'.¹²

The right to liberty and security is among the listed rights in the human rights charters of the Australian Capital Territory and Victoria.¹³

Notes

- 1 *South Australia v Totani* (2010) 242 CLR 1; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[423\]](#) per Crennan and Bell JJ (citing *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) per Gleeson CJ).
- 2 Blackstone W, *Commentary on the Laws of England* (1765) Vol 1, 130 (cited in *Antunovic v Dawson* [\[2010\] VSC 377](#); [BC201006085](#) at [\[6\]](#) per Bell J (extensive review of the writ of habeas corpus).
- 3 See [\[80-1020\]-\[80-1060\]](#).
- 4 See [\[80-1065\]-\[80-1080\]](#).
- 5 As to arrest see further POLICE AND EMERGENCY SERVICES [\[320-395\]-\[320-410\]](#).
- 6 *Alderson v Booth* [\[1969\] 2 QB 216](#) at [220](#); [\[1969\] 2 All ER 271](#); *R v Inwood* [\[1973\] 2 All ER 645](#); [\[1973\] 1 WLR 647](#); (1973) 57 Cr App Rep 529, CA (as to the situation being clear to the person); *Dellit v Small* [\[1978\] Qd R 303](#); *Hatzinikolaou v Snape* (1989) 97 FLR 86 at 90, 91; 41 A Crim R 389; (1989) Aust Torts Reports ¶80-262; [BC8902005](#) per Kirby P, CA(NSW).
- 7 For the definition of 'detention' see [\[80-1065\]](#).
- 8 For example, in relation to immigrants, aliens, persons with mental illness, children and young persons see [\[80-1045\]](#).
- 9 As to freedom of movement see [\[80-1135\]-\[80-1175\]](#).
- 10 As to remedies for unlawful arrest see [\[80-1085\]](#). As to remedies for unlawful detention see [\[80-1080\]](#). As to the right to privacy and protection from unlawful entry, search and seizure see [\[80-1285\]](#). As to the presumption against deprivation of liberty generally see PRISONS [\[335-185\]](#).
- 11 See [\[80-1017\]](#).
- 12 See [\[80-1090\]-\[80-1125\]](#).
- 13 (ACT) [Human Rights Act 2004](#) s 18
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 21.
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

[80-1015] Right in international law

The paragraph below is current to **07 March 2018**

Both the Universal Declaration of Human Rights¹ and the International Covenant on Civil and Political Rights (the 'ICCPR') provide for a right to liberty and security of person.² The essential elements of the right in Australian law cover:

- (1) interrogation prior to arrest;³

- (2) regulation of the act of arrest by police, citizens or others;⁴
- (3) a requirement that the reasons for arrest be made known to the person being arrested;⁵
- (4) the early making of a charge, if criminal matters are involved;⁶
- (5) early determination by a court of the lawfulness of the detention;⁷
- (6) release while awaiting trial;⁸ and
- (7) remedies for unlawful arrest or detention.⁹

Article 9(1) of the ICCPR provides that '[n]o one shall be subjected to arbitrary arrest or detention'. The United Nations Human Rights Committee has drawn on the drafting history of this article to confirm that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.¹⁰ This means that remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹¹

Notes

- 1 (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) art 3; (INT) Resolutions of the United Nations GA Res 217A (III) ('Everyone has the right to life, liberty and security of person').
- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 6 (right to life). Ibid art 9 relates to the right to liberty and security of person, which provides:
 - (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
 - (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
 - (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
 - (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
 - (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

For interpretation of ibid art 9 by the United Nations Human Rights Committee, see United Nations Human Rights Committee, *CCPR General Comment No 8: Right to Liberty and Security of Persons (Art 9)*, adopted at Sixteenth Session, A/37/40, 30 June 1982 (addressing all deprivations of liberty, not just in criminal cases, for example for mental illness, vagrancy, drug addiction, educational purposes, immigration control, the total length of detention pending trial, preventive detention for reasons of public security etc; some of the provisions of (INT) International Covenant on Civil and Political Rights 1966 art 9 only apply to those against whom criminal charges are brought but the remainder do not (eg the right to control by a court of the legality of the detention)). (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 11 stipulates that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

(A) Introduction — Liberty and Security of Person

See also United Nations Human Rights Committee, *CCPR General Comment No 27: Freedom of movement (Art 12)*, CCPR/C/21/Rev 1/Add 9 (2 November 1999) at [7] (right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement).

3 See [\[80-1025\]](#).

4 See [\[80-1030\]-\[80-1045\]](#).

5 See [\[80-1050\]](#).

6 See [\[80-1070\]](#).

7 See [\[80-1640\]](#).

8 See [\[80-1075\]](#).

9 See [\[80-1080\]-\[80-1085\]](#).

10 *Womah Mukong v Cameroon* Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) at [9.8].

11 *Hugo van Alphen v The Netherlands* Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8].

[80-1017] A constitutional immunity

The paragraph below is current to **07 March 2018**

With certain exceptions, 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under the Australian system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.¹ The exceptions to this rule at the Commonwealth level include detention in custody without bail pending the determination of a criminal charge, detention because of infectious disease or mental illness, contempt of Parliament and imprisonment by military tribunals.²

The High Court of Australia has held that the immunity does not apply to laws providing for the detention of non-citizens, upholding a law conferring upon the executive authority to detain an alien in custody for the purposes of expulsion or deportation.³ More recently, it has found that the power to detain aliens for the purpose of excluding them from the Australian community operates as an exemption that will support the indefinite, mandatory detention of unlawful non-citizens, including children.⁴ In spite of the negative effects of such detention, such as the psychological trauma associated with indefinite detention, such detention is not characterised as punitive.⁵

The existence of the constitutional immunity with respect to citizens acted as an impediment to the implementation of federal anti-terrorism laws providing for detention without charge or trial for up to 14 days. As a consequence of these constraints, State and Territory leaders agreed to enact legislation to give effect to such measures.⁶

The detention of non-citizens in Australia has received attention from the United Nations Human Rights Committee, particularly in relation to violations of article 9 of the International Covenant on Civil and Political Rights.⁷

Notes

- 1 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  at 27 per Brennan, Deane and Dawson JJ; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#). As to constitutional implications see also [\[80-45\]](#).

(A) Introduction — Liberty and Security of Person

- 2 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  at 28; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#). On statutory construction and personal liberty see *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) per Gleeson CJ: 'Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment'.
- On the question of bail see *Re Application for Bail by Islam* (2010) 4 ACTLR 235 ; 244 FLR 158; [\[2010\] ACTSC 147](#); [BC201008719](#) at [\[333\]](#), [\[334\]](#) per Penfold J (there is no meaning for (ACT) [Bail Act 1992](#) s 9C (which precludes bail being granted a charge of attempted murder in the absence of special or exceptional circumstance) that is compatible with (ACT) [Human Rights Act 2004](#) s 18(5) (which prevents anyone awaiting trial being detained in custody 'as a general rule') and no meaning that can be justified under *ibid* s 28 (at [\[382\]](#)-[\[385\]](#))).
- 3 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#). Among the immigration detention decisions discussed elsewhere are *Al-Kateb v Godwin* (2004) 219 CLR 562  at 577; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#); *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 ; [242 ALR 290](#); [\[2007\] FCA 1273](#); [BC200706740](#); *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 ; [234 ALR 114](#); [\[2007\] HCA 14](#); [BC200702595](#); *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 ; [256 ALR 32](#); [\[2009\] FCA 528](#); [BC200904335](#); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ; [267 ALR 204](#); [\[2010\] HCA 23](#); [BC201004220](#).
- 4 *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) at [\[44\]](#)-[\[46\]](#) per McHugh J. See also *Woolley, Re; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [\[2004\] HCA 49](#); [BC200406534](#), especially McHugh J at [\[57\]](#) who doubts whether the constitutional immunity itself can still stand. See also *Plaintiff M7612013 v Minister For Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ; [304 ALR 135](#); [\[2013\] HCA 53](#); [BC201315602](#) (Hayne, Keifel and Keane JJ upheld the finding in *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#)).
- 5 *Woolley, Re; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [\[2004\] HCA 49](#); [BC200406534](#) at [\[29\]](#) per Gleeson CJ, at [\[82\]](#) per McHugh J, at [\[165\]](#) per Gummow J. See also *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#), in which the Court found that the power to detain Aboriginal children in custody (for the purpose of their welfare) cannot be construed as punitive and therefore did not involve the performance of exclusively vested judicial power.
- 6 Council of Australian Governments' Special Meeting on Counter-Terrorism, 'Strengthening Counter-Terrorism Laws', 27 September 2005, available at <http://www.coag.gov.au>.
- 7 *Madafferi v Australia* (Communication No 1011/2001), A/59/40 Vol II (2004) 208 (detention of unauthorised arrivals is not *per se* arbitrary (at [\[9.2\]](#)) but violation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 10 (the 'ICCPR') in detention until committal to a psychiatric hospital contrary to medical advice as not based on a proper assessment of the circumstances of the case but disproportionate (at [\[9.3\]](#)); *A v Australia* (Communication No 560/1993), ICCPR, A/52/40 Vol II (1997) 125 (prolonged detention pending determination of entitlement to refugee status was 'arbitrary' within ICCPR art 9(1) (the term includes notions of inappropriateness and injustice) (at [\[9.1\]](#), [\[9.4\]](#)); violation of the right in ICCPR art 9(4) to have detention reviewed by a court (at [\[9.5\]](#)); *C v Australia* (Communication No 900/1999), A/58/40 Vol II (2002) 188 and *Baban et al v Australia* (Communication No 1014/2001), ICCPR, A/58/40 Vol II (2003) 331 (violation of ICCPR art 9 for detention without individual justification and without any chance of substantive judicial review, and inability judicially to challenge a detention; *Bakhtiyari v Australia* (Communication No 1069/2002), A/59/40 Vol II (2003) 301.

As to the discriminatory treatment of non-citizens see Committee on the Elimination of Racial Discrimination General Recommendation *Discrimination Against Non-Citizens*, A/59/18 (2004) 93. For the interpretation of article 10 of the ICCPR see United Nations Human Rights Committee, *CCPR General Comment No 9: Humane Treatment of Persons Deprived of Liberty (Art 10)*, adopted at the Sixteenth Session, A/37/40 (1982), 30 July 1982 (available at <http://www.unhcr.org>). On the treatment of unaccompanied and separated children see United Nations Committee on the Rights of the Child, *CRC General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, A/61/41 (2005) 15, 1 September 2009 (available at <http://www.unhcr.org>).

(B) Right not to be Subjected to Arbitrary Arrest

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(3\) LIBERTY AND SECURITY OF PERSON](#)

(B) RIGHT NOT TO BE SUBJECTED TO ARBITRARY ARREST

(I) Criminal Process

[80-1020] Definition of 'arrest'

The paragraph below is current to **07 March 2018**

'Arrest' has been given a broad definition at common law,¹ and this definition has, in large part, survived in Australian law without substantial statutory modification. Arrest need not require any physical force, provided there is acceptance of the situation by the person arrested.² The concept of arrest may cover both the stages leading to action not involving physical restraint, provided there is submission, including in particular interrogation of a suspect, and it covers actual physical restraint, which need not involve physical force.³ There will not be an arrest if the subject believes he or she must merely accompany the officer.⁴ The arrest may lead to detention or custody, in relation to which further rights inhere in the detained person.⁵

Stemming from initiatives in the United Kingdom in the early part of the twentieth century, the Judges' Rules⁶ were formulated to guide police in their interrogation and apprehension of suspects, and the legislation of most Australian jurisdictions provides the framework for the incorporation of guidance for police officers and courts.⁷ In Queensland and South Australia, the courts apply the Judges' Rules without legislative backing.⁸ The Commonwealth has legislated with respect to the investigation of Commonwealth offences⁹ and the legislation requires that a person under arrest be treated with humanity and with respect for human dignity and not be subjected to cruel, inhuman or degrading treatment.¹⁰ The Commonwealth legislation also provides that State or Territory law may operate, so far as it can, concurrently with the Commonwealth legislation.¹¹ In the Australian Capital Territory, the Commonwealth legislation operates through the Australian Federal Police in respect of all offences carrying a sentence of over 12 months.¹² The High Court of Australia has indicated that the Judges' Rules have no force of law in Australia and that they are no more than a useful, but not compelling, point of reference.¹³

(B) Right not to be Subjected to Arbitrary Arrest

- 1 For the common law power to arrest on a criminal charge see *Halliday v Nevill* (1984) 155 CLR 1 ; [57 ALR 331](#); 59 ALJR 124; [BC8400463](#).
- 2 *Alderson v Booth* [\[1969\] 2 QB 216](#)   at [220](#) ; [\[1969\] 2 All ER 271](#) per Lord Parkes (quoted in *Hatzinikolaou v Snape* (1989) 97 FLR 86  at 90, 91; 41 A Crim R 389; (1989) Aust Torts Reports ¶180-262; [BC8902005](#), CA(NSW)); *Dellit v Small* [\[1978\] Qd R 303](#) , SC(QLD), Full Court. On whether arrest unlawful because of failure to state reasons: see *R v Welch* [\(2009\) 166 ACTR 32](#)  ; [\[2009\] ACTSC 35](#); [BC200902244](#).
- 3 *Alderson v Booth* [\[1969\] 2 QB 216](#)   at [220](#) ; [\[1969\] 2 All ER 271](#) per Lord Parker CJ; *Hatzinikolaou v Snape* (1989) 97 FLR 86 ; 41 A Crim R 389(1989) Aust Torts Reports ¶180-262; [BC8902005](#).
- 4 *R v O'Donoghue* (1988) 34 A Crim R 397  at 402 per Hunt J.
- 5 See [\[80-1065\]-\[80-1080\]](#). A person under arrest who is not an Australian citizen has rights to communicate with the relevant consular office: (CTH) [Crimes Act 1914](#).
- 6 The Judges' Rules, formulated by the King's Bench Division in 1912, were incorporated in Australian law before they were reformulated in 1964 and are now in large part incorporated in the (UK) Police and Criminal Evidence [Act](#) 1984 and in the (UK) Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Their principal requirement is that a person subjected to questioning be told of his or her right to remain silent. For the full text of the rules see POLICE AND EMERGENCY SERVICES [\[320-1\]](#) and the 1964 Rules in Practice Note [1964] 1 All ER 237.

In the Australian context, the *Anunga* guidelines apply to the questioning of suspected Aboriginal persons: *R v Anunga* [\(1976\) 11 ALR 412](#)  at [414-16](#), see *R v Cotchilli* [\[2007\] NTSC 52](#) ; [BC200708980](#); *R v Nagawalli* [\[2009\] NTSC 25](#) ; [BC200905251](#) (admissions not reliable where rules not complied with); *Slater v Western Australia* [\[2009\] WASC 144](#) ; [BC200910311](#) (in Western Australia the rules do not have the force of law but operate as guidelines). Generally see ABORIGINALS AND TORRES STRAIT ISLANDERS [5-1815], [5-1825]. See also EVIDENCE [\[195-1255\]-\[195-1265\]](#).
- 7 (NT) [Police Administration Act 1978](#) ss [137\(2\)](#), 138-143

(NSW) [Police Act 1990](#) s 8(4) (Commissioner of Police has power to issue instructions as to management and control of police service)

(VIC) [Police Regulation \(Pensions\) Act 1958](#) s [130](#); (VIC) [Victoria Police Act 2013](#) s [16](#)

(WA) [Police Act 1892](#) s [9](#) (and Instructions made under the [Act](#)).

See also *Van der Meer v R* [\(1988\) 82 ALR 10](#)  at [15](#), [16](#) per Mason CJ, at 26 per Wilson, Dawson and Toohey JJ, at 32 per Deane J; 62 ALJR 656; 35 A Crim R 232 (status of the Judges' Rules and their Australian counterparts).
- 8 For Queensland see *R v Juraszko* [\[1967\] Qd R 128](#) ; *R v Nichols* [\[1958\] Qd R 200](#) ; (1958) 52 QJPR 48; *Dansie v Kelly* [\[1981\] Qd R 1](#) . For South Australia see *R v Lavery (No 2)* (1979) 20 SASR 430  at 459, 460; *R v Bailey* [1958] SASR 301 .
- 9 (CTH) [Crimes Act 1914](#) Pt IC.
- 10 Ibid s 23Q.
- 11 Ibid s 23A(2).
- 12 Ibid s 23A(6).
- 13 *Van der Meer v R* [\(1988\) 82 ALR 10](#)  at [15](#), [16](#) per Mason CJ, at 26 per Wilson, Dawson and Toohey JJ; 62 ALJR 656; 35 A Crim R 232.

[80-1025] Inquiries prior to arrest

The paragraph below is current to **07 March 2018**

The common law distinguishes two stages in interrogation by police prior to arrest:¹

(B) Right not to be Subjected to Arbitrary Arrest

- (1) questioning prior to charging or deciding to lay a charge; and
- (2) interrogation after a decision has been made to lay a charge or a charge has been laid.

At common law, during the first questioning stage, police may ask questions of any person whom they believe could be of assistance. However, the questioning creates no obligation on the person questioned to make any reply, even as to their name and address. Furthermore, with the exception of anti-terrorism laws, neither the police nor any other State agencies may arrest a person or detain them against their will for questioning.² In the Northern Territory, South Australia and Tasmania, police have statutory powers to require a person to provide their name and address, even if a decision to charge has not yet been made.³ Additionally, legislation in all jurisdictions allows police, even at this stage, to require some responsive action by a person in some circumstances, such as the provision of a name and address where a motor accident has occurred.⁴ It is also possible for non-police officers to require answers to questions prior to arrest or other forms of detention, for example:

- (1) customs officers about the import of prohibited goods;⁵
- (2) the Minister or officers in relation to the identity or whereabouts of an unlawful non-citizen;⁶ or
- (3) civil aviation investigators.⁷

Special laws allowing for questioning about terrorism-related activities without charge have been instituted in every jurisdiction.⁸

Notes

- 1 As to interrogation after arrest see [80-1020] and POLICE AND EMERGENCY SERVICES [\[320-1\]](#).
- 2 *Rice v Connolly* [\[1966\] 2 QB 414](#) ; [\[1966\] 2 All ER 649](#). See also *R v Governor of Metropolitan Gaol; Ex parte Molinari* [\[1962\] VR 156](#)  at 168; (1961) 2 FLR 477; *Foster v R* [\(1993\) 113 ALR 1](#) ; 67 ALJR 550; 65 ALB 14; [BC9303566](#). See also *Bales v Parmeter* (1935) 35 SR (NSW) 182 ; 52 WN (NSW) 41; *Drymalik v Feldman* [1966] SASR 227 ; *R v Banner* [\[1970\] VR 240](#) . As to questioning under anti-terrorism legislation, see [\[80-1095\]-\[80-1100\]](#).
- 3 (NT) *Police Administration Act 1978* s 134
(SA) *Summary Offences Act 1953* s 74A (a name or address may be required even if no charge is laid)
(TAS) *Police Offences Act 1935* s 55A (arrest may follow if the person refuses to give name or address).
There are no equivalent provisions in the other jurisdictions.
- 4 (ACT) *Road Transport (General) Act 1999* s 58 (in the execution of any of his or her functions under the road transport legislation)
(NT) *Traffic Regulations 1999* regs 9, 10
(NSW) *Road Transport Act 2013* ss 175-177 (in the execution of his or her functions under the road transport legislation)
(QLD) *Transport Operations (Road Use Management) Act 1995* s 48

(B) Right not to be Subjected to Arbitrary Arrest

(SA) [Road Traffic Act 1961](#) s 40V

(TAS) [Traffic Act 1925](#) s 41(1) (when required by a police officer or an authorised officer in the execution of his duty)

(VIC) [Road Safety Act 1986](#) s 59(1)

(WA) [Road Traffic Act 1974](#) ss 54-55.

See further TRANSPORT [425-1195].

5 (CTH) [Customs Act 1901](#) ss 195, 243SA.

6 (CTH) [Migration Act 1958](#) ss 18, 21 (notification is required).

7 (CTH) [Civil Aviation Act 1988](#) s 32AJ (a warrant is required to enter premises).

8 See [\[80-2318\]](#).

[80-1030] Arrest with warrant

The paragraph below is current to **07 March 2018**

All Australian jurisdictions have adopted the common law rules that allow police to obtain from a magistrate a warrant for the arrest of a person on providing information that a person has, or is suspected of having, committed a crime.¹ The warrant must state the charge on account of which the arrest is being made, and in normal circumstances be read to the person to be arrested.² While the common law rule is that the arresting officer must hold the warrant when the arrest is made (in order to protect persons from arbitrary arrest), statutory provisions may render actual possession of a detention order unnecessary.³

Notes

1 See, for example:

(NT) [Police Administration Act 1978](#) ss 121, 122, 124

(QLD) [Justices Act 1886](#) s 57

(TAS) [Justices Act 1959](#) s 32

(WA) [Criminal Procedure Act 2004](#) s 31.

On whether to proceed by arrest warrant or summons in light of (ACT) [Human Rights Act 2004](#) s 18 see *R v Welch* (2009) 166 ACTR 32 ; [\[2009\] ACTSC 35](#); [BC200902244](#).

As to warrants see further CRIMINAL LAW [\[130-13335\]](#) and POLICE AND EMERGENCY SERVICES [\[320-405\]](#).

2 See, for example;

(QLD) [Police Powers and Responsibilities Act 2000](#) s 372(1)(c)

Christie v Leachinsky [\[1947\] AC 573](#)   at 585 ; [\[1947\] 1 All ER 567](#) at 571 per Viscount Simon (followed *R v Stafford* (1976) 13 SASR 392  at 399, 400 per Bray CJ). Compare *Walker v Police* (2009) 263 LSJS 270 ; 196 A Crim R 132; [\[2009\] SASC 164](#); [BC200905028](#) (failure of police officer to provide further particulars immediately after being requested did not render the arrest unlawful). For a brief account of the protections built into the common law rules, such as the need to have sworn information, see *McArthur v Williams* (1936) 55 CLR 324  at 365, 366 per Dixon J, at 365, 366 per Evatt and McTiernan JJ; [1936] ALR 239. Compare also *Haque v State of Victoria* [2015] VSCA 83 ; BC201503331 (police are not required to make investigations to be able to inform the apprehended person of the basis for the warrant if they do not know).

(B) Right not to be Subjected to Arbitrary Arrest

- 3 *Little v Commonwealth* (1947) 75 CLR 94 ; [1947] ALR 483; (1947) 21 ALJ 292; [BC4700330](#).

[80-1035] Arrest by police without warrant

The paragraph below is current to **07 March 2018**

In all jurisdictions, police have power, without a warrant, to apprehend a person if it is reasonably believed that he or she has committed or is about to commit an offence; however, police are then often obliged to take the person before a magistrate for charging.¹ The Commonwealth has adopted by statute the common law rules,² to the effect that arrest without warrant may only occur where the police officer finds a person committing or reasonably suspects the person of having committed an offence³ and most States and Territories cover the powers of police officers by legislation to both summary and indictable offences.⁴

Notes

- 1 (CTH) [Crimes Act 1914](#) s [3W](#) (arrest without warrant for an offence); see also *ibid* ss 3X (arrest without warrant where prisoner unlawfully at large), 3Y (arrest without warrant of person on bail)
- (ACT) [Crimes Act 1900](#) ss [212](#) (arrest without warrant), [213](#) (arrest without warrant in possession), [214](#) (arrest of prisoner unlawfully at large), [217](#) (arrest without warrant for offences committed outside the Territory). However, see also (ACT) [Human Rights Act 2004](#) s 18(4)(a) (anyone arrested or detained on a criminal charge must be promptly brought before a judge or magistrate)
- (NT) [Police Administration Act 1978](#) ss ss 123, [128](#), [129](#) (an intoxicated person may be apprehended and held while intoxicated), [131](#) (an intoxicated person may be released without need for bail)
- (NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 99
- (QLD) [Police Powers and Responsibilities Act 2000](#) ss [365](#) (arrest without warrant), [366](#) (arrest of escapees), [367](#) (arrest of persons granted bail), [368](#) (arrest of persons given notice to appear), [393](#) (duty of police officer after arrest)
- (SA) [Summary Offences Act 1953](#) ss [75](#), [78](#); (SA) [Criminal Law Consolidation Act 1935](#) s [271](#) (general power of arrest)
- (TAS) [Police Offences Act 1935](#) s [55](#); (TAS) [Criminal Law \(Detention and Interrogation\) Act 1995](#) s [4](#)
- (VIC) [Crimes Act 1958](#) ss [457](#) (common law powers to arrest are abolished), [458](#), [459](#), [464A](#). See *Slaveski v Victoria* [\[2010\] VSC 441](#) ; [BC201007298](#) (claim for false imprisonment failed as brought to a bail justice within a reasonable time, decision upheld on appeal in *Slaveski v Victoria* [\[2009\] VSCA 6](#) ; [BC200900624](#)).
- (WA) [Criminal Investigation Act 2006](#) ss [127](#), [128](#) (where a person is found committing an offence).
- 2 (CTH) [Crimes Act 1914](#) s [3W](#); (CTH) Criminal Code s 11.6.
- 3 *Nolan v Clifford* (1904) 1 CLR 429  at 444 per Griffith CJ.
- 4 See *Nolan v Clifford* (1904) 1 CLR 429 ; *Pollard v R* (1992) 176 CLR 177 ; [110 ALR 385](#); 67 ALJR 193; 64 A Crim R 393 (a confessional statement given by a suspect without proper warnings should not be included in evidence considered by a judge). For further details relating to arrest without warrant see POLICE AND EMERGENCY SERVICES [\[320-400\]](#). As to the classification of offences in the different jurisdictions see CRIMINAL LAW [\[130-10\]](#), [\[130-13000\]](#)-[\[130-13010\]](#).

[80-1040] Citizen arrest powers

The paragraph below is current to **07 March 2018**

At common law, a citizen may arrest a person found committing a crime, but the arrest will only be lawful if the crime has actually been committed.¹ In most jurisdictions, the power of citizen arrest has now been confirmed by statute, with the result that the citizen's powers vary between the jurisdictions.² However, where statutory provision exists for citizen's arrest, the common law requirement that arrest may only be for an indictable offence has in all cases been removed.

Notes

- 1 *Walters v WH Smith & Son Ltd* [1914] 1 KB 595  at 602; (1914) 110 LT 345.
- 2 (CTH) *Crimes Act 1914* s 3Z
(ACT) *Crimes Act 1900* s 218
(NT) *Police Administration Act 1978* (no provision for citizen arrest, with the result, it seems, that the common law rules apply)
(NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 100
(QLD) Criminal Code s 546(b), 546(e) (a citizen may arrest in aid of police where a person is found committing an offence; or, if an offence has been committed, if the person is reasonably believed to have committed it; or by night, if there are reasonable grounds for believing an offence has been committed)
(SA) *Criminal Law Consolidation Act 1935* s 271 (a person may arrest another who has committed or is in the *act* of committing most criminal offences, but must deliver the person arrested forthwith to a member of the police force); (SA) *Summary Offences Act 1953* ss 76 (a property owner, or servant or agent of the owner, may apprehend if a person is found committing an offence on or with respect to that property), 77 (arrest of persons pawning or selling stolen goods)
(TAS) *Police Offences Act 1935* s 55(3) (an arrest may be made if any person is found committing an offence and it is believed on reasonable grounds that substantial injury to the person or property of the person is resulting or is likely to result)
(VIC) *Crimes Act 1958* ss 457 (common law rules are extinguished), 458 (a person may apprehend another if found committing an offence, if it is reasonably believed apprehension is necessary to ensure the appearance of that person, to preserve public order or safety or to prevent continuation or repetition of the offence)
(WA) *Criminal Investigation Act 2006* s 25.

[80-1045] Arrest by officers other than police

The paragraph below is current to **07 March 2018**

A wide range of Commonwealth, State and Territory legislation allows officers working under that legislation to make arrests where offences against that legislation are involved. Examples of arrest powers in Commonwealth legislation are arrest by customs officers,¹ immigration officers² and civil aviation officers.³ There are also arrest powers in a number of areas of service provided by the States, such as those contained in local government legislation,⁴ mental health legislation,⁵ and general health legislation.⁶ Where the statute requires a person arrested to be taken before a justice 'without undue delay', the person is not allowed to be detained for questioning (depending on statutory construction).⁷

(B) Right not to be Subjected to Arbitrary Arrest

Notes

- 1 (CTH) [Customs Act 1901](#) ss [196C](#) (persons seeking approval for delivery of goods for home consumption who refuse to answer questions — the officer may detain the person), [210](#) (person suspected of smuggling).
- 2 The powers of arrest in the (CTH) [Migration Act 1958](#) include: *ibid* s 245F(3)(f) (arrest without warrant any person found on the ship or aircraft if reasonably suspected of involvement in offence). Many provisions provide for other forms of administrative detention, such as *ibid* ss 249 (power to prevent persons from landing), 250 (detention of suspected offenders), 253 (detention of deportee), Pt 2 Div 6 (certain non-citizens to be kept in immigration detention), Pt 2 Div 7 (detention of unlawful non-citizens). See also CITIZENSHIP AND MIGRATION [\[77-660\]](#).
- 3 (CTH) [Civil Aviation Regulations 1988](#) reg 309 (a member of the crew may arrest a person found committing or reasonably suspected of having committed an offence against the [Act](#)).
- 4 See, for example:

(NSW) [Local Government Act 1993](#) s 680(3) (person who refuses to give name or address or gives false name or address may be apprehended by authorised person). See *Hazell v Parramatta City Council* [1968] 1 NSW 165 ; 5 LGRA 263; (1967) 87 WN (Pt 1) (NSW) 229.

See also LOCAL GOVERNMENT [\[265-5000\]-\[265-5565\]](#).
- 5 See, for example, (NSW) [Mental Health Act 2007](#) Ch 3 (involuntary admission and treatment). Involuntary admission of patients under mental health legislation is provided for in each jurisdiction: see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-230\]-\[285-275\]](#). See also *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 ; [254 ALR 432](#); [2009] HCA 15; [BC200902940](#) at [\[82\]](#), [\[118\]](#) per Gummow, Hayne and Heydon JJ ((VIC) [Mental Health Act 2014](#) s [375](#) power to apprehend mentally ill person, no obligation to do so).
- 6 See, for example, (VIC) [Public Health and Wellbeing Act 2008](#) Pts 8 (management and control of infectious diseases, micro-organisms and medical conditions), 9 (authorised officers), 10 (protection and enforcement provisions)). See also PUBLIC HEALTH [\[350-3010\]-\[350-3043\]](#) (quarantine), [350-3045]-[350-3110] (disease control).
- 7 *R v Iorlano* (1983) 151 CLR 678 ; [50 ALR 291](#); 58 ALJR 22; [BC8300124](#) (in relation to the (CTH) [Customs Act 1901](#) s [212](#)).

[80-1050] Right to be informed of reasons for arrest

The paragraph below is current to **07 March 2018**

Article 9(2) of the International Covenant on Civil and Political Rights (the 'ICCPR') provides that anyone who is arrested shall be informed at the time of arrest of the reasons for their arrest and shall be informed promptly of any charges against them.¹ Australian courts have held that where a warrant or summons is issued, the reasons for the arrest or order to appear must be stated in the warrant or summons.² Where the arrest is without warrant, the common law rule is that unless a person is given reasons for the arrest, the arrest itself is not lawful and an action for false imprisonment can be brought.³ In the Northern Territory, Queensland, South Australia and Tasmania, the relevant legislation confirming or extending the arrest powers requires the arresting officer to state the reasons for the arrest.⁴ The Australian Capital Territory and Victoria have incorporated the form of article 9(2) of ICCPR into their human rights statutes.⁵ In the other jurisdictions, the matter is left to the common law. It is not lawful for a person to be arrested on one charge (often called a holding charge) if the real basis for arrest was a different, usually more serious charge. Nor can a person be held for an unreasonable period before a charge is brought before a court.⁶

Notes

(B) Right not to be Subjected to Arbitrary Arrest

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 19(2).
- 2 *R v Stafford* (1976) 13 SASR 392  (following *Christie v Leachinsky* [\[1947\] AC 573](#)  ; [\[1947\] 1 All ER 567](#)). See also [80-1030] and POLICE AND EMERGENCY SERVICES [\[320-395\]-\[320-410\]](#).
- 3 *Nicholas v Parsonage* [1987] RTR 199, Div Ct; *Christie v Leachinsky* [\[1947\] AC 573](#)   at [586](#) , [587](#)  per Viscount Simon, at 590-3 per Lord Simonds; [\[1947\] 1 All ER 567](#). See also *Slaveski v Victoria* [\[2010\] VSC 441](#) ; [BC201007298](#) (failure to show certificate of identity did not invalidate the arrest, decision upheld on appeal in *Slaveski v Victoria* [\[2009\] VSCA 6](#) ; [BC200900624](#)).
- 4 (NT) [Police Administration Act 1978](#) s [127](#)
(SA) [Summary Offences Act 1953](#) s [82](#) (confirms the powers, responsibilities and duties of police under the common law in addition to those provided in the [Act](#)). Compare *Walker v Police* (2009) 263 LSJS 270 ; 196 A Crim R 132; [\[2009\] SASC 164](#); [BC200905028](#) (failure of police officer to provide further particulars immediately after being requested did not render the arrest unlawful).
(TAS) Criminal Code s 301(2), 301(3) (failure to give reasons may, but will not necessarily, invalidate the arrest)
(QLD) Criminal Code s 255(2) (duty of arresting person to give notice, if practicable, of the process or warrant under which the person is [acting](#) or of the cause of the arrest).
- 5 ([ACT](#)) [Human Rights Act 2004](#) s 18(3)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [21\(4\)](#).
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 6 See [\[80-1070\]](#).

[80-1052] Arrest of children

The paragraph below is current to **07 March 2018**

The Convention on the Rights of the Child (the 'Convention') provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'¹ Under the Convention, states recognise the right of every child alleged or accused of having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights of others and takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.²

All Australian jurisdictions prescribe an age below which a child is considered incapable of committing a criminal offence.³ Several Australian jurisdictions have implemented legislation that provides for the special treatment of children facing potential arrest. In Queensland, for instance, a police officer must consider alternatives to proceedings against a child for an offence other than a serious offence,⁴ and must start the proceeding by way of complaint and summons or notice to appear.⁵ They can only use the power of arrest without warrant in prescribed circumstances, and should only detain a child as a last resort.⁶ Similar provisions exist in the Australian Capital Territory, New South Wales, Victoria and Western Australia.⁷ The human rights statutes in the Australian Capital Territory and Victoria provide that an accused child who is detained or a child detained without charge must be segregated from detained (or accused) adults, and that an accused child must be brought to trial as quickly as possible.⁸ Several jurisdictions also include diversionary provisions in their juvenile justice regimes to divert a child who commits an offence from the courts' criminal justice system.⁹ Specific policies and legislative provisions have also been implemented in some jurisdictions to address the high rate of Indigenous juvenile detention.¹⁰

(B) Right not to be Subjected to Arbitrary Arrest

Notes

- 1 (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 37(b).
- 2 Ibid art 40. Taken into consideration in *Director of Public Prosecutions (DPP) v TY (No 3)* (2007) 18 VR 241 ; [2007] VSC 489; BC200710237 at [51] per Bell J. (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 9(1) (child not to be separated from parents unless necessary for the best interests of the child) taken into account in the variation of a custodial supervision order on the parent in *Re Application for Extended Leave* by TLB [2007] VSC 439 ; BC200709694. See also *Secretary, Department of Human Services v Sanding* [2011] VSC 42 ; BC201100569 at [14] per Bell J (noting the paramountcy principle is now reflected in (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 17(2)).
- 3 (ACT) *Criminal Code 2002* Div 2.3.1 deals with the criminal responsibility of children. Ibid s 25 provides that a child under 10 years old is not criminally responsible for an offence. On whether criminal capacity proven beyond reasonable doubt and for an extensive review of the authorities see *R v JA* (2007) 161 ACTR 1 ; 212 FLR 309; [2007] ACTSC 51; BC200705368 per Higgins CJ.

(NT) Criminal Code s 38(1), 38(2) (10 years; 14 years unless relevant capacity is proved)
(NSW) *Children (Criminal Proceedings) Act 1987* s 5 (10 years)
(QLD) Criminal Code s 29 (10 years; 14 years unless relevant capacity is proved)
(SA) *Young Offenders Act 1993* s 5 (10 years)
(TAS) Criminal Code s 18(1), 18(2) (10 years; 14 years unless relevant capacity is proved)
(VIC) *Children, Youth and Families Act 2005* s 344 (10 years)
(WA) Criminal Code s 29 (10 years; 14 years unless relevant capacity is proved).
- 4 (QLD) *Youth Justice Act 1992* s 11.
- 5 Ibid s 12.
- 6 Ibid s 13, which refers to (QLD) *Police Powers and Responsibilities Act 2000* s 365(3). The *Act* includes juvenile justice principles in ibid Sch 1, under which a child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances.
- 7 (ACT) *Children and Young People Act 2008* s 94(1)(f) (a child or young person may only be detained in custody for an offence as a last resort and for the minimum time necessary)

(NSW) *Young Offenders Act 1997* ss 7, 9

(VIC) *Children, Youth and Families Act 2005* s 345 (criminal proceedings against children must be by summons unless there are exceptional circumstances)

(WA) *Young Offenders Act 1994* s 7(h) (detaining a young person for an offence should only be used as a last resort and, if required, is only to be for as short a time as is necessary).
- 8 (ACT) *Human Rights Act 2004* s 20

(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 23. For the significance of charter-listed rights see [80-27], [80-28].

Australia entered a reservation under the (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) accepting the general principles of ibid art 37 but in relation to the obligation to separate children from adults in prison accepted it only to the extent that imprisonment is considered to be feasible and consistent with the obligation that children be able to maintain contact with their families.
- 9 (ACT) *Children and Young People Act 2008*.

For instance, the (NSW) *Young Offenders Act 1997* sets up alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings.

10 See [80-1053].

[80-1053] Arrest of Indigenous persons

The paragraph below is current to **07 March 2018**

The Royal Commission into Aboriginal Deaths in Custody (the 'Commission') found that a disproportionately high number of the total number of persons in police custody were Aborigines.¹ International treaty bodies have similarly expressed concerns about the disproportionate number of Indigenous Australians coming into contact with the criminal justice system.² Causes identified by the Commission as contributing to over-representation include inter alia the petty nature of much contact with the police which often escalates into more serious offending, the enforcement of preventive custody and public drunkenness offences, the poor relations between Aboriginal people and the police, and over-policing.³ The key principle underpinning the recommendations was that arrest should be used as a measure of last resort, with the use of alternatives to custody and diversionary mechanisms as appropriate.⁴

The Commission further recognised that the problems affecting Aboriginal juveniles 'are so widespread and have ... potentially disastrous repercussions for the future', and called on government and Aboriginal organisations to devise strategies to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and in particular to reduce the rate at which Aboriginal juveniles are separated from their families and their communities whether by being declared to be in need of care, detained, imprisoned or otherwise.⁵

The Commission's recommendations have only been partially implemented. For instance, public drunkenness remains an offence in Victoria,⁶ and most jurisdictions retain criminal offences relating to 'disorderly' behaviour as well as other street offences such as 'offensive language' which are regularly used against Indigenous Australians.⁷ Some jurisdictions, however, have introduced special provisions dealing with the questioning of Indigenous people in custody as a mechanism to alleviate relative disadvantage in comparison with members of the Australian community generally.⁸

Statistics indicate that rates of incarceration of Indigenous people continues to climb.⁹

United Nations Declaration on the Rights of Indigenous Peoples may go some way towards addressing such issues through its espoused aim of enhancing harmonious and cooperative relations between the State and indigenous people, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.¹⁰

Notes

1 Royal Commission into Aboriginal Deaths in Custody, National Reports, Vol 5, AGPS, Canberra, 1991

2 See, for example, the United Nations Committee Against *Torture*, *Concluding Observations of the Committee Against Torture: Australia*, UN Doc, A/56/44, November 2000 at [47]-[53]; United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc, A/55/40, 24 July 2000 at [498]-[528]; United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc, CERD/C/304/Add 101, 19 April 2000; United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc, CRC/C/15/Add 79, 10 October 1997.

(B) Right not to be Subjected to Arbitrary Arrest

- 3 See, for example, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice under scrutiny: report of the inquiry into implementation by Governments of the recommendations of the Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1994, at [10.21] (Queensland), [10.92] (Western Australia) which found that poor Aboriginal-police relations were evident in Queensland and that in parts of Western Australia (such as Roebourne and Wiluna) over-policing was a significant issue.
- 4 The Royal Commission into Aboriginal Deaths in Custody, National Report, Vol 5, AGPS, Canberra, 1991 made 339 recommendations. Recommendations 79-91 were concerned with diverting Aboriginal and Torres Strait Islander people away from police custody by abolishing the offence of drunkenness, avoiding arrest for offensive language, and adopting and applying the principle of arrest being the sanction of last resort in dealing with offenders.
- 5 Royal Commission into Aboriginal Deaths in Custody, National Report, Vol 2, AGPS, Canberra, 1991, Recommendation 62, p 252.
- 6 (VIC) [Summary Offences Act 1966](#) ss [13](#), [14](#).
- 7 In some jurisdictions, these offences have been re-introduced. See, for example, (NSW) [Summary Offences Act 1988](#) s 4 (offensive conduct).
- 8 See (QLD) [Police Powers and Responsibilities Act 2000](#) s [420](#) (questioning of aboriginal people and Torres Strait islanders); (QLD) [Police Powers and Responsibilities Regulation 2012 Sch 9 Pt 5 Div 1 cl 25](#) (a police officer must first ask questions necessary to establish an adult Aborigine or Torres Strait Islander's level of education and understanding). Forster J in *R v Anunga* ([1976](#)) [11 ALR 412](#) at [415](#) also developed nine guidelines, known as the *Anunga* rules, which are applicable in situations where police interrogate Aboriginal dependents and are designed to 'remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police'. These rules have subsequently been incorporated into police standing orders. See *R v Janima* ([2012](#)) [NTSC 16](#); [BC201201503](#) (full *Anunga* procedure not necessary where accused is being charged rather than questioned); *R v Nagawalli* ([2009](#)) [NTSC 25](#); [BC200905251](#) (admissions not reliable where rules not complied with); *Slater v Western Australia* ([2009](#)) [WASC 144](#); [BC200910311](#) (in Western Australia the rules do not have the force of law, but operate as guidelines). See also *R v Age* (2011) 257 FLR 85; ([2011](#)) [NTSC 104](#); [BC201109970](#). As to the definition of 'arrest' generally see [80-1020].
- 9 At the time of the Royal Commission into Aboriginal Deaths in Custody, National Report, Vol 2, AGPS, Canberra, 1991, Indigenous people made up 14 per cent of the total prison population. In 2004 this figure had risen to 21 per cent. See *Prisoners in Australia*, Australian Bureau of Statistics, Series cat no 4517.0, Canberra, 2004, p 5; *Indigenous Deaths in Custody 1989 — 1996: A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner for the Aboriginal and Torres Strait Islander Commission*, October 1996.

As of June 2015, indigenous persons accounted for 27 per cent of the total Australian prison population: Australian Bureau of Statistics, *4517.0 - Prisoners in Australia* (10 December 2015).

As at 30 June 2003, Indigenous young people (up to age 18) were 20 times more likely to be detained in juvenile detention facilities than non-Indigenous young people. For updated figures on rates of indigenous incarceration and the effectiveness of juvenile diversionary schemes, see <http://www.humanrights.gov.au>.
- 10 United Nations Declaration on the Rights of Indigenous Peoples Preamble (GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007)) affirms the rights of indigenous people individually and collectively, including many rights recognised in other United Nations instruments (opposed by Australia at vote on adoption but endorsed 3 April 2009).

(II) Civil Process

[80-1060] Arrest for breaches of civil law

The paragraph below is current to **07 March 2018**

The International Covenant on Civil and Political Rights provides that 'no one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation'.¹ The same right is found in the Australian Capital Territory and Victorian human rights charters.² Arrest will in many cases be the consequence of failing to comply with a court order.³

Special arrangements have been made to deal with the problems of debtors leaving the jurisdiction. In most jurisdictions arrest by way of mesne process is available only if the debtor is about to leave the

(B) Right not to be Subjected to Arbitrary Arrest

jurisdiction.⁴ The arrest for civil process is to be distinguished from arrest for contempt of court, which is a criminal process, although it may follow failure to obey a court order related to a civil process (such as on contract).⁵

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 11.
- 2 (ACT) [Human Rights Act 2004](#) s 18(8)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [21\(8\)](#).
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 3 See CONTEMPT [\[105-450\]](#) (civil contempt).
- 4 (NT) [Absconding Debtors Act 1978](#) ss 5-7 (arrest with warrant), [11](#) (the debtor must be brought before a court within 24 hours), [12](#) (release is possible on satisfaction, order of the court or consent of the creditor)
There is some doubt as to the power of the New South Wales Supreme Court, in an action for debt, to issue an injunction to restrain a person leaving the jurisdiction: *Elliott v Elliott* [\[1975\] 1 NSWLR 148](#)  (refers to (NSW) [Supreme Court Act 1970](#) ss 5, 10 (repealed)).
(QLD) [Civil Proceedings Act 2011](#) ss [90](#), [91](#) (provide for the enforcement of court order by warrant). The [Act](#) does not provide for arrest of an absconding debtor in the absence of a court order.
(SA) [Enforcement of Judgments Act 1991](#) s [14](#)
(TAS) [Debtors Act 1870](#) s [5](#) (mesne process abolished, but still allowed for defendant about to quit Tasmania)
(VIC) [Supreme Court Act 1986](#) s [87](#) (arrest may be ordered if \$50,000 or more is involved and departure of the defendants will defeat the proceedings)
(WA) [Restraint of Debtors Act 1984](#) ss [5](#), [6](#), [16](#) (allows arrest without warrant if there has been conditional release from custody).
- 5 As to criminal and civil contempt see CONTEMPT [\[105-10\]-\[105-245\]](#), [\[105-450\]](#) respectively.

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(C) Right not to be Subjected to Arbitrary Detention

Halsbury's Laws of Australia

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Halsbury's Laws of Australia > **80 — Civil and Political Rights** > **II CIVIL RIGHTS** > **(3) LIBERTY AND SECURITY OF PERSON**

(C) RIGHT NOT TO BE SUBJECTED TO ARBITRARY DETENTION

[80-1065] Definition of 'detention'

The paragraph below is current to **07 March 2018**

In Australian law, detention involves the continuous holding of a person under some form of constraint. The constraint need not involve the use of force, provided there is an apprehension by the person detained that compulsion would follow resistance,¹ or a belief that custody by the police is involved.² The arresting officer must exercise reasonable care for the safety of a person in custody, even if a charge has not yet been laid.³ The fact that a person is not aware of the restraint or is not physically able to exercise freedom of movement does not mean that wrongful imprisonment cannot be made out.⁴ It should not matter that the person claiming wrongful detention lacked the physical capacity to exercise the freedom of movement that was denied by the restraint.⁵

There are many forms of administrative detention that do not amount to, or result in, an arrest in that they are not imposed on a person's liberty with a view to involve that person in the criminal process.⁶ As with arrest, international law provides that such detention must not be arbitrary, and that a person deprived of their liberty by detention 'shall be entitled to take proceedings before a court' and be entitled to an enforceable right to compensation.⁷

Examples of forms of administrative detention provided for by legislation in Australia include the detention of persons for the prevention of the spreading of infectious diseases,⁸ detention of persons of unsound mind,⁹ public order-type detention of persons on the basis of drunkenness or 'vagrancy' where no offence has been committed,¹⁰ and detention of non-citizens pending the investigation and determination of an application for a visa, removal or deportation, or merely to prevent entry to the Australian community.¹¹ Simply being subject to a deportation order does not constitute imprisonment.¹² All jurisdictions in Australia also provide for the detention of children in need of care and protection.¹³ However, the required element of restraint is not present in fostering a child and removing them from their natural parents.¹⁴ Detention of persons who are reasonably suspected of possessing information about terrorism-related offences is also considered a form of administrative detention standing outside normal criminal law processes.¹⁵

To the extent that these forms of administrative detention occur under federal legislation, they may breach the separation of powers doctrine if characterised as 'punitive', although the High Court of

(C) Right not to be Subjected to Arbitrary Detention

Australia has recognised many of the above as exceptions to any potential constitutional immunity. No such impediment exists at the level of State and Territory law.¹⁶

Notes

- 1 *Watson v Marshall* (1971) 124 CLR 621 ; [1972] ALR 83; (1971) 45 ALJR 444 (affirmed *Marshall v Watson* (1972) 124 CLR 640 ; [1972] ALR 641; (1972) 45 ALJR 339). Note in the context of foreign sex workers *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [2008] HCA 39; [BC200807527](#) per Gleeson CJ (concerning (CTH) Criminal Code ss 270.1, 270.3(1)(a) (giving effect to Australia's obligations under the (INT) International Convention to Suppress the Slave Trade and Slavery (Geneva, 25 September 1926; Aust TS 1927 No 11; UKTS 1927 No 16; 60 LNTS 253)) (the 'Slavery Convention'). The Slavery Convention was subsequently updated by the (INT) Protocol amending the Convention to Suppress the Slave Trade and Slavery (New York, 7 December 1953; Aust TS 1953 No 8; 182 UNTS 51); (INT) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956; Aust TS 1958 No 3; 266 UNTS 40)). Gleeson CJ observed the European Convention decision of *Siliadin v France* ([2005](#)) [20 BHRC 654](#) ; (2006) 43 EHRR 16 distinguishing 'modern' from 'classic' slavery within the Slavery Convention (when claimed in that case by a domestic servant), and noted at [32] that it is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context and purpose of the Slavery Convention). See also *Director of Public Prosecutions (Cth) v Kam Tin Ho* [[2009](#)] [VSC 437](#) ; [BC200910089](#) (convictions under the slavery provisions of (CTH) Criminal Code s 270.3(1)(a) engaging foreign nationals to travel to Australia for prostitution. ((CTH) Criminal Code Ch 8 prohibits offences against humanity)). As to slavery see also [\[80-1391\]](#), FOREIGN RELATIONS [\[215-615\]](#) note 2.
- 2 *Smith v R* (1957) 97 CLR 100  at 129; 31 ALJ 76 per Williams J. See also [\[80-1085\]](#). See further POLICE AND EMERGENCY SERVICES [\[320-410\]](#).
- 3 *Howard v Jarvis* (1958) 98 CLR 177 ; 32 ALJ 40; [BC5800370](#).
- 4 *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ; [[2010](#)] [SASC 56](#); [BC201001454](#) at [\[289\]](#) per Doyle CJ, Duggan and White JJ (but note at [282] false imprisonment and wrongful imprisonment involve a 'total restraint' on movement).
- 5 *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ; [[2010](#)] [SASC 56](#); [BC201001454](#) at [\[297\]](#) per Doyle CJ, Duggan and White JJ.
- 6 As to the definition of 'arrest' see [\[80-1020\]](#).
- 7 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 9(1), 9(4), 9(5). See [\[80-1015\]](#), [\[80-1065\]](#) for interpretation of what will amount to arbitrary detention, and [\[80-1066\]](#)-[\[80-1069\]](#) for cases concerning Australia.
- 8 See, for example, (VIC) *Public Health and Wellbeing Act 2008* ss [113](#), [114](#), [117](#), [123](#), [200](#) (detention in cases of infectious diseases, serious risk to public health, emergency powers). See further PUBLIC HEALTH [\[350-3001\]](#)-[\[350-3110\]](#) (prevention and control of human disease).
- 9 See, for example, (QLD) *Mental Health Act 2016* Ch 2, which concerns the 'involuntary assessment' procedure for person reasonably believed to have a mental illness of a nature, or to an extent, that involuntary assessment is necessary. All jurisdictions have similar provisions. See further MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-230\]](#)-[\[285-275\]](#).
- 10 Generally see POLICE AND EMERGENCY SERVICES [\[320-510\]](#).
- 11 (CTH) *Migration Act 1958* ss [189](#), [196](#), [198](#). See *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [[2004](#)] [HCA 37](#); [BC200404861](#) (view that indefinite detention for the purpose of excluding an alien from the Australian community does not breach any constitutional limitations on the exercise of power. See also *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 ; [243 ALR 606](#); [[2007](#)] [FCAFC 203](#); [BC200711294](#) (charged with having provided resources to a terrorist organisation and when granted bail his visa was cancelled in the national interest under (CTH) *Migration Act 1958* s [501\(3\)](#) as the Minister reasonably suspected he did not pass the 'character test' by virtue of his associations).
- 12 *Louis v Commonwealth* (1987) 87 FLR 277 .

(C) Right not to be Subjected to Arbitrary Detention

13 Generally see SOCIAL WELFARE AND SERVICES [\[380-1\]](#).

14 *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ; [\[2010\] SASC 56](#); [BC201001454](#) at [\[307\]](#) per Doyle CJ, Duggan and White JJ.

15 See [\[80-1120\]](#).

16 As to constitutional immunity see [\[80-1017\]](#).

[80-1066] Detention of children for welfare purposes

The paragraph below is current to **07 March 2018**

Special provision is made for children in international law.¹ In all Australian jurisdictions, children whom authorised officials have identified as being in need of care and protection may be taken into the custody of the relevant state body, either through administrative processes or court order.² All jurisdictions, except the Australian Capital Territory, New South Wales and Victoria, define a 'child' as a person under the age of 18 years.³

Children's rights are partly protected through the implementation of the principles embodied in relevant child welfare legislation which administrators and courts exercising powers under the relevant **Act** are required to apply.⁴ Consistent with article 3 of Convention of the Rights of the Child, these provide that the child's best interests are the paramount consideration. The rights of parents are also protected in most jurisdictions through reference to the principle that the primary responsibility for caring for the child or young person should lie with the family.⁵

Terms such as 'in need of care and protection' and 'at risk of harm' are defined in the various jurisdictions.⁶ In New South Wales the two are distinguished. A child may be 'at risk' if their basic physical or psychological needs are (or are at risk of) not being met, they are not receiving necessary medical care, they have been (or are at risk of being) physically or sexually abused or ill-treated, or they are at risk of psychological or physical harm from domestic violence.⁷ Processes for notification, investigation and assessment of risks and needs differ in each jurisdiction, although in each jurisdiction a child may ultimately be removed from their usual caregiver by a Court order. In some jurisdictions, emergency provisions exist that allow for emergency removal of a child or young person who is at risk without warrant.⁸

In New South Wales, if a child is removed under a power of removal a care application must be made within 3 days. A Court order will similarly expire after 14 days.⁹

Several jurisdictions have also promulgated special principles for the protection of Indigenous children, in recognition of their special needs and the history of removal on discriminatory grounds. The principles may direct, for instance, that members of the children's community be consulted, that account be taken of any submissions received from relevant Indigenous organisations, and attention given to Indigenous traditions and cultural values.¹⁰ When Indigenous children are removed from home, they should, where possible, be placed within their extended family or with members of their own community.¹¹

Notes

- 1 (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 37 stipulates that:

(C) Right not to be Subjected to Arbitrary Detention

- (1) 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (2) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; and
- (3) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

On the need for administrative decisions following treaty ratification to take into account the best interests of the children see *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273  at 291 per Mason CJ and Deane J, at 302 per Toohey J, and at 304 per Gaudron J; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#). On the application of *Teoh*, above and the interests of the child: see *NTD8 v Australian Crime Commission (No 2)* (2008) 106 ALD 23 ; [\[2008\] FCA 1551](#); [BC200809115](#).

2 (ACT) [Children and Young People Act 2008](#) Ch 14

(NT) [Care and Protection of Children Act 2007](#) Ch 2

(NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) Ch 4. See *Director-General, Dept of Community Services v Thomas* (2009) 41 Fam LR 220 ; [\[2009\] NSWSC 217](#); [BC200902041](#) (child was a serious risk to others and at risk himself from others and justifiably the subject of an order authorising indefinite involuntary detention in secure accommodation unit (following *K (A Child) (Secure Accommodation Order: Right to Liberty)* [\[2001\] 2 All ER 719](#) ; [\[2001\] 2 WLR 1141](#) ; [\[2000\] Fam 377](#) , in which similar detention was not incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Strasbourg, 16 September 1963 ETS 46)).

(QLD) [Child Protection Act 1999](#) Ch 2

(SA) Children's Protection [Act](#) 1993 Pt 5

(TAS) [Children, Young Persons and Their Families Act 1997](#) Pt 5

(VIC) [Children, Youth and Families Act 2005](#) Ch 4. See *Secretary, Department of Human Services v Sanding* [\[2011\] VSC 42](#) ; [BC201100569](#) (paramount interests of children now reflected in (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 17(2)).

(WA) [Children and Community Services Act 2004](#) Pt 4.

As to children in need of care and protection see further SOCIAL WELFARE AND SERVICES [\[380-1\]](#).

3 (NT) [Care and Protection of Children Act 2007](#) s 13 (also a person apparently less than 18 years of age if the person's age cannot be proved)

(QLD) [Child Protection Act 1999](#) s 8

(SA) Children's Protection [Act](#) 1993 s 6(1)

(TAS) [Children, Young Persons and Their Families Act 1997](#) s 3(1)

(WA) [Children and Community Services Act 2004](#) s 3 (and in the absence of positive evidence as to age, means a person who is apparently under 18).

In the Australian Capital Territory, a 'child' is defined as a person under the age of 12 years: (ACT) [Children and Young People Act 2008](#) s 11.

In New South Wales, a 'child' is defined as a person under the age of 16 years (except in the case of children's employment): (NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) s 3.

In Victoria, a 'child' is defined as a person who is under the age of 17 years: (VIC) [Children, Youth and Families Act 2005](#) s 3(1). However, in the case of a person who is alleged to have committed an offence, a child is a person who

(C) Right not to be Subjected to Arbitrary Detention

was over 10 and under 18 at the time of its alleged commission. Furthermore, (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 3 defines child as a person under 18 years of age.

4 See, for example:

(ACT) [Children and Young People Act 2008](#) s 9

(NT) [Care and Protection of Children Act 2007](#) Pt 1.3

(NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) s 9

(QLD) [Child Protection Act 1999](#) ss 5A, 5B

(SA) Children's Protection [Act](#) 1993 s 4

(TAS) [Children, Young Persons and Their Families Act 1997](#) s 3

(VIC) [Children, Youth and Families Act 2005](#) Ch 1 Pt 1.2

(WA) [Children and Community Services Act 2004](#) Pt 2.

5 See, for example:

(ACT) [Children and Young People Act 2008](#) s 16

(NT) [Care and Protection of Children Act 2007](#) s 8(1) (the family of a child has the primary responsibility for the care, upbringing and development of the child)

(QLD) [Child Protection Act 1999](#) s 5B(b)

(WA) [Children and Community Services Act 2004](#) ss 6(da), 9(a).

6 (ACT) [Children and Young People Act 2008](#) s 345

(NT) [Care and Protection of Children Act 2007](#) s 20. See also ibid Pt 2.3 (creates an appropriate judicial process for safeguarding the wellbeing of children, particularly children who are or might be in need of protection through the family matters jurisdiction of the Local Court).

(QLD) [Child Protection Act 1999](#) ss 9, 10

(SA) Children's Protection [Act](#) 1993 s 6(2)

(TAS) [Children, Young Persons and Their Families Act 1997](#) s 4(1)

(VIC) [Children, Youth and Families Act 2005](#) s 162

(WA) [Children and Community Services Act 2004](#) s 28.

7 See (NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) s 23.

8 See, for example, (NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) s 43(1) (child or young person at immediate risk of serious harm, and an apprehended violence order would not be sufficient to protect them).

(SA) Children's Protection [Act](#) 1993 s 16.

9 (NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) ss 45, 46.

10 (ACT) [Children and Young People Act 2008](#) s 10

(NT) [Care and Protection of Children Act 2007](#) s 12

(QLD) [Child Protection Act 1999](#) s 5C

(SA) Children's Protection [Act](#) 1993 s 5

(VIC) [Children, Youth and Families Act 2005](#) ss 12, 13

(WA) [Children and Community Services Act 2004](#) s 12.

11 See, for example:

(NSW) [Children and Young Persons \(Care and Protection\) Act 1998](#) s 13 (Aboriginal and Torres Strait Islander Child and Young Person Placement Principles)

(SA) Children's Protection [Act](#) 1993 s 5; (VIC) [Children, Youth and Families Act 2005](#) s 13(2)

(VIC) [Children, Youth and Families Act 2005](#) s 13

(WA) [Children and Community Services Act 2004](#) s 12(2).

[80-1067] Removal of children from public places

The paragraph below is current to **07 March 2018**

In New South Wales, a police officer has the power to remove a child who is under the age of 16 years¹ from a public place² in an operational area³ if the officer believes that the child is not under the direct supervision of a responsible adult and is at risk.⁴ The officer may request the name, age and address of the child.⁵ The officer is preferably to escort the child to his or her parent's or carer's residence,⁶ but if that is not practicable, may escort the child to a prescribed place of refuge;⁷ however, a child must not be escorted to a police station.⁸ The officer is required to notify the child's parent or carer if the child is placed in the care of a person other than the parent or carer or is left at a residence in the absence of the parent or carer.⁹ The powers of the police to remove a child are limited by the requirements that the officer considers that the child is at risk¹⁰ or is about to commit an offence¹¹ and that the action is in the best interests of the child.¹²

Notes

- 1** (NSW) [Children \(Protection and Parental Responsibility\) Act 1997](#) s 18 (whom a police officer believes on reasonable grounds is a child under the age of 16 years).

Note the (SA) Parental Responsibility Bill 2004 which proposed an equivalent provision never became law.

- 2** (NSW) [Children \(Protection and Parental Responsibility\) Act 1997](#) s 3 (definition of 'public place').

- 3** Ibid ss 13-17 (declaration of an 'operational area' by Attorney-General on request by the local council for an area).

- 4** Ibid s 19.

- 5** Ibid s 27.

- 6** Ibid s 22.

- 7** Ibid s 22.

- 8** Ibid s 23.

- 9** Ibid s 25.

- 10** Ibid s 19.

- 11** Ibid s 19.

- 12** Ibid ss 21(2), 23(2). This legislation was introduced as part of a package of solutions to the perceived 'rising' juvenile crime problem in New South Wales. The legislation has been criticised, however, for creating greater police surveillance of Aboriginal youth: New South Wales Aboriginal Justice Advisory Committee, *A Fraction More Power, Review of the impact of the Children (Protection & Parental Responsibility) Act on Aboriginal people in Moree and Ballina*, 1999 (available at <http://www.lawlink.nsw.gov.au>), which noted that on 91 of the 95 occasions in which the **Act** was used in Moree since December 1998, the young person was an Aboriginal young person. This report is available at <http://www.lawlink.nsw.gov.au>.

[80-1068] Detention of non-citizens

The paragraph below is current to **07 March 2018**

(C) Right not to be Subjected to Arbitrary Detention

Under the (CTH) [Migration Act 1958](#), an unlawful non-citizen¹ must be detained until they are granted a visa, removed or deported.² The High Court of Australia has held there is no need for these events that end detention to be foreseeable, nor is there any constitutional impediment to the indefinite detention of an alien as long as it continues to be for a legitimate purpose, including the broad purpose of 'exclusion from the Australian community'.³ Furthermore, the harmful consequences of long-term detention (notably on children) is not a consideration that will result in a finding that detention has become punitive. Consequently, a court is limited in its capacity to order the release of a detainee.⁴ In certain limited instances, unlawful non-citizens are able to be released temporarily on bridging visas.⁵

Australia's regime of mandatory detention of unlawful non-citizens was found by the United Nations Human Rights Committee (the 'Committee') to be arbitrary within the meaning of article 9 of the International Covenant on Civil and Political Rights (the 'ICCPR').⁶ The Committee has also found (with respect to the detention of a mother with her children) that Australia failed to demonstrate 'that other, less intrusive, measures could not have achieved the same end'.⁷ The Committee concluded that the unavailability of judicial review in substantive terms to challenge a detention that was, or had become, contrary to article 9(1) of the ICCPR constituted a violation of article 9(4) of the ICCPR.⁸

Notes

- 1 (CTH) [Migration Act 1958](#) s 14 (defines an 'unlawful non-citizen' as a person who is not a citizen, and is in the migration zone without a valid visa).
 - 2 Ibid ss 189 (an officer must detain an unlawful non-citizen), 196 (duration of detention). On the rights of non-citizens to natural justice see *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 ; 85 ALJR 133; [2010] HCA 41; [BC201008390](#); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ; [267 ALR 204](#); [2010] HCA 23; [BC201004220](#); *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ; 81 ALJR 1190; [2007] HCA 26; [BC200704430](#).
 - 3 *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [2004] HCA 37; [BC200404861](#) at [42], [43], [241]. See also *Lesuma v Minister for Immigration and Citizenship* (No 2) (2007) 99 ALD 514 ; 48 AAR 99; [2007] FCA 2106; [BC200711608](#) at [21] (following *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [2004] HCA 37; [BC200404861](#)). See, however, obiter in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 ; [312 ALR 537](#); [2014] HCA 34; [BC201407458](#) at [24] per the court (unanimously endorsed the doctrine in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ; [110 ALR 97](#); 67 ALJR 125; [BC9202669](#) which states that detention cannot be an end in itself and must be in aid of the objects of the (CTH) [Migration Act 1958](#). This endorsement throws doubt on the authority of *Al-Kateb v Godwin* (2004) 219 CLR 562 ; [208 ALR 124](#); [2004] HCA 37; [BC200404861](#)).
- For further information see Joyce Chia, 'Back to the Constitution: the implications of Plaintiff S4/2014 for immigration detention' (2015) 38(2) *New South Wales Law Journal* 628.
- 4 *Woolley, Re; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [2004] HCA 49; [BC200406534](#) at [221]-[227] per Hayne J.
 - 5 As to bridging visas see CITIZENSHIP AND MIGRATION [77-530].
 - 6 In *A v Australia* UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993 (1997) at [9.4]-[9.5], the Committee found that the detention of the author was arbitrary within the meaning of the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 9(1) and was also in breach of ibid art 9(4) for the reasons that the detention authorised by the (CTH) [Migration Act 1958](#) was indefinite, prolonged, not open to review and not proportionate to the end being sought.
 - 7 *Bakhtiyari v Australia* Communication No 1069/2002 UN Doc CCPR/C/79/D/1069/2002 (2003) at [9.3].
 - 8 *Bakhtiyari v Australia* Communication No 1069/2002 UN Doc CCPR/C/79/D/1069/2002, (2003) at [9.3], [9.4].

[80-1069] Mandatory indefinite detention of non-citizen children

The paragraph below is current to **07 March 2018**

Non-citizens who are in Australia without a valid visa must be detained until they are either granted a visa, deported or removed.¹ While bridging visas provide release from detention for certain categories of non-citizens,² those who arrived without a visa are often ineligible for such visas and can in some circumstances remain in detention indefinitely.³ As the (CTH) [Migration Act 1958](#) does not differentiate in its mandatory detention regime on the basis of age, many non-citizen children are detained under these provisions and have, in some cases, remained detained for several years. United Nations human rights bodies⁴ and domestic human rights organisations have documented the psychological toll that long-term and often indefinite detention can have, particularly on children and those already traumatised by human rights violations in their countries of origin.⁵ The Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) found in a National Inquiry into Children in Immigration Detention that Australia's immigration detention laws, as applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child, including, inter alia, a child's right to be treated with humanity and respect for their inherent dignity.⁶ The Australian Human Rights Commission made similar findings in a 2014 report.⁷ It also found that at various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the right to be protected from all forms of physical or mental violence.⁸

The argument that the effects on children of administrative detention amount to punishment and that the power to detain children was thus part of the exclusively vested judicial power and could not be exercised by the executive, was unsuccessful in the High Court of Australia.⁹ Nonetheless, the (CTH) [Migration Act 1958](#) was amended in 2005 to provide that a child should only be detained as a measure of last resort,¹⁰ and to empower the Minister to make a determination in the public interest that a detainee is to reside at a specified place rather than being held in detention centre, subject to certain conditions.¹¹ The Minister is not under a duty to consider whether to exercise this power.¹² The new legislation also provided the Ombudsman with a new oversight role,¹³ and gave the Minister power to grant visas to detainees in the public interest.¹⁴ In July 2005, the Minister for Immigration announced that all families with children in detention had moved into such 'residence determination arrangements'. A Residential Housing Project established at Port Augusta is also used to allow eligible women and children to live in family-style accommodation.¹⁵ Other alternative schemes for children that have been developed include foster care arrangements with state child welfare authorities, and community-care placements for people with special needs. Furthermore, the (CTH) [Migration Regulations 1994](#) were amended to enable the release, pending removal, of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.¹⁶

In addition to the duty of care which the Minister and the Department of Immigration, Multicultural and Indigenous Affairs have towards all children in immigration detention, the (CTH) [Immigration \(Guardianship of Children\) Act 1946](#) provides that the Minister is the guardian of certain non-citizen children who enter Australia without the care of a parent or relatives.¹⁷

Notes

- 1 (CTH) [Migration Act 1958](#) ss [196](#), [198](#). See CITIZENSHIP AND MIGRATION [\[77-385\]-\[77-410\]](#).
- 2 See (CTH) [Migration Regulations 1994](#) Sch 2 for criteria for the grant of various bridging visas.
- 3 As to bridging visas available to unauthorised arrivals generally see CITIZENSHIP AND MIGRATION [\[77-530\]](#).

(C) Right not to be Subjected to Arbitrary Detention

- 4 See UN Working Group on Arbitrary Detention, Civil and Political Rights Including the Question of *Torture* and Detention: Addendum — Visit to Australia, UN Doc E/CN.4/2003/8/Add 2 (2002) at [28]-[35]; Justice PN Bhagwati (Regional Adviser for Asia and the Pacific of the UN Commissioner for Human Rights), *Human Rights and Immigration Detention in Australia* (July 31, 2002) at [16], [17]; United Nations Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add 79 (1997), at [20].
- 5 See Mares S, Newman L, Dudley M, Gale F, 'Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention', *Australian Psychiatry*, Vol 10, No 2, June 2002, and the position statement in Lesnie, V, et al, 'Health Care For Refugees And Asylum Seekers', *Royal Australian College of General Practitioners*, July 2004 available at <http://www.psa.org.au>. See also evidence documented in Human Rights and Equal Opportunity Commission, *A Last Resort: National Inquiry into Children in Immigration Detention*, April 2004, Ch 9, 'Mental Health of Children in Immigration Detention' which noted the contribution of a range of factors including:
 - (1) **torture** and trauma prior to arrival in Australia;
 - (2) the length of detention, uncertainty as to the visa process and negative visa decisions;
 - (3) the breakdown of many families within detention;
 - (4) living in a closed environment;
 - (5) children's perception that they are not safe within detention; and
 - (6) treatment of children by detention staff.
- 6 See Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, Ch 17 available at <http://www.humanrights.gov.au>. The Committee on Rights of the Child has urged Australia to remove its reservation to art 37(3): Committee on the Rights of the Child, *Concluding Observations: Australia*, CRC/C/15/Add 268, 20 October 2005 at [7].
- 7 See Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 11 November 2014, Ch 2 available at <http://www.humanrights.gov.au>.
- 8 Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004, at 17.2.6 (major finding 3) available at <http://www.humanrights.gov.au>.
- 9 Woolley, *Re; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1 ; [210 ALR 369](#); [\[2004\] HCA 49](#); [BC200406534](#).
- 10 (CTH) [Migration Act 1958](#) s [4AA](#). However, the Australian Human Rights Commission found in 2014 that in practice detention was routinely used as a first option for unlawful non-citizen children: See Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*, 11 November 2014, p 79 available at <http://www.humanrights.gov.au>.
- 11 Ibid ss 197AA-197AB.
- 12 Ibid s 197AE.
- 13 Ibid s 486N-486Q.
- 14 Ibid s 195A.
- 15 The Woomera Residential Housing Project (now closed) was established in August 2001; the Port Hedland alternative detention project (opened in September 2003, now closed); the Port Augusta Residential Housing Project opened in November 2003. Immigration residential housing (with housing or family-style accommodation) is available in Sydney, Perth and Port Augusta (South Australia).
- 16 (CTH) [Migration Regulations 1994](#) 2 subclass 070 (Bridging (Removal Pending)).
- 17 (CTH) [Immigration \(Guardianship of Children\) Act 1946](#) s [6](#).

[80-1070] Person to be taken as soon as practicable before a judicial officer

The paragraph below is current to **07 March 2018**

(C) Right not to be Subjected to Arbitrary Detention

Under the common law, persons detained must be taken without delay and by the most direct route before a justice or magistrate for charging unless circumstances reasonably justify otherwise.¹ A person cannot be held simply for questioning about an offence which that person or another may have committed² or for making further investigations to determine whether a charge should be laid against that or another person.³ Legislative departure from the common law 'without delay' formulation, is in the interests of allowing greater opportunity for questioning the detainee before charging him or her before a justice. A common phrase is 'as soon as practicable'.⁴ The Commonwealth specifies a time limit for holding which may only be extended if an application is made to the relevant judicial officer.⁵ In two other jurisdictions, the principal qualification is 'a reasonable time' but significant extensions of the normal rules are provided for in the relevant legislation. In Victoria, the current position has been reached only after variations during the 1980s, although this legislation must be read against the Victorian Charter of Human Rights' provision that a detained person 'must be promptly informed about any proceedings to be brought against him'.⁶ In the Northern Territory, the provisions were significantly modified in 1992.⁷ While the legislative provisions have the effect of moderating the strict application by the High Court of Australia (the 'High Court') of the common law rule,⁸ the High Court has made it clear that it will apply the rule in the absence of clear legislative intention to the contrary.⁹ The overall consequence is that in most jurisdictions, the common law is to some extent supplemented by statutory provisions to the same effect.¹⁰ The person detained must, if not charged, be released. Following charging, the person must either be released unconditionally if the charge is not accepted, be released on bail¹¹ or, under order of the court, be remanded pending trial.¹²

The effect of holding a person simply for questioning is to make the whole period of the arrest and custody unlawful,¹³ while holding for an excessive time after a lawful arrest leaves the arrest and earlier custody lawful while the excess becomes false imprisonment.¹⁴

Notes

- 1 See *Clarke v Bailey* (1933) 33 SR (NSW) 303  at 309; 50 WN (NSW) 104 per Davidson J; *R v Iorlano* (1983) 151 CLR 678  at 680; [50 ALR 291](#); 58 ALJR 22; [BC8300124](#) per the court (regarding (CTH) [Customs Act 1901](#) s [212](#)). See also (NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 99(4).
- 2 *Williams v R* (1986) 161 CLR 278 ; [66 ALR 385](#); 60 ALJR 636; 28 A Crim R 1. See also *Ex parte Evers* (1945) 62 WN (NSW) 146 ; *R v Iorlano* (1983) 151 CLR 678 ; [50 ALR 291](#); 58 ALJR 22; [BC8300124](#). See also (VIC) [Crimes Act 1958](#) s 458(3) (a person must be released from custody once the reason for the arrest 'no longer continues').
- 3 *Bales v Parmeter* (1935) 35 SR (NSW) 182  at 188; 52 WN (NSW) 41 per Jordan CJ.
- 4 See, for example, (CTH) [Customs Act 1901](#) s [212](#) ('as soon as practicable'); see also *R v Iorlano* (1983) 151 CLR 678 ; [50 ALR 291](#); 58 ALJR 22; [BC8300124](#).
(TAS) [Criminal Law \(Detention and Interrogation\) Act 1995](#) s [4](#) ('as soon as practicable')
(WA) [Criminal Investigation Act 2006](#) ss [140-141](#) (reasonable period).
- 5 (CTH) [Crimes Act 1914](#) ss [23C](#) (investigation period limited to a maximum of 2 hours for Aboriginals and Torres Strait Islanders and 4 hours for other persons), [23D](#) (extension of investigation period).
- 6 The (VIC) Crimes (Criminal Investigation) [Act 1984](#) (repealed) allowed a stated maximum period of 6 hours, but in 1988 this was superseded by (VIC) [Crimes Act 1958](#). The grounds for extending the 'reasonable time' principle contained in *ibid* s 464A(1) include:

(1) time to reach a magistrate (*ibid* s 464A(4)(a));

(C) Right not to be Subjected to Arbitrary Detention

- (2) the number of offences (ibid s 464A(4)(b));
- (3) the need for collating material (ibid s 464A(4)(c));
- (4) any need to transport the person (ibid s 464A(4)(d))
- (5) the number of others involved (ibid s 464A(4)(e)); and
- (6) any other matters (ibid s 464A(4)(f)).

See also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 21(4).

- 7 (NT) [Police Administration Act 1978](#) s 137(2) (uses the phrase 'reasonable period'; however, ibid s 137(2)(a), 137(2)(b) allows this to be extended for questioning or carrying out investigations), ibid s 138 (allows extension on a further 17 grounds including the number and complexity of offences (ibid s 138(b)), the need to assess material (ibid s 138(d)), completion of forensic investigations (ibid s 138(k)), the holding of an identification parade (ibid s 138(r)) and breakdown in electronic equipment (ibid s 138(t))).
- 8 *R v Iorlano* (1983) 151 CLR 678 ; [50 ALR 291](#); 58 ALJR 22; [BC8300124](#) (affirmed in *Williams v R* (1986) 161 CLR 278  at 291, 292, 295 per Mason and Brennan JJ, at 305, 308, 312, 313 per Wilson and Dawson JJ; [66 ALR 385](#); 60 ALJR 636; 28 A Crim R 1).
- 9 *Williams v R* (1986) 161 CLR 278  at 292, 298 per Mason and Brennan JJ, at 313 per Wilson and Dawson JJ; [66 ALR 385](#); 60 ALJR 636; 28 A Crim R 1.
- 10 See, for example:
(CTH) [Crimes \(Overseas\) Act 1964](#) s 6(3) ('no longer than is reasonably necessary in the circumstances'); (CTH) [Customs Act 1901](#) s 212 ('as soon as practicable'); (CTH) [Excise Act 1901](#) s 102 ('without undue delay')
(ACT) [Crimes Act 1900](#) ss 214(2), 218(2), 309(1)(c) ('as soon as practicable'); (ACT) [Human Rights Act 2004](#) s 18(4) (anyone arrested or detained on a criminal charge must be promptly brought before a judge or magistrate; and has the right to be tried within a reasonable time or released)
(NT) [Police Administration Act 1978](#) ss 137, 138; (NT) [Bail Act 1982](#) ss 16, 19
(NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) ss 114-118
(QLD) Criminal Code s 552 ('forthwith')
(SA) [Summary Offences Act 1953](#) s 78(2) (on apprehension without warrant, maximum holding 4 hours without warrant, or 8 hours with authorisation by a magistrate)
(TAS) [Criminal Law \(Detention and Interrogation\) Act 1995](#) s 4 ('as soon as practicable')
(VIC) [Crimes Act 1958](#) s 464A ('within a reasonable time'); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 21(5) (a person who is arrested or detained on a criminal charge must be promptly brought before a court and has the right to be brought to trial without unreasonable delay, otherwise must be released)
(WA) [Criminal Investigation Act 2006](#) ss 140-142.
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 11 As to bail see [\[80-1075\]](#) and CRIMINAL LAW [\[130-13315\]-\[130-13325\]](#). Note *Re Application for Bail by Islam* (2010) 4 ACTLR 235 ; 244 FLR 158; [\[2010\] ACTSC 147](#); [BC201008719](#) at [\[333\]](#), [\[334\]](#) per Penfold J (there is no meaning for (ACT) [Bail Act 1992](#) s 9C (which precludes bail being granted on a charge of attempted murder in the absence of special or exceptional circumstance) that is compatible with (ACT) [Human Rights Act 2004](#) s 18(5) (which prevents anyone awaiting trial being detained in custody 'as a general rule') and no meaning that can be justified under ibid s 28 (at [\[382\]](#)-[\[385\]](#))).
- 12 As to the trial and the requirement that it must take place within a reasonable time see [\[80-1640\]](#).
- 13 *Ex parte Evers* (1945) 62 WN (NSW) 146 .
- 14 *Drymalik v Feldman* [1966] SASR 227  at 234, 235; *Ex parte Evers* (1945) 62 WN (NSW) 146 .

[80-1075] Conditional release or bail

The paragraph below is current to **07 March 2018**

The International Covenant on Civil and Political Rights states that 'it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial'.¹ This is mirrored in the human rights charters of the Australian Capital Territory and Victoria.² A person may not be held in custody unless arrested or committed.³ If a person is committed for trial, both common law and statutory provisions in all Australian jurisdictions lean towards the granting of bail on conditions imposed by either the police or a court.⁴ Numerous requirements have been established at common law for granting bail. The primary requirement is that the person is likely, if released, to appear for trial.⁵ Other factors taken into account include:

- (1) the seriousness of the offence;⁶
- (2) the severity of the punishment;⁷
- (3) probability of conviction;⁸
- (4) previous criminal record;⁹
- (5) interference with witnesses;¹⁰ and
- (6) delay in hearing a case.¹¹

Legislation in all jurisdictions, with the New South Wales legislation being the most comprehensive, provides for bail to be granted by both police officers and courts. In the Australian Capital Territory, the Northern Territory, New South Wales and Western Australia, the legislation excludes the operation of the common law¹² and provides particular criteria for granting bail,¹³ while Queensland, South Australia and Victoria have supplemented it by statutory provisions,¹⁴ although in the latter case there have been differing interpretations of the extent to which the legislation covers the field so as to exclude the common law.¹⁵

The role of the justice in determining whether to admit to bail is not to take into account the personal character or opinions of the bail seeker, but to release that person unless there is an accepted ground for his or her continued detention. In that sense, the justice is required to **act** 'judicially', but is not required to **act** as a court does when determining guilt or innocence.¹⁶

Police bail is authorised subject to varying conditions, with the power being in the person in charge of a police station or of a lock-up and being mainly confined to cases where the offence is not major and there is difficulty in obtaining release from a court.¹⁷ Court bail is also available by legislation in all jurisdictions, with the power being vested in courts at all levels, being exercisable at varying stages during the proceedings, and in some cases with the factors to be taken into account being stipulated.¹⁸ It is possible in some jurisdictions for the Supreme Court to exercise an inherent power to grant bail,¹⁹ although in others it seems the power cannot²⁰ or will not be exercised.²¹

(C) Right not to be Subjected to Arbitrary Detention

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 9(3).
- 2 (ACT) [Human Rights Act 2004](#) s 18(5); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 21(6). For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

See also *Re Application for Bail by Rodrigues* [\[2008\] ACTSC 50](#); [BC200804277](#); *Re Application for Bail by Lacey* [\[2010\] ACTSC 82](#); [BC201005565](#) ((ACT) [Bail Act 1992](#) s 43 (review of decision) to be given a liberal interpretation under (ACT) [Human Rights Act 2004](#) s 30, with recognition of the right to liberty and not to be detained in custody (ibid s 18)); *R v Kristiansen* (2008) 221 FLR 127; [\[2008\] ACTSC 83](#); [BC200807853](#).

Note the (ACT) [Bail Act 1992](#) has been found not inconsistent with (ACT) [Human Rights Act 2004](#): *Re Application for Bail by Blundell* [\[2008\] ACTSC 138](#); [BC200811052](#) at [\[2\]](#) per Refshauge J; *Re Application for Bail by Lacey* [\[2010\] ACTSC 82](#); [BC201005565](#).

- 3 As to remedies for false imprisonment see [\[80-1085\]](#).
- 4 The Commonwealth has not enacted bail provisions, but the (CTH) [Judiciary Act 1903](#) s 68 provides that the bail laws of the relevant State or Territory must be applied in respect of Commonwealth offences tried there.
- 5 *Re Robinson* (1854) 23 LJQB 286 at 287; *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300; *Burton v R* (1974) 3 ACTR 77 at 78 per Fox J.
- 6 *R v Higgs* [1962] NSW 34; (1961) 79 WN (NSW) 335a (bail refused for murder charge); *R v Montgomery* (1958) 75 WN (NSW) 233 at 234 (bail refused for accused with criminal record charged with multiple accounts of stealing).
- 7 *R v Fraser* (1892) 13 NSWLR 150; 8 WN (NSW) 59.
- 8 *R v Watson* (1947) 64 WN (NSW) 100.
- 9 *R v Pascoe* [1960] NSW 481.
- 10 *R v A* (1968) 13 FLR 342 at 344 per Gibbs J, SC(ACT).
- 11 *R v Clarkson* (1879) 2 SCR (NSW) (NS) 101 (bail granted for sexual assault charge with 4 month delay); *R v May* (1938) 55 WN (NSW) 29 (original refusal of bail for sexual assault charge reversed to allow for preparation of defence).
- 12 (ACT) [Bail Act 1992](#) s 57
(NT) [Bail Act 1982](#) s 49
(NSW) [Bail Act 2013](#) Sch 3 cl 11
(WA) [Bail Act 1982](#) s 66.
- 13 (ACT) [Bail Act 1992](#) ss 22 (criteria for granting bail to adults), 23 (criteria for granting bail to children), 23A (victim's concern about need for protection)
(NT) [Bail Act 1982](#) s 24
(NSW) [Bail Act 2013](#) s 18
(WA) [Bail Act 1982 Sch 1 Pt C](#).
- 14 (QLD) [Bail Act 1980](#) s 16
(SA) [Bail Act 1985](#) s 10
(VIC) [Bail Act 1977](#) s 4. See *R v Rich (Ruling No 19)* [\[2008\] VSC 538](#); [BC200812192](#) at [\[28\]](#) per Lasry J (a number of matters point to refusal of bail and while it is appropriate to take the terms of the Charter into account, that must be done against the scheme of the (VIC) [Bail Act 1977](#) and its relevant provisions). Compare *R v White* [\[2007\] VSC 142](#); [BC200703431](#) (accused was found not guilty of murder on the grounds of mental impairment but remanded in custody pursuant to of (VIC) [Crimes \(Mental Impairment and Unfitness to be Tried\) Act 1997](#) s 24).

There are no equivalent provisions in Tasmania though it has enacted the (TAS) [Bail Act 1994](#).

- 15 Compare *Panagiotidis v Jakacic* (1986) 41 SASR 591 at 592 per King CJ (the South Australian bail provisions constituted a statutory code and, at least in relation to appeals, excluded the inherent jurisdiction of the Supreme Court)

(C) Right not to be Subjected to Arbitrary Detention

with *Director of Public Prosecutions (DPP) v Kanfouche* [1992] 1 VR 141  at 142 per Young CJ and Ashley J (the Victorian legislation did allow continuation of that jurisdiction). See also *Re Anderson* [1978] VR 322 .

- 16 *R v Badger* (1843) 4 QB 468 ; 114 ER 975; *Linford v Fitzroy* (1849) 13 QB 240  ; 116 ER 1255. See also *Gray v Sweatman* (1987) 45 SASR 517 ; 26 A Crim R 157 (clarifying *Green v Lynch* (1983) 21 NTR 1 ; 70 FLR 206 on the question of 'acting as a court').
- 17 (CTH) *Judiciary Act 1903* s 68(1) (State laws on bail to apply when State courts are exercising federal jurisdiction)
(ACT) *Bail Act 1992* ss 14, 17 (bail must be obtained within 48 hours); (ACT) *Magistrates Court Act 1930* s 226 (power of Supreme Court to release on bail in habeas corpus cases)
(NT) *Justices Act* 1928 s 33 (for police or keeper of a gaol); (NT) *Bail Act 1982* ss 16, 18
(NSW) *Bail Act 2013* ss 43-47 (police bail)
(QLD) *Bail Act 1980* s 7(1) (bail must be granted if it is not practicable to bring a person before a court within 24 hours)
(SA) *Bail Act 1985* s 5(1)(e)
(TAS) *Justices Act 1959* s 34
(VIC) *Bail Act 1977* ss 4 (right to bail with stated exceptions), 10 (release after 24 hours), 11 (allows for release on payment of a cash deposit for certain summary offences)
(WA) *Bail Act 1982* s 6 (duty imposed on arresting officer). See also *ibid* ss 5 (right of defendant to have bail considered), 8 (defendant to be given prescribed forms), 11 (rights following grant of bail), 13 (jurisdiction to grant bail).
- 18 (CTH) *Judiciary Act 1903* s 68(1) (State courts are authorised to apply State laws relating to bail when exercising federal jurisdiction)
(ACT) *Bail Act 1992* ss 19-20
(NT) *Bail Act 1982* ss 19-23A
(NSW) *Bail Act 2013* Pt 5 Divs 2-4
(QLD) *Bail Act 1980* ss 8, 10 (powers), 9 (prima facie right to bail)
(SA) *Bail Act 1985* ss 5(1)(c), 10 (factors), 14 (review); (SA) Summary Procedure Act 1921 s 60(2)
(TAS) *Justices Act 1959* ss 35, 107, 125A-125D (appeals); (TAS) Criminal Code ss 304 (power of Supreme Court), 348 (bail on adjournment of trial), 415 (bail on appeal), 418(1)(c) (during trial)
(VIC) *Bail Act 1977* ss 4 (prima facie right), 12 (court decision required), 18 (appeals)
(WA) *Bail Act 1982* ss 13 (powers including community services officer powers), 14, 15 (Supreme Court powers).
- 19 See, for example, *R v Light* [1954] VLR 152  (Victoria); *Re Groves* [1973] Qd R 310  (Queensland) (both following *R v Spilsberg* [1898] 2 QB 615  ); *Ex parte Rundle* (1982) 30 SASR 282 ; 5 A Crim R 408 (South Australia) (the jurisdiction does not end until sentencing and recording of conviction have taken place).
- 20 *R v Weichart* (1903) 5 WALR 105 .
- 21 *R v A* (1968) 13 FLR 342 , SC(ACT).

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(D) Remedies for Unlawful Arrest and Detention

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(3\) LIBERTY AND SECURITY OF PERSON](#)

(D) REMEDIES FOR UNLAWFUL ARREST AND DETENTION

[80-1080] Habeas corpus

The paragraph below is current to **07 March 2018**

The writ of habeas corpus, which originated in the medieval period, takes numerous forms but now usually appears in the form *habeas corpus ad subjiciendum*.¹ The (IMP) Habeas Corpus Acts of 1640, 1679 and 1816 are still to some extent² operative in most Australian jurisdictions either by common law or, in some jurisdictions, by statutory provision,³ and the common law remedy is also available.⁴ Its scope is broad and flexible.⁵ The purpose of the writ is to enable review by a superior court of the legality of imprisonment or detention,⁶ but not to subvert the normal processes of appeal where a superior court of record has, correctly or not, determined its jurisdiction and made an order⁷ or as a means of collaterally impeaching the correctness of a judgment or court order which is not shown to be a nullity.⁸ The writ has been held to be available to secure review of the detention:

- (1) of persons held in actual or constructive detention under guardianship arrangements⁹ or a custody order;¹⁰
- (2) of persons detained on account of mental illness;¹¹
- (3) of persons imprisoned for offences, where possible defects in the committal process will not result in release if conviction has been good;¹²
- (4) of persons in a reformatory (mental illness) prison;¹³
- (5) of non-enemy aliens;¹⁴
- (6) of fugitive offenders;¹⁵
- (7) of persons wanted pursuant to both foreign state and British Commonwealth extradition;¹⁶ and
- (8) in some circumstances, of persons ordered by the Commonwealth Parliament to be detained for contempt of Parliament.¹⁷

Strong, clear and cogent evidence may be required to justify detention.¹⁸ However, the writ goes only to the legality of the detention and does not provide a means of obtaining compensation, for which the remedies for false imprisonment may be available.¹⁹

(D) Remedies for Unlawful Arrest and Detention

Notes

- 1 As to habeas corpus see CRIMINAL LAW [\[130-13910\]](#) (prerogative-type relief). For an extensive review of the history and development of the writ of habeas corpus see *Antunovic v Dawson* [\[2010\] VSC 377](#) ; [BC201006085](#) per Bell J.
- 2 Substitute provisions, or alternative arrangements are now in operation in relation to (IMP) Habeas Corpus Act 1679 s 6 (persons committed for high treason or felony may be discharged on bail and if not indicted and tried must be discharged from imprisonment). (QLD) Criminal Code s 590 provides in effect a modern version of (IMP) Habeas Corpus Act 1679 s 6 and in *R v Jenkin* [\[1994\] 1 Qd R 266](#) ; (1991) 57 A Crim R 124 (considering previous (QLD) Criminal Code s 590 (repealed by (QLD) Criminal Law Amendment Act 1997 s 106)) it was held that the entitlement to 'discharge' (the term used in (IMP) Habeas Corpus Act 1679 s 6) means discharge from the consequences of an earlier committal (for murder), but not necessarily from a further charge for the same offence). In *Clarkson v Director-General of Corrections* [\[1986\] VR 425](#)  at [437](#) it was held that (IMP) Habeas Corpus Act 1679 s 6 is effectively no longer operative in Victoria because the radical changes in criminal procedure and timetabling made it no longer applicable. The Supreme Court of Victoria noted that other provisions are now available to ensure bail or terminate unlawful detention).
- 3 (NT) [Sources of the Law Act 1985 s 2](#) (no specific provision relating to the (IMP) Habeas Corpus Acts, this section declares the laws of England to be applicable as at the date of the establishment of the Territory on 28 December 1836; there has been no express repeal of the (IMP) Habeas Corpus Acts)
(NSW) [Imperial Acts Application Act 1969](#) s 6, Sch 2 (applies all three (IMP) Habeas Corpus Acts)
(QLD) [Imperial Acts Application Act 1984](#) s 5, Sch 1 (applies all three (IMP) Habeas Corpus Acts)
(VIC) [Imperial Acts Application Act 1980](#) Pt II Div 2 (applies all three (IMP) Habeas Corpus Acts); (VIC) [Supreme Court \(General Civil Procedure\) Rules 2015](#) r 57.02.
- 4 In Tasmania and Western Australia, there has been no adoption of the relevant imperial legislation, and equally no repeal of it, as would now be practicable following the complementary (UK) Australia Act 1986 and the (CTH) [Australia Act 1986](#). By *ibid* ss 2(2), 12, all States may now amend or repeal imperial legislation applicable to them. Since these States have not amended or repealed it, the imperial habeas corpus legislation will continue in force.
- 5 *Al-Kateb v Godwin* (2004) 219 CLR 562  at 577; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) at [\[25\]](#) per Gleeson CJ (citing *R v Secretary of State for the Home Dept; Ex parte Muboyayi* [\[1992\] QB 244](#)  at [258](#)  per Donaldson LJ (that habeas corpus is 'the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times')).
- 6 See *Ruddock v Vadarlis* (2001) 110 FCR 491 ; [183 ALR 1](#); [\[2001\] FCA 1329](#); [BC200105576](#) at [\[69\]](#) per Black CJ ('it is not necessary to show actual detention and complete loss of freedom to found the issue of habeas corpus. Rather, custody and control are the required elements'). As noted above, the issue of habeas corpus writs is part of the inherent jurisdiction of the Supreme Courts of the States and Territories (see *Re Superintendent of Training Centre at Goulburn; Ex parte Pelle* [\(1983\) 48 ALR 225](#)  at [227](#); 57 ALJR 679 per Brennan J). In relation to the High Court of Australia (the 'High Court'), the (CTH) [Judiciary Act 1903](#) s [33\(1\)\(f\)](#) authorises the court to issue the writ of habeas corpus. The High Court's jurisdiction extends to 'appellate or original jurisdiction' but is not a 'general jurisdiction': *Jerger v Pearce* (1920) 28 CLR 588  at 590; [BC2090120](#) per Starke J (confirmed in *Ex parte Williams* (1934) 51 CLR 545 ; [1934] ALR 422; (1934) 8 ALJ 313).
- 7 *Ex parte Williams* (1934) 51 CLR 545  at 550; [1934] ALR 422; (1934) 8 ALJ 313 per Dixon J; *Eaves v James* (1988) 33 A Crim R 369 ; [BC8801910](#); *PR v Dept of Human Services* [\[2007\] VSC 338](#) ; [BC200707806](#).
- 8 *Re Officer in Charge of Cells, ACT Supreme Court* [\(1994\) 123 ALR 478](#)  at [480](#); 68 ALJR 668; [BC9404643](#) per Deane J.
- 9 *R v Ward* (1762) 1 Wm BI 386; 96 ER 218; *Re Lyons (an infant)* (1869) 22 LT 770; 18 WR 238; *Skyllas v Retirement Care Australia (Preston) Pty Ltd* [\[2006\] VSC 409](#) ; [BC200609028](#) (nursing home).
- 10 *PR v Dept of Human Services* [\[2007\] VSC 338](#) ; [BC200707806](#).

(D) Remedies for Unlawful Arrest and Detention

- 11 *R v Board of Control; Ex parte Ratty* [1956] 2 QB 109 ; *Antunovic v Dawson* [2010] VSC 377 ; [BC201006085](#) (community treatment order under (VIC) Mental Health Act 1986).
- 12 *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254 .
- 13 *R v Governor of Metropolitan Gaol, Coburg; Ex parte Kimball* [1937] VLR 279 ; [1937] ALR 532.
- 14 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221 ; [1935] ALR 125; (1934) 8 ALJ 308; [BC3500060](#).
- 15 *Re Marshall* (1901) 27 VLR 205 .
- 16 *Puharka v Webb* [1983] 2 NSWLR 31 ; (1983) 48 ALR 420; 77 FLR 306 (foreign states extradition); *Ingram v A-G (Cth)* [1980] 1 NSWLR 190 ; (1980) 42 FLR 420; *MacDonald v A-G (Cth)* (1980) 24 SASR 294 ; 42 FLR 133 (Commonwealth countries extradition). As to deportation and removal see [\[80-1170\]](#).
- 17 While the issue of writs was rejected in *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 at 171; [1955] ALR 705; (1955) 29 ALJ 125 (leave to appeal to the Privy Council refused), the court noted that it is for the courts to determine the existence of a privilege of Parliament, and 'if the warrant specifies the ground of the commitment the court may, it seems, determine whether it is sufficient in law as a ground to amount to a breach of privilege'. In (CTH) [Parliamentary Privileges Act 1987](#) it is provided that a resolution of a House of Parliament imposing a penalty and the warrant committing a person to custody 'shall set out particulars of the matters determined by the House to constitute' the breach of privilege.
- 18 *Truong v Immigration Detention Centre, Port Hedland* (1993) 31 ALD 729 at 731; [BC9301519](#) per Malcolm CJ. See also *Antunovic v Dawson* [2010] VSC 377 ; [BC201006085](#) at [\[121\]-\[128\]](#) per Bell J.
- 19 See [80-1085]. See also *Morro v Australian Capital Territory* (2009) 4 ACTLR 78 ; [168 ACTR 1](#); [\[2009\] ACTSC 118](#); [BC200908249](#) at [\[48\]](#) per Gray J (under (ACT) [Human Rights Act 2004](#) s 18(7) compensation for arrest or detention does not require a notion of public law vindication to be imported into the right to compensation if the existing remedy at common law would achieve that vindication). For general damages for false imprisonment see *Ruddock v Taylor* (2005) 222 CLR 612 ; [221 ALR 32](#); [\[2005\] HCA 48](#); [BC200506594](#) at [\[13\]-\[159\]](#) per Kirby J.

[80-1085] Remedies for unlawful arrest

The paragraph below is current to **07 March 2018**

The remedy for unlawful arrest is the civil action of false imprisonment.¹ To be free from interference with liberty is 'the most elementary and important of all common law rights'² and the courts have been strict in interpreting the provisions that allow for arrest without warrant.³ Holding beyond the due date for release, even if the initial detention was lawful, can amount to false imprisonment.⁴ An action for false imprisonment is actionable per se; specific damage, in addition to infringement of the right, is not necessary⁵ and exemplary damages may be awarded.⁶ However, statutory provisions may negate a claim of false imprisonment even if there is a mistake as to the facts or the law.⁷

Notes

- 1 *Christie v Leachinsky* [1947] AC 573 at 587 ; [1947] 1 All ER 567 per Viscount Simon. As to false imprisonment generally see TORT [\[415-395\]-\[415-440\]](#).
- 2 *Trobridge v Hardy* (1955) 94 CLR 147 at 152; [1956] ALR 15; [BC5500340](#) per Fullagar J.
- 3 *Harnett v Bond* [1925] AC 669 (even an assertion by the Commissioner in Lunacy (UK) that the person should remain in the room, which was complied with by the patient, could amount to false imprisonment). Compare *Cobbett v*

(D) Remedies for Unlawful Arrest and Detention

Grey (1850) 4 Exch 729 ; [154 ER 1409](#) at [1416](#) per Pollock CB (confining a prisoner properly obtained in the prison but in an inappropriate place is neither trespass nor false imprisonment).

- 4 *Cowell v Corrective Services Commission (NSW)* [\(1988\) 13 NSWLR 714](#) ; 34 A Crim R 364; (1988) Aust Torts Reports ¶180-197.
- 5 *Watson v Marshall* (1971) 124 CLR 621 ; [1972] ALR 83; (1971) 45 ALJR 444 (affirmed *Marshall v Watson* (1972) 124 CLR 640 ; [1972] ALR 641; (1972) 45 ALJR 339).
- 6 *Attorney-General (St Christopher, Nevis and Anguilla) v Reynolds* [\[1980\] AC 637](#)  ; [1979] B All ER 129, PC; *Myer Stores Ltd v Soo* [\[1991\] 2 VR 597](#) ; (1990) Aust Torts Reports ¶181-077.
- 7 *Little v Commonwealth* (1947) 75 CLR 94 ; [1947] ALR 483; (1947) 21 ALJ 292; [BC4700330](#).

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(E) Questioning and Detention under the Federal Counter Terrorism Regime

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(3\) LIBERTY AND SECURITY OF PERSON](#)

(E) QUESTIONING AND DETENTION UNDER THE FEDERAL COUNTER TERRORISM REGIME

[80-1090] Warrants

The paragraph below is current to **07 March 2018**

Federal counter-terrorism legislation provides for the detention and questioning of people in relation to terrorist offences.¹ The key provisions, which appear in the (CTH) [Australian Security Intelligence Organisation Act 1979](#) (the 'ASIO Act'), provide for warrants to be issued by an 'issuing authority' (normally a Federal Magistrate or judge who has consented to acting *persona designata*)² which require people to attend for questioning, or authorise people to be taken into custody for questioning and detained during periods when questioning is not taking place.

The procedure for obtaining questioning and detention warrants involves the Director-General of the Australian Security Intelligence Organisation seeking consent of the Minister to request the issue of a warrant,³ and the issuing of a warrant by an issuing authority.⁴ Unlike other areas of ***criminal*** law, there is no need to demonstrate culpability or involvement in offences as a precondition for the issuing of a warrant. Instead, the Minister must be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence relevant to a 'terrorist offence', that other methods would be ineffective and, for detention warrants, that there are reasonable grounds for believing that unless a person is detained they may alert others, not appear, or interfere with evidence.⁵ A detention warrant must require the person to be brought before a 'prescribed authority' immediately for questioning.⁶

The breadth of the definition of 'terrorist act' in the (CTH) ***Criminal*** Code⁷ and the potential applicability of the ASIO Act provisions to persons with no involvement in offences widens the scope for persons to be deprived of their liberty outside the normal ***criminal*** investigative processes.⁸

Notes

- ¹ Relevant provisions are mostly contained in (CTH) [Australian Security Intelligence Organisation Act 1979](#) Pt III Div 3. This ceases to be in force on 7 September 2018: see *ibid* s 34ZZ. In its concluding observations in CCPR/C/AUS/CO/5 7 May 2009 at [11], the Human Rights Committee recommended that Australia 'should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the

(E) Questioning and Detention under the Federal Counter Terrorism Regime

definition of terrorist act in the *Criminal* Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences ... [It] should in particular: (a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; (b) ensure that the notion of “exceptional circumstances” does not create an automatic obstacle to release a bail; and (c) envisage to abrogate provisions providing Australian Security Intelligence Organisation the power to detain people without access to a lawyer and in conditions of secrecy for up to 7-day renewable periods’.

- 2 (CTH) [Australian Security Intelligence Organisation Act 1979](#) ss 34A, 34AB (definition of ‘issuing authority’).
- 3 Ibid s 34D. A Protocol outlining procedures for the exercise of authority under warrants was presented to Parliament on 13 August 2003, consistent with the requirements in ibid s 34C(3)(ba), 34C(3A) (as they were in force immediately before commencement) (available at <http://www.apf.gov.au>).
- 4 (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 34AB enables the Minister to appoint as an issuing authority a consenting federal magistrate or judge or a consenting person in a specified class declared by regulations to be an issuing authority.
- 5 Ibid ss 34D (request for questioning warrant), 34F(4) (request for questioning and detention warrant).
- 6 Ibid s 34B (under which the Minister may select any retired superior court judge who has served for more than 5 years as a ‘prescribed authority’. Depending upon availability in this class, the Minister may appoint from serving superior court judges, and the President and Deputy Presidents of the Administrative Appeals Tribunal).
- 7 (CTH) *Criminal* Code s 100.1. The definition incorporates certain actions or threats of action done with the intention of advancing a political, religious or ideological cause, and with the intention of coercing the government or intimidating the public. Actions that fall within the definition include action that causes physical harm or death, damage to property, endangering of life, a serious health risk, or interfering with an electronic system.
- 8 This is made explicit in the definition of ‘terrorism offence’ in the note to (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 4 which states ‘A person can commit a terrorism offence against Part 5.3 of the (CTH) *Criminal* Code even if no terrorist act (as defined in that Part) occurs.’

[80-1095] Period of detention

The paragraph below is current to **07 March 2018**

Both questioning and detention warrants provide for a regime of a maximum of 24 hours of questioning¹ in three 8 hour blocks, with the prescribed authority before whom questioning takes place able to determine after each 8 hour block whether questioning can continue.² Three additional extensions of 8 hours may be granted in cases where an interpreter is present.³ A person cannot be detained for a continuous period of more than 168 hours,⁴ although a capacity to obtain subsequent warrants exists where there is information additional to or materially different from that relied upon before.⁵ Furthermore, a person may be arrested for refusal to provide information or records requested in accordance with a warrant, or for making false statements.⁶

Notes

- 1 (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 34R(6).
- 2 Ibid s 34R(1)-(4) (provides that there must be ‘reasonable grounds’ for believing that continuation will substantially assist the collection of important intelligence).
- 3 Ibid s 34R(8)-(12).
- 4 Ibid s 34S.
- 5 Ibid ss 34F(3)(d), 34F(6), 34G(2) (the issuing authority must also take account of the requirements of the person already having been detained in connection with one or more warrants).
- 6 Ibid s 34L(1)-(9).

[80-1100] Rights in detention

The paragraph below is current to **07 March 2018**

The 'prescribed authority' before whom a person appears must inform them of their rights and duties under the legislation, of the authority's role and of the reason for the presence of each person present during the interview.¹ Rights include the right to make a complaint to the Inspector-General of Intelligence and Security or to the Commonwealth Ombudsman, and the right to seek judicial review of relevant decisions and conduct.² A detainee also has the right to an interpreter, as determined by the prescribed authority.³ The person has the right to humane treatment at all times during detention and questioning.⁴ Questioning must also be video-taped.⁵ A further safeguard against abuse includes the requirement that copies of all draft requests for warrants, of all warrants issued, and of all mandatory video-recordings, be provided to the Inspector-General of Intelligence and Security (the 'IGIS'),⁶ and the IGIS is required to make an annual report on all cases where multiple warrants have been issued in relation to the same person. The report must then be tabled in Parliament.⁷

Notes

- 1** (CTH) [Australian Security Intelligence Organisation Act 1979](#) s [34J](#).
- 2** Ibid s 34J(1)(e), 34J(1)(f).
- 3** Ibid ss 34M, 34N.
- 4** Ibid s 34T.
- 5** Ibid s 34ZA.
- 6** Ibid s 34ZI.
- 7** Ibid ss 34ZJ, 94(3).

[80-1105] Incommunicado detention and legal representation

The paragraph below is current to **07 March 2018**

Under the (CTH) [Australian Security Intelligence Organisation Act 1979](#), a detainee has no enforceable right to notify a family member or employer about their whereabouts.¹ Furthermore, limited contact rights are subject to a range of contingencies and discretions. Thus while the warrant must permit the person to contact identified persons at specified times while in custody or detention, and may identify a person whom the detainee can contact with whom he or she has a legal or familial relationship,² the prescribed authority has discretion to allow such communication.³ Furthermore, contact must be capable of being monitored by the person with authority under the warrant.⁴

There are also significant restrictions on the role of lawyers during detention, with the prescribed authority having some discretion to prevent contact with lawyers in certain conditions.⁵ There is no explicit right to have a lawyer present during questioning,⁶ and a range of limitations exist on a lawyer's role.⁷

Notes

- 1 (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 34K(10) ('A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention').
- 2 Ibid s 34K(1)(d), 34K(11)(a).
- 3 Ibid s 34K(1), 34K(6).
- 4 Ibid s 34ZQ(2).
- 5 Ibid s 34G(3), 34G(5), 34G(6) requires the Minister to ensure the warrant permits contact with a single lawyer of the person's choice, but allows for the prescribed authority to direct under ibid s 34ZO that the person be prevented from contacting the lawyer in certain conditions, notably where satisfied that there are circumstances relating to the nominated lawyer such that, if there is contact, a person involved in a terrorist offence may be alerted or a record altered, damaged or destroyed.
- 6 Ibid s 34ZP(1) states that 'a person before a prescribed authority ... may be questioned under the warrant in the absence of a lawyer'.
- 7 For example, contact between a detainee and their lawyer must be made in a way that can be monitored: ibid s 34ZQ(2); and a legal adviser may not intervene during questioning except to request clarification of an ambiguous answer: ibid s 34ZQ(5), 34ZQ(6). However, lawyers must be given a reasonable opportunity to advise persons during breaks in questioning.

[80-1110] Prohibition of disclosure of information

The paragraph below is current to **07 March 2018**

The (CTH) [Australian Security Intelligence Organisation Act 1979](#) prohibits disclosure of information pertaining to warrants and questioning ('operational information') in the 2 years after the expiry of the warrant, with the penalty for doing so being imprisonment for up to 5 years.¹ This would also have the effect of criminalising media reporting, even where done to expose abuses that may have taken place. Strict **liability** also applies to disclosure by lawyers.²

Notes

- 1 (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 34ZS(1), 34ZS(2). 'Operational information' is defined in ibid s 34ZS(5). Exceptions allow disclosure of information in the exercise of statutory functions, and for the purpose of obtaining legal advice or representation.
- 2 Ibid s 34ZS(3).

[80-1115] ASIO detention and children

The paragraph below is current to **07 March 2018**

The (CTH) [Australian Security Intelligence Organisation Act 1979](#) provides that no warrant has effect in relation to a person aged less than 16 years.¹ Warrants can only be issued against a person aged between 16 years and 18 years if the Minister is satisfied that the person is committing, has committed or will commit a terrorist offence and only if the warrant includes specific protections, notably permitting the

detainee to contact a parent, guardian or other person who can represent the child's interests (who is not a police or Australian Security Intelligence Organisation officer), and authorises questioning in the presence of such person, and only for continuous periods of 2 hours or less.²

Notes

- 1 (CTH) [Australian Security Intelligence Organisation Act 1979](#) s 34ZE(1).
- 2 Ibid s 34ZE(4)-(6).

[80-1120] Anti-terrorism detention provisions

The paragraph below is current to **07 March 2018**

Federal anti-terrorism legislation passed in 2005 pursuant to the referral of power by the States provides for 'control orders' over terrorist suspects for up to 12 months, and allows suspects to be held in preventative detention for up to 14 days.¹ These orders, which were modelled on similar legislation passed in the United Kingdom but without the safeguard of a bill of rights,² have been the target of significant criticism for their restrictions on the liberty of the person.³ In the United Kingdom, a number of control orders have been successfully challenged as incompatible with the right to liberty guaranteed under article 5 of the European Convention of Human Rights.⁴

Notes

- 1 (CTH) Anti-Terrorism Act (No 2) 2005 which amends several pieces of legislation, and creates within the (CTH) *Criminal* Code a new Pt 5.3 on terrorism. Control orders are provided for in ibid Div 104, preventative detention orders in ibid Div 105. The validity of the power to make interim control orders in (CTH) *Criminal* Code Div 104 was upheld in *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[145\]-\[148\]](#) per Gummow and Crennan JJ (Gleeson CJ agreeing) (the protection of the public from a 'terrorist act' was within the defence power of (CC) Commonwealth Constitution s 51(vi)), at [94]-[103], [651] per Gummow and Crennan JJ (Heydon J agreeing) (rejecting the view that making of an interim control was dominated by legislative policy to the point that there was an impermissible limitation of the judicial power to apply objectively determinable criteria). The significance of related powers was evident in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 ; [243 ALR 606](#); [\[2007\] FCAFC 203](#); [BC200711294](#) (bail granted following charges of having provided resources to a terrorist organisation but visa immediately cancelled in the national interest under (CTH) [Migration Act 1958](#) s 501(3) as the Minister reasonably suspected he did not pass the 'character test'). See also *Benbrika v R* (2010) 247 FLR 1 ; [\[2010\] VSCA 281](#); [BC201007814](#).
- 2 See (UK) Human Rights Act 1998 which allows a Court to make an incompatibility finding with respect to conflicting legislation; provision is made for a person to be appointed under the (UK) Prevention of Terrorism Act 2005 (repealed) Sch para 7 to represent the interests of a relevant party in control order proceedings. Only Queensland's public interest monitor has an analogous function: see [80-1123]. The original functions of a special advocate in connection with 'closed material' under the (UK) Prevention of Terrorism Act 2005 (repealed) were rendered inadequate for a fair trial in the decision of European Court of Human Rights in *A v UK* [\(2009\) 26 BHRC 1](#) .
- 3 See, for example, the submissions made to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005* available at <http://www.aph.gov.au>.
- 4 (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) (the 'European Convention'). See *Secretary of State for the Home Department v JJ* [\[2006\] EWHC 1623](#), upheld by the Court of Appeal, *Secretary of State for the Home Department v JJ* [\[2006\] EWCA Civ 1141](#) .

[\[2006\] 3 WLR 866](#) . See also *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140  ((UK) Prevention of Terrorism Act 2005 (repealed) s 3 breach of (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 art 5 but not ibid art 6).

[80-1123] Control orders

The paragraph below is current to **07 March 2018**

Control orders¹ consist of 'interim control orders'² and 'confirmed control orders'.³ An application for a control order can be initiated by the Australian Federal Police (the 'AFP') after receiving the written consent of the Attorney-General.⁴ The order can only be sought where a senior AFP member considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation.⁵ The orders are issued by a court which is satisfied of these same matters on the balance of probabilities,⁶ and that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.⁷ In this context, the issuing court must consider the impact of such orders on the person's financial and personal circumstances.⁸

A control order may impose:⁹

- (1) a restriction on a person being at specified areas and places;
- (2) a prohibition or restriction on the person leaving Australia;
- (3) a requirement to remain at specified premises;
- (4) a requirement that a person wear a tracking device;
- (5) a prohibition on communications or associations with specified individuals or the use of communication technology;
- (6) a prohibition on the carrying out of specified activities (including work);
- (7) a reporting requirement; and
- (8) a requirement to participate in counselling or education.

An interim order must be served on and explained to a person within 48 hours, and a copy of the order given to the Queensland public interest monitor where the person is a resident of Queensland or the order is made in Queensland.¹⁰

A court can declare, revoke, vary or confirm a control order after taking and considering evidence adduced by the AFP, the person in relation to whom the interim order is made and their representatives, and (where relevant) the Queensland public interest monitor,¹¹ although commentators remain concerned about the possible brevity of the information which the individual is given which might frustrate their attempts to respond meaningfully to it.¹² The period during which the confirmed control order is to be in force must not end more than 12 months after the day on which the interim control order is made, or 3 months for one made in relation to a 16 - 18 years old.¹³ The person can apply for the order to be varied, revoked or declared void as soon as the person is notified that an order is confirmed.¹⁴

Notes

- 1 Generally see CRIMINAL LAW [130-1]. As to the constitutional implications, including the limits on the executive to direct courts in the content of judicial decisions see also [80-45].
- 2 (CTH) Criminal Code s 100.1 defines an interim control order as an order made under ibid ss 104.4, 104.7 or 104.9. An interim control order cannot be requested in relation to a person who is under 16 years of age: ibid s 104.28.
- 3 Ibid s 100.1 defines a confirmed control order as an order made under ibid s 104.16.
- 4 Ibid s 104.2. In 'urgent circumstances' the request can be made without such consent, although such consent must then be obtained within 4 hours of the member making the request. See ibid Pt 5.3 Div 104 Subdiv C (making an urgent interim control order), notably ibid s 104.6, 104.10.
- 5 Ibid s 104.2(2).
- 6 Ibid s 104.4.
- 7 Ibid s 104.4(1)(d).
- 8 Ibid s 104.4(2).
- 9 Ibid s 104.5(3).
- 10 Ibid s 104.12.
- 11 Ibid s 104.14.
- 12 See, for example, Andrew Lynch, 'Don't lie back and think of England: comparisons on the process and substance of counter-terrorism laws', 2005 Special Issue, *Human Rights Defender*, p 9.
- 13 (CTH) Criminal Code ss 104.16(1)(d), 104.28.
- 14 Ibid ss 104.18, 104.20.

[80-1125] Preventative detention orders

The paragraph below is current to **07 March 2018**

A preventative detention¹ order allows a person to be taken into custody to prevent an imminent terrorist act occurring, or to preserve evidence of a recent terrorist act. An order may only be made by an 'issuing authority' which, for an initial order, is a Senior Australian Federal Police ('AFP') member,² and for a continued order is either an appointed judicial officer (acting persona designata), a former judge, or the President or Deputy President of the Administrative Appeals Tribunal.³ An order may be made where an issuing authority is satisfied that there are reasonable grounds to suspect that the subject will engage in a terrorist act, or possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or has done an act in preparation for, or planning, a terrorist act. Furthermore, the making of the order must substantially assist in preventing a terrorist act occurring, and detaining the subject for the relevant period must be reasonably necessary.⁴ The terrorist act must be imminent and expected to occur in the next 14 days.⁵ Alternatively, an order can be made where the issuing authority is satisfied that a terrorist act has occurred within the last 28 days, it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and such detention is reasonably necessary.⁶

A detainee has certain rights. Notably, the Commonwealth Ombudsman must be notified of the detention and given a copy of the order,⁷ and in the case of a continued detention order the order must set out a summary of the grounds on which the order is made.⁸ Unless impracticable, a detainee must be given a copy of the order,⁹ and be informed of a range of things including the period of detention under the order, their right to contact the Ombudsman and a lawyer, to make representations to the senior AFP

(E) Questioning and Detention under the Federal Counter Terrorism Regime

member to have the order revoked, to complain about their treatment, and to approach the Federal Court of Australia for a remedy relating to the order or their treatment.¹⁰ Questioning of a detainee is prohibited except to ascertain their identity and to ensure their safety,¹¹ and they must be treated with humanity and respect for human dignity and not be subjected to cruel, inhuman or degrading treatment.¹² Orders will not apply to people under 16 years, and special rules apply for people between the ages of 16 and 18 years and people incapable of managing their own affairs.¹³ Special assistance is to be provided for persons with inadequate knowledge of English or a disability.¹⁴

In many respects a person held under preventative detention is held incommunicado. A detainee is not entitled to contact another person¹⁵ except a family member, a cohabitee, an employer, an employee, and a business partner, and then solely for the purpose of letting them know they are 'safe' but are 'not able to be contacted for the time being'.¹⁶ A detainee may contact the Ombudsman,¹⁷ and a lawyer, although this latter contact is strictly controlled by the legislation,¹⁸ and all such contact (except that made with the Ombudsman) must be conducted in such a way that it can be effectively monitored.¹⁹ A 'prohibited contact order' may also be issued which further limits the detainee's entitlement to contact even this limited group.²⁰ Moreover, it is an offence for anyone to disclose the fact that an order has been made or that a person is being detained.²¹

Because of constitutional limitations, a federal preventative detention order only allows a person to be detained for 48 hours. However, complementary State and Territory legislation permits people to be held without charge for up to 14 days.²² This legislation largely mirrors the federal statutory scheme, although the Australian Capital Territory statute notably precludes the detention of children under the age of 18 years.²³

Notes

- 1 (CTH) *Criminal* Code Pt 5.3 Div 101, s 105.1 (preventative detention orders).
- 2 Ibid ss 100.1(1) (definition of 'issuing authority'), 105.8.
- 3 Ibid s 105.2. The authority must consider afresh the merits of making the order: ibid s 105.12(2).
- 4 Ibid s 105.4(2), 105.4(4).
- 5 Ibid s 105.4(5).
- 6 Ibid s 105.4(6).
- 7 Ibid ss 105.8(8) (for an initial preventative detention order), 105.12(8) (for a continued preventative detention order).
- 8 Ibid s 105.12(6)(d), although concerns have been raised about the adequacy of such information if the detention is to be effectively challenged.
- 9 Ibid ss 105.31, 105.32.
- 10 Ibid ss 105.28 (for an initial preventative detention order), 105.29 (for a continued preventative detention order).
- 11 Ibid s 105.42.
- 12 Ibid s 105.33.
- 13 Ibid ss 105.5 (no preventative detention order in relation to person under 16 years of age), 105.33A (detention of persons under 18 years), 105.39.
- 14 Ibid s 105.5A.
- 15 Ibid s 105.34.
- 16 Ibid s 105.35.
- 17 Ibid s 105.36.
- 18 Ibid s 105.37.

(E) Questioning and Detention under the Federal Counter Terrorism Regime

- 19** Ibid s 105.38. However, communication with the lawyer is not admissible in Court: ibid s 105.38(5).
- 20** Ibid ss 105.14A, 105.15, 105.16, 105.40.
- 21** Ibid s 105.41.
- 22** (ACT) [Terrorism \(Extraordinary Temporary Powers\) Act 2006](#) Pt 2 (preventative detention orders), s 26
(NT) [Terrorism \(Emergency Powers\) Act 2003](#) Pt 2B (preventative detention orders), s 21K (maximum period of detention is 14 days)
(NSW) [Terrorism \(Police Powers\) Act 2002](#) Pt 2A Div 2 (preventative detention orders). Under ibid s 26K, the maximum period for which a person may be detained under a preventative detention order (other than an interim order) is 14 days.
(QLD) [Terrorism \(Preventative Detention\) Act 2005](#) Pt 2 s 12(2) (in no case can a person be detained under the final order longer than 14 days after being taken into custody)
(SA) [Terrorism \(Preventative Detention\) Act 2005](#) Pt 2 s 8(4)
(TAS) [Terrorism \(Preventative Detention\) Act 2005](#) Pt 2 s 8(3)
(VIC) [Terrorism \(Community Protection\) Act 2003](#) Pt 2A (preventative detention orders). See also ibid ss 13A, 13F(3), 13G.
(WA) [Terrorism \(Preventative Detention\) Act 2006](#) Pt 2 s 15(4) (permitted detention period under the order cannot exceed 14 days when aggregated with any period or periods of actual detention).
- 23** (ACT) [Terrorism \(Extraordinary Temporary Powers\) Act 2006](#) Pt 2 (preventative detention orders), s 11.

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(A) Introduction — Freedom of Movement and Residence

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (4)
FREEDOM OF MOVEMENT AND RESIDENCE

(4) FREEDOM OF MOVEMENT AND RESIDENCE

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(A) INTRODUCTION — FREEDOM OF MOVEMENT AND RESIDENCE

[80-1135] Common law

The paragraph below is current to **07 March 2018**

The common law confers no positive right to freedom of movement as such, or to choose one's place of residence.¹ However, many remedies have been developed for those whose movement is restricted by false imprisonment, unlawful arrest, illegal detention, and release from custody through habeas corpus.² While section 92 of the Commonwealth Constitution protects freedom of movement between States,³ there are statutorily imposed restrictions on movement to and from Australia⁴ and to certain places within Australia.⁵ Restrictions on the right to choose a place of residence include laws relating to access to national parks and to land planning and development.⁶

Notes

- ¹ Although there is no major Australian case determining this, the United States case *Kent v Dulles* (1958) 357 US 116  at 125, 126; 2 L Ed 2d 1204 at 1210; 78 S Ct 1113 per Douglas J (with whom the majority agreed) provides an authority: 'In Anglo-Saxon law that right was emerging at least as early as Magna Carta [Art 12 was referred to] ... Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage ... Freedom of movement is basic in our scheme of values'. The common law right to freedom of movement on the highways was asserted in *Melbourne Corp v Barry* (1922) 31 CLR 174  at 206; [1923] VLR 141; [BC2200001](#) per Higgins J. For a comment on Magna Carta in relation to immigration controls, see *Chia Gee v Martin* (1905) 3 CLR 649  at 652-3; 12 ALR 425; [BC0500013](#) per Griffith CJ. In relation to habeas corpus see *Antunovic v Dawson* [\[2010\] VSC 377](#) ; [BC201006085](#) and for constitutional significance see *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36 ; (1926) 32 ALR 46; [BC2500003](#) per Isaacs J. See also references made to an implied right to freedom of

(A) Introduction — Freedom of Movement and Residence

movement, associated with the structure of representative democratic government: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 212 per Gaudron J, at 233 per McHugh J; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 73; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#) per Deane and Toohey JJ. Compare *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 150; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#) per Brennan J. See also *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#) at [141](#) per Brennan CJ (dubitante), at 160 per Dawson J (with whom McHugh J agreed) (such a right does not apply to Commonwealth Constitution s 122 powers), compare at 179, 182 per Toohey J, at 196 per Gaudron J (there is an implied right associated with the right to political communication), at 230 per Gummow J (dubitante); 71 ALJR 991; [BC9703253](#).

- 2 As to the right not to be subjected to arbitrary arrest generally see [\[80-1065\]-\[80-1075\]](#).
- 3 See [\[80-1145\]](#).
- 4 See [\[80-1155\]-\[80-1172\]](#).
- 5 See [\[80-1145\]](#), [\[80-1150\]](#).
- 6 See [\[80-1175\]](#).

[80-1140] Right to freedom of movement and residence in international law

The paragraph below is current to **07 March 2018**

The simple provisions of the Universal Declaration of Human Rights that focus on freedom of movement and residence within the borders of a state and the right to leave and return to one's own country¹ have been subject to closer definition in the International Covenant on Civil and Political Rights (the 'ICCPR'),² largely through the identification of a number of permissible limitations on the right.³ Such limitations can only be imposed to protect national security, public order, public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary (and proportional) in a democratic society for the protection of these purposes and must be consistent with all other rights recognised in the ICCPR, as well as fundamental principles of equality and non-discrimination.⁴ Specific freedom of movement guarantees also exist in relation to racial discrimination,⁵ discrimination against women,⁶ and migrant workers.⁷

Notes

- 1 (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) art 13, which provides:

- (1) 'Everyone has the right to freedom of movement and residence within the borders of each State'.
- (2) 'Everyone has the right to leave any country, including his own, and to return to his country'.

As to the Universal Declaration of Human Rights 1948 see FOREIGN RELATIONS [\[215-630\]](#).

- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 12 which provides as follows:

- (1) 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence
- (2) Everyone shall be free to leave any country, including his own

(A) Introduction — Freedom of Movement and Residence

- (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant.
- (4) No one shall be arbitrarily deprived of the right to enter his own country.'

See further FOREIGN RELATIONS [\[215-635\]](#). The United Nations Human Rights Committee established under *ibid* art 28 has issued a general comment specifically in relation to *ibid* art 12 (United Nations Human Rights Committee, *CCPR General Comment No 27: Freedom of movement (Art 12)*, CCPR/C/21/Rev 1/Add 9, 2 November 1999), as well as a general comment in relation to the rights of lawfully present aliens (United Nations Human Rights Committee, *CCPR General Comment No 15: The Position of Aliens under the Covenant*, adopted at the Twenty-seventh session, 11 April 1986): see [\[80-1167\]](#). The (INT) Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Strasbourg, 16 September 1963 ETS 46) art 2 provides in almost identical terms for liberty of movement, and for permissible limitations on those rights.

Interpretation of the provisions by the European Commission and European Court of Human Rights established under the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) (the 'ECHR') has tended to be restrictive. See, for example, *X v Federal Republic of Germany* (1976) 5 Decisions and Reports of European Commission 137, European Commission, Application 7216/75 (extradition is not precluded); *Abdulaziz, Cabales and Balkandali v United Kingdom* [\(1985\) 7 EHRR 471](#), European Court of Human Rights (immigration powers may have a broad operation that may violate privacy of the family); *15 Foreign Students v United Kingdom* (1977) 9 Decisions and Reports of the European Commission of Human Rights Application No 7671/76 (the presence of a foreign student for education (a right under the ECHR) does not prevent extradition, at least after elementary education).

- 3 The limitations have been construed broadly in application of the ECHR, again reducing the scope of the rights. Thus forbidding a bankrupt person to leave the jurisdiction was considered necessary for public order and protection of the rights and freedoms of others: *X v Belgium* (1981) 24 Decisions and Reports of European Commission 198, Application 8988/80. See also *Talacko v Talacko* (2010) 183 FCR 311, [115 ALD 279](#); [\[2010\] FCAFC 54](#); [BC201003473](#) (departure from Australia prevented to give effect to powers under (CTH) *Bankruptcy Act 1966*).
- 4 See United Nations Human Rights Committee, *CCPR General Comment No 27: Freedom of movement (Art 12)*, CCPR/C/21/Rev 1/Add 9, 2 November 1999 at [11]-[18].
- 5 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; Aust TS 1975 No 40; 660 UNTS 195) art 5(d)(i): 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... [t]he right to freedom of movement and residence within the border of the State'. See also UN Committee on the Elimination of Racial Discrimination, *CERD General Recommendation No XXX: Discrimination Against Non-Citizens*, 1 October 2002, A/59/18 (2004) 93 (available at <http://www.unhcr.org>) at [34]: 'the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures: ... Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault'.
- 6 (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980)) art 15.4: 'States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile'.
- 7 (INT) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990; 30 ILM 1517 (1991)) arts 36, 39, 65 (not ratified by Australia).

End of Document

(B) Freedom of Movement

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(4\) FREEDOM OF MOVEMENT AND RESIDENCE](#)

(B) FREEDOM OF MOVEMENT

[80-1145] Freedom of interstate movement

The paragraph below is current to **07 March 2018**

To ensure a right to freedom of interstate movement, section 92 was included in the Commonwealth Constitution (the 'Constitution').¹ Section 92 of the Constitution states that 'trade, commerce and intercourse among the states ... shall be absolutely free'.² The right to freedom of intercourse is regarded by the High Court of Australia (the 'High Court') as being distinct from the rights to freedom of trade and commerce included in the same clause in section 92 of the Constitution. The distinction between 'intercourse' and 'trade and commerce' means that some forms of intercourse are more immune from legislative or executive interference than are the activities of trade and commerce.³ The intercourse aspect of section 92 of the Constitution 'extends to a personal guarantee' of freedom of movement between States.⁴ Although section 92 of the Constitution does not apply to the Territories, Commonwealth legislation establishing self-government in the Australian Capital Territory⁵ and the Northern Territory⁶ contains provisions that in effect extend the constitutional guarantee to intercourse (and to trade and commerce) between the States and Territories.⁷

Legislation that prevented persons convicted of capital or other serious crimes from entering New South Wales has been held to be invalid by the High Court, with two Justices using section 92 of the Constitution as the ground for decision, and two drawing upon a federal principle to uphold a general freedom of movement between the states which could be abridged only where 'necessary' to protect the internal order, safety, health and morals of the people of the State.⁸ An order pursuant to national security regulations that prohibited travel by rail or commercial passenger vehicle without a permit has also been unanimously held to be invalid for being a direct interference with the freedom of intercourse.⁹

A freedom of movement founded on federalism has been presented by many advocates both in Australia and the United States as a fundamental liberty, guaranteeing residents the ability to live in the legal system of their choice.¹⁰

(B) Freedom of Movement

- 1 *Gratwick v Johnson* (1945) 70 CLR 1  at 13 per Latham CJ, at 17 per Starke J; [1945] ALR 167; (1945) 19 ALJ 54; [BC4500037](#). The word 'intercourse' in the phrase 'intercourse among the States ... shall be absolutely free' was an original part of (CC) Commonwealth Constitution s 92, not an afterthought: *Cole v Whitfield* (1988) 165 CLR 360  at 387, 388; [78 ALR 42](#); 62 ALJR 303 per the court, HC of A, Full Court.
As to intercourse between the States see CONSTITUTIONAL LAW [\[90-2270\]-\[90-2290\]](#).
- 2 (CC) Commonwealth Constitution s 92.
- 3 See *Cole v Whitfield* (1988) 165 CLR 360  at 393, 394; [78 ALR 42](#); 62 ALJR 303. For discussion of changes in the economic environment in which Commonwealth Constitution s 92 operates see *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 ; [244 ALR 32](#); [\[2008\] HCA 11](#); [BC200801843](#) at [\[10\]-\[20\]](#) per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.
- 4 See *Cole v Whitfield* (1988) 165 CLR 360  at 393; [78 ALR 42](#); 62 ALJR 303.
- 5 (CTH) [Australian Capital Territory \(Self-Government\) Act 1988](#) s 69 (trade and commerce with States to be free).
- 6 (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 49 (trade and commerce with States to be free).
- 7 The equivalent to *ibid* s 49 in the (CTH) Northern Territory (Administration) Act 1910 (repealed) was considered in *Lamshed v Lake* (1958) 99 CLR 132 ; [1958] ALR 388; (1958) 32 ALJ 75; [BC5800530](#).
- 8 *R v Smithers* (1912) 16 CLR 99 ; 19 ALR 209 per Isaacs and Higgins JJ (who found the legislation invalid because it breached ss 92 and 117), and Griffith CJ and Barton J (who implied certain rights as arising out of the creation of a federal union with one government).
- 9 *Gratwick v Johnson* (1945) 70 CLR 1 ; [1945] ALR 167; (1945) 19 ALJ 54; [BC4500037](#).
- 10 See, for example, Bork R, *The Tempting of America*, Macmillan, 1990, p 53; Walker, G de Q, *Ten advantages of a Federal Constitution and how to make the most of them*, The Centre for Independent Studies, March 2001, pp 7-9.

[80-1150] Freedom of movement within a State

The paragraph below is current to **07 March 2018**

There are no general laws conferring a right to freedom of movement within a State or Territory, save for recognition of the right in the Australian Capital Territory and Victorian human rights charters,¹ although the limitations imposed on the right assume its existence. For example, movement into and within national parks and Commonwealth reserves may be restricted, subject to conditions or, in some cases, prohibited,² entry onto certain land set aside for defence purposes may be prevented,³ a child may be escorted from a place if a police officer considers he or she is at risk⁴ and provisions exist for restricting entry onto Aboriginal land.⁵ In general, freedom of movement does not extend to access to property in private ownership, and entry onto such land is subject to the ordinary laws of trespass.⁶

Restraining the freedom of movement of a passenger in a vehicle by making it difficult or dangerous for the passenger to leave may result in false imprisonment and a suit for damages.⁷

Notes

- 1 (ACT) [Human Rights Act 2004](#) s 13

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 12.

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#). On the scope of the right of freedom of movement see *PJB v Melbourne Health (Patrick's Case)* [\[2011\] VSC 327](#) ; [BC201105182](#) at [\[45\]-\[52\]](#) per Bell J.

(B) Freedom of Movement

On compatibility see *Antunovic v Dawson* [2010] VSC 377 ; *BC201006085* at [60] per Bell J (all the more important for habeas corpus jurisdiction to be exercised, because that would be consistent with the (VIC) *Charter of Human Rights and Responsibilities Act 2006*). For examples of freedom of movement restrictions see *Spatoliano v Hyde* [2009] ACTSC 161 ; *BC200911045* (move on direction under (ACT) Crime Prevention Powers Act 1998 (repealed) s 4); *Temoannui v Ford* (2009) 231 FLR 216 ; 196 A Crim R 442; [2009] ACTSC 69; *BC200905561* (police direction to move on under (ACT) Crime Prevention Powers Act 1998 (repealed) s 4).

- 2 See, for example (CTH) *Environment Protection and Biodiversity Conservation Regulations 2000* regs 12.23(3) (Director may prohibit or restrict entry by persons generally, or a class of persons, to all or part of a reserve), 12.31 (public gatherings in a reserve), 12.41 (vehicle use of roads or tracks), 12.08 (authorising activities by indigenous people).

(VIC) *Planning and Environment Act 1987* s 6.

See also ENVIRONMENT [180-9295] (National Parks), [180-9330] (nature reserves), [180-9380] (wilderness areas).

- 3 (CTH) *Defence Act 1903* ss 116Q (Minister may, by notice in the *Gazette*, declare an area to be a public area used for defence purposes), 116ZD (power to make by-laws regulating use of public areas, or excluding persons).
- 4 (NSW) *Children (Protection and Parental Responsibility) Act 1997* ss 19-23. See further [80-1066].

- 5 See, for example, (SA) *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* and discussion of the restrictions imposed by the legislation in *Gerhardy v Brown* (1985) 159 CLR 70 ; 57 ALR 472; 59 ALJR 311; *BC8501115*, notably the potential conflict with (CTH) *Racial Discrimination Act 1975* s 9(2) which incorporates the guarantee of freedom of movement found in () International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5(d)(i). See also ABORIGINALS AND TORRES STRAIT ISLANDERS [5-275], [5-415], [5-550], [5-562], [5-705]-[5-715], [5-915], [5-1015]. See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 ; 252 ALR 232; [2009] HCA 2; *BC200900208* (example of the permit system under (CTH) *Aboriginal Land Rights (Northern Territory) Act 1976* which allowed certain persons to have access to, and to remain on, Aboriginal land (altered by emergency response to the incidence of sexual abuse of Aboriginal children in the Northern Territory)).

- 6 See TORT [415-480]-[415-550].

- 7 *Burton v Davies* [1953] St R Qd 26 .

[80-1155] Freedom to leave Australia

The paragraph below is current to **07 March 2018**

In practice, though not in law,¹ a person (whether or not an Australian citizen) may not leave Australia or enter another country without some form of valid travel document, normally a passport in the case of Australian citizens.² The essential element in the common law rules relating to passports is that passports are official documents issued by exercise of the prerogative power and that their purpose is to facilitate rather than authorise the travel of a person overseas.³ Under Commonwealth legislation, Australian citizens are issued with passports by the Minister or an authorised officer in the name of the Governor-General.⁴ An Australian passport always remains the property of the Australian Government and can, in certain circumstances, include a travel-related document such as a certificate of identity, document of identity or provisional travel document.⁵ An Australian passport may only be issued to an Australian citizen.⁶ The circumstances in which a passport may be refused include where a person:

- (1) is a child without parental consent (or no court order for travel);⁷
- (2) is subject to arrest or other constraint under court order;⁸

(B) Freedom of Movement

- (3) is the subject of a foreign arrest warrant in respect of a serious foreign offence, where proceedings relating to the offence would be compromised by the grant of an Australian travel document;⁹
- (4) owes money to the Commonwealth;¹⁰
- (5) already has a valid Australian travel document;¹¹ or
- (6) is a threat, whether in Australia or a foreign country, to security, or may endanger the health or physical safety of other persons, or may interfere with the rights of other persons as defined in the International Covenant on Civil and Political Rights 1966.¹²

Notes

- 1** In some cases, it is a condition of the issue of a ticket by a carrier that the person whose travel is authorised hold a valid passport or similar authorisation: this is a consequence of provisions such as those in (CTH) [Migration Act 1958](#) ss [207](#), [213](#) (a carrier which brings an unlawful non-citizen to Australia may be required to pay the costs of detention, removal and deportation of the non-citizen).

There is currently no legal requirement for an Australian citizen to hold a passport when leaving Australia.

- 2** 'Australian citizenship' is defined in (CTH) [Australian Citizenship Act 2007](#) ss [12](#) (citizenship by birth), [13](#) (by adoption), [19B-19F](#) (inter-country adoption), [15A-19A](#) (by descent), [14](#) (abandoned children), [19G-28](#) (conferral). 'Australian travel document' is defined in the (CTH) [Australian Passports Act 2005](#) s [6](#) to mean an Australian passport or a travel related document.

- 3** As to the nature of a passport see *R v Brailsford* [\[1905\] 2 KB 730](#)  at [745](#); [\[1904-7\] All ER Rep 240](#) per Lord Alverstone CJ. Although it is issued by exercise of the prerogative, the decision is reviewable by the courts: *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Everett* [\[1989\] 1 QB 811](#)  ; [\[1989\] 2 WLR 224](#) , CA.

- 4** (CTH) [Australian Passports Act 2005](#) s [53](#).

- 5** (CTH) [Migration Act 1958](#) s [5](#) (definition of 'identity document'); (CTH) [Australian Passports Act 2005](#) s [9](#).

- 6** Ibid s 8(a).

- 7** Ibid s 11.

- 8** Ibid s 12 (on a refusal or cancellation request by a defined 'competent authority').

- 9** Ibid s 13.

- 10** Ibid s 16.

- 11** Ibid s 17.

- 12** Ibid s 14. See (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).

As to passports see CITIZENSHIP AND MIGRATION [\[77-190\]-\[77-300\]](#) (passports).

[80-1160] Remedies for refusal or cancellation of a passport

The paragraph below is current to **07 March 2018**

It is possible for an Australian citizen to seek review by the Administrative Appeals Tribunal (the 'AAT') of most decisions made by the Minister relating to passports.¹ The AAT may, however, only affirm or make recommendations concerning the issue or cancellation of a passport where international relations or

(B) Freedom of Movement

criminal intelligence are determining factors in the Minister's decision, and the Minister has issued a certificate to that effect.² A Ministerial review, including on the merits, may be obtained of all decisions taken by a delegate of the Minister in relation to the issue or cancellation of a travel authorising document (most Ministerial decisions are themselves reviewable by the AAT).³

Notes

- 1 (CTH) [Australian Passports Act 2005](#) ss 48 (defines 'reviewable decision'), 49 (review by Minister of decisions made by Minister's delegate), 50 (review by Administrative Appeals Tribunal of a reviewable decision, or the Minister's review of a reviewable decision under ibid s 49(4)).
- 2 Ibid s 50(2).
- 3 Ibid ss 49, 50. See further CITIZENSHIP AND MIGRATION [\[77-300\]](#).

[80-1165] Freedom of citizens to return to Australia

The paragraph below is current to **07 March 2018**

An Australian citizen whose permanent home is in Australia or who is a member of the Australian community may return to Australia at any time without the need for formal documentation. Such persons are not 'immigrants' for the purposes of section 51(xxvii) of the Commonwealth Constitution.¹

Australian citizens who have engaged in a number of prescribed international terrorist-related acts can be barred from re-entering Australia as their citizenship is deemed to have been renounced from the time they engage in the prescribed conduct.²

Notes

- 1 *Potter v Minahan* (1908) 7 CLR 277 ; 14 ALR 635 (affirmed *Donohoe v Wong Sau* (1925) 36 CLR 404  at 407, 408; [BC2590102](#) per Isaacs J).
- 2 See Australian Citizenship Amendment (Allegiance to Australia) Act 2015.

[80-1167] Restrictions on entry and movement of non-citizens

The paragraph below is current to **07 March 2018**

Subject to certain qualifications, a non-citizen must not travel to Australia without a visa.¹ This restriction does not apply to:

- (1) an inhabitant of the Protected Zone established under article 10 of the Torres Strait Treaty who is a citizen of Papua New Guinea and is travelling to a protected area in connection with traditional activities;²

(B) Freedom of Movement

- (2) a New Zealand citizen who holds and produces a New Zealand passport that is in force;³
- (3) a resident of Norfolk Island;⁴
- (4) a non-citizen brought into the migration zone pursuant to an officer's power to board and search ships and aircraft under the (CTH) [Migration Act 1958](#) or (CTH) [Customs Act 1901](#);⁵
- (5) bringing a transitory person into Australia for a temporary purpose; or⁶
- (6) a person who was removed from Australia as an unlawful non-citizen, but who travelled back to Australia as a direct result of being refused entry by another country.⁷

A person who is not a citizen and is within the Australian migration zone⁸ without a visa is an unlawful non-citizen⁹ and must be detained,¹⁰ and detention only ends on the grant of a visa or removal or deportation from Australia.¹¹ An unlawful non-citizen who is also an unlawful maritime arrival must be taken for offshore processing in a 'regional processing country'.¹² Unlawful maritime arrivals are generally not permitted to apply for any type of visa,¹³ even if brought into Australia for a temporary purpose.¹⁴

The United Nations Human Rights Committee has asserted that once an alien is lawfully within a territory, he or she enjoys the right to move freely and to choose his or her place of residence equally with other citizens under article 12 of the International Covenant on Civil and Political Rights (the 'ICCPR').¹⁵ Although there are no general provisions in Australian migration law to restrict lawful non-citizens moving internally within the Commonwealth, conditions on visas may operate in some circumstances to have such an effect. For instance, a condition must be imposed on a Skilled — Independent Regional visa¹⁶ that the holder must not live, study or work outside certain parts of Australia.¹⁷ Certain working visas may have a restriction on changing employers imposed.¹⁸ Strict reporting conditions may be placed on certain bridging visas, for example, visas that provide for temporary release from detention.¹⁹ Citizens of the People's Republic of China who hold visitor visas to travel to Australia as members of specified organised tours cannot deviate from the approved tour arrangements.²⁰

Notes

- 1 (CTH) [Migration Act 1958](#) s 42 (non-citizen must not travel to Australia without a visa that is in effect).
- 2 Ibid s 42(2). See *ibid* s 5 for definition of 'protected zone'.
- 3 Ibid s 42(2A)(a).
- 4 Ibid s 2(2A)(b).
- 5 Ibid s 42(2A)(c).
- 6 Ibid ss 42(2A)(ca). In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 ; [BC201106561](#), the High Court established the criteria for declaring under s 198A a country as one to which asylum seekers may be taken for processing, and held that the Minister has no other power under (CTH) Migration Act 1958 to remove asylum seekers offshore when their claims have not been determined.
- 7 (CTH) [Migration Act 1958](#) s 42(2A)(d).
- 8 Ibid s 5. See CITIZENSHIP AND MIGRATION [\[77-355\]](#).
- 9 Ibid s 14. See CITIZENSHIP AND MIGRATION [\[77-635\]](#).
- 10 Ibid s 189. See CITIZENSHIP AND MIGRATION [\[77-660\]](#).
- 11 Ibid ss 196, 198. See CITIZENSHIP AND MIGRATION [\[77-660\]](#).

(B) Freedom of Movement

- 12** Ibid s 198AD. See *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28; [309 ALR 29](#); [\[2014\] HCA 22](#); [BC201404675](#); *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) [327 ALR 369](#); 90 ALJR 297; [\[2016\] HCA 1](#); [BC201600257](#) (cases upholding the constitutional validity of the offshore processing scheme).
- 13** (CTH) [Migration Act 1958](#) s [46A](#).
- 14** Ibid s 198B. See also ibid s 5 for definition of 'transitory person'.
- 15** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 12. See also United Nations Human Rights Committee, *CCPR General Comment No 15: The Position of Aliens Under the Covenant*, HRI/GEN/1/Rev 2, 11 April 1986 at [4]-[10] (in particular [7]); United Nations Human Rights Committee, *CCPR General Comment No 27: Freedom of Movement (Art 12)*, CCPR/C/21/Rev 1/Add 9, 2 November 1999 at [4]. See also *Celepli v Sweden* Communication No 456/1991, CCPR/C/51/D/456/1991, (1994) at [9.2] for the view that an alien who entered a State illegally, but whose status has been regularised, must be considered to be lawfully within the territory.
- 16** That is, a visa granted for skilled people who are unable to meet the passmark for a permanent visa and wish to live and work in a regional or low population growth metropolitan area in Australia. As to visas generally see CITIZENSHIP AND MIGRATION [\[77-385\]-\[77-620\]](#).
- 17** See (CTH) [Migration Regulations 1994](#) Sch 8 cl 8539.
- 18** See ibid Sch 8 cl 8107, 8110, 8111.
- 19** See ibid Sch 2 for conditions that can be imposed on subclass 040, 050 and 070 bridging visas, and ibid Sch 8 cl 8401, 8402.
- 20** See ibid Sch 1 Pt 2 cl 1218(1)(b); ibid Sch 2 cl 676.221(2)(d)(ii); ibid Sch 8 cl 8530.

[80-1170] Deportation and removal

The paragraph below is current to **07 March 2018**

The International Covenant on Civil and Political Rights (the 'ICCPR') enshrines the long-standing legal principle that persons have rights to freedom of movement and residence within the territory of States Parties.¹ Citizens are, in general, not subject to deportation or involuntary removal, the one exception being in relation to extradition.² Although treaty law provides for the removal (extradition) of any person under established extradition arrangements, there are in Australia both common law and statutory protections of the rights of individuals, whether citizens or aliens, in relation to whom extradition may be sought.³

In relation to aliens (non-citizens), article 12 of the ICCPR recognises two categories: those who are lawfully in the territory of a State, and those who are not. This distinction is operative in Australian law.⁴ The United Nations Human Rights Committee (the 'Committee') has indicated that aliens lawfully within the territory of a State Party are entitled without discrimination to the rights set out in the ICCPR.⁵ Such aliens may not be arbitrarily prevented from returning to their own country.⁶ The Committee also indicates that 'if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with art[icle] 13 [of the ICCPR]'.⁷ In Australian law, persons who are aliens (non-citizens) may have their visas cancelled⁸ if they have breached the conditions of their entry, such as by making out false documents,⁹ thereby becoming unlawful non-citizens.¹⁰ As unlawful non-citizens they may be removed¹¹ or deported by order of the Minister if convicted in Australia of a serious offence.¹² A person reasonably suspected of being an illegal entrant (unlawful non-citizen) may be detained.¹³ An unlawful non-citizen who is also an unlawful maritime arrival must be taken for offshore processing in a 'regional processing country'.¹⁴ All illegal entrants (unlawful non-citizens) are subject to removal.¹⁵ Removal may result from public interest grounds such as the existence of 'any disease or condition'.¹⁶ A person who is a non-citizen may include a person who was a British subject prior to May 1987 and has not subsequently become an Australian citizen.¹⁷ Persons who are permanent residents,¹⁸ but have not been so for 10 years, may be deported for committing serious

(B) Freedom of Movement

offences.¹⁹ There are special provisions for refugees or those claiming refugee status, and the role of the Refugee Review Tribunal.²⁰

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 12, 13. For the text of *ibid* art 12 see [\[80-1140\]](#) and of *ibid* art 13 see note 7 below.
- 2 See CRIMINAL LAW [\[130-13340\]](#)-[\[130-13355\]](#).
- 3 As to extradition generally see (CTH) [Extradition Act 1988](#) and see CRIMINAL LAW [\[130-13350\]](#), [\[130-13355\]](#). See *Mokbel v DPP (Vic)* (2008) 26 VR 1 ; 202 A Crim R 319; [2008] VSC 433; [BC200809446](#) (extradition pending determination of application to European Court of Human Rights not an abuse of process). On whether an extradition treaty requirement (that an offence for which extradition is sought be an offence in the requesting state at time of relevant act) is satisfied if the act constituted an offence (even if not that in relation to which extradition sought) see *O'Connor v Zentai* [2011] FCAFC 102 ; [BC201106143](#).
- 4 In the (CTH) [Migration Act 1958](#) a distinction is made between citizens and non-citizens: *ibid* s 5 (definition of 'non-citizen').
- 5 Within the latter category there is a distinction between those who are lawfully in the country and those who are not: *ibid* ss 5, 14. In respect of the latter, the Act provides for various forms of remedy, for example, obtaining a visa, seeking removal or being detained: see CITIZENSHIP AND MIGRATION [\[77-635\]](#)-[\[77-670\]](#).

See United Nations Human Rights Committee, *General Comment No 15: The Position of Aliens Under the Covenant*, HRI/GEN/Rev 2, 11 April 1986 at [6], [7].
- 6 United Nations Human Rights Committee, *General Comment No 15: The Position of Aliens Under the Covenant*, HRI/GEN/Rev 2, 11 April 1986 at [8].
- 7 United Nations Human Rights Committee, *General Comment No 15: The Position of Aliens Under the Covenant*, HRI/GEN/Rev 2, 11 April 1986 at [9]. (INT) International Covenant on Civil and Political Rights 1966 art 13 provides: 'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority'.
- 8 (CTH) [Migration Act 1958](#) ss [116](#), [117](#).
- 9 *Ibid* Pt 2 Div 3 Subdiv C (cancelling visa based on incorrect information).
- 10 *Ibid* s 15.
- 11 *Ibid* ss 198, 199 (removal of dependants).
- 12 *Ibid* Pt 2 Div 9, particularly ss 200, 201. See also CITIZENSHIP AND MIGRATION [\[77-10\]](#), [\[77-665\]](#).
- 13 *Ibid* s 189.
- 14 *Ibid* s 198AD. See *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 ; [309 ALR 29](#); [\[2014\] HCA 22](#); [BC201404675](#); *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) [327 ALR 369](#) ; 90 ALJR 297; [2016] HCA 1; [BC201600257](#) (cases upholding the constitutional validity of the offshore processing scheme).
- 15 Generally see (CTH) [Migration Act 1958](#) Pt 2 Div 9 and [80-1170]. The removal may follow a request in writing to the Minister by an officer under *ibid* s 198(1) or, under *ibid* s 198(5), 198(6) by virtue of the unlawful non-citizen being a detainee.
- 16 (CTH) [Migration Regulations 1994](#) Sch 4 Pt 1 cl 4005-4007.
- 17 See CITIZENSHIP AND MIGRATION [\[77-5\]](#). See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178  at 195, 196; [80 ALR 561](#); 62 ALJR 539 per Gaudron J (dissenting) (discussing the rights of residents absorbed into the Australian community or persons resident in the country for a substantial period). As to absorption and the

(B) Freedom of Movement

interpretation of (CC) Commonwealth Constitution s 51(xix) see further *Pochi v Macphee* (1982) 151 CLR 101 ; 56 ALJR 878 sub nom *Pochi v Minister for Immigration and Ethnic Affairs* [\(1982\) 43 ALR 261](#) .

18 See (CTH) [Migration Act 1958](#) s [204\(2\)](#) (definition 'permanent resident').

19 Ibid ss 200, 201, 202(1).

20 See CITIZENSHIP AND MIGRATION [\[77-610\]-\[77-620\]](#).

[80-1172] Restrictions on freedom of movement

The paragraph below is current to **07 March 2018**

The International Covenant on Civil and Political Rights allows for restrictions that are, 'provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant'.¹ The United Nations Human Rights Committee has interpreted this as requiring that the restriction in question be the least intrusive means of effectively protecting national security.²

Control orders which can be imposed under federal and State anti-terrorism legislation may place severe restrictions on freedom of movement. Such orders can be imposed where there are reasonable grounds for suspecting that it would substantially assist in preventing a terrorist act, or that a person has provided training to, or received training from, a listed terrorist organisation.³ A control order may impose a range of conditions restricting freedom of movement, including a prohibition or restriction on the person being at specified places or leaving Australia, a requirement that the person remain at specified premises at specified times, as well reporting requirements.⁴ The orders can be imposed for up to 12 months at a time, and are renewable.⁵ There is no requirement that a person be charged with an offence or be under investigation. Judicial power to grant 'no departure' injunctions to assist in the exercise of the bankruptcy jurisdiction may also impede freedom of movement.⁶

Notes

- 1** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 12(3).
- 2** United Nations Human Rights Committee, *General Comment No 27: Freedom of Movement (Art 12)*, CCPR/C/21/Rev 1/Add 9, 2 November 1999 at [14].
- 3** See [\[80-1120\]-\[80-1125\]](#).
- 4** (CTH) Criminal Code s 104.5(3).
- 5** Ibid s 104.16(1)(d).
- 6** *Talacko v Talacko* (2010) 183 FCR 311 ; [115 ALD 279](#); [\[2010\] FCAFC 54](#); [BC201003473](#) (departure from Australia prevented to give effect to powers under (CTH) [Bankruptcy Act 1966](#)) (distinguishing *Potter v Minahan* (1908) 7 CLR 277 ; 14 ALR 635 (Australian citizen re-entering Australia)). See also *Talacko v Talacko* (No 2) [\(2009\) 25 VR 613](#) ; [\[2009\] VSC 444](#); [BC200909093](#) (Supreme Court of Victoria had jurisdiction to make a no departure order, (citing *Bayer AG v Winter* [\[1986\] 1 All ER 733](#) ; [\[1986\] 1 WLR 497](#) ; [1986] FSR 323 at [42], [43] per Fox and Ralph Gibson LJ) observing the wide discretion to do what appears to be just and reasonable in the circumstances of the case).

(C) Freedom of Residence

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(4\) FREEDOM OF MOVEMENT AND RESIDENCE](#)

(C) FREEDOM OF RESIDENCE

[80-1175] Freedom to choose a residence

The paragraph below is current to **07 March 2018**

In Australia there is no enforceable right to choose a place of residence, but anti-discrimination legislation in the Commonwealth and most States and Territories makes it unlawful for persons to discriminate on the proscribed grounds (including race, sex, marital status and disability) in the provision of accommodation and in transactions in land.¹ However, restrictions are placed on the use of land for particular purposes by land and environment legislation,² and by rules relating to territorial areas.³ Other areas are reserved for defence purposes,⁴ use by Aboriginal communities⁵ and national parks.⁶ Under the (CTH) [Family Law Reform Act 1995](#) the right to freedom to choose a residence of a parent may be taken into account to the extent that it does not prevail over the 'best interests of a child' to have access to particular family members.⁷

Notes

- 1 See [\[80-550\]-\[80-567\]](#) (accommodation), [\[80-520\]-\[80-545\]](#) (dealings in land).
- 2 See, for example, (VIC) [Planning and Environment Act 1987](#), under which Ministers and municipal councils (ibid ss 8, 9) are given power, subject to the directions of the Minister, to plan for their areas within the framework established by the Act (ibid s 12), to require permits for use or development of land within a planning scheme (ibid s 47) and to apply for and obtain enforcement orders from the Victorian Administrative Appeals Tribunal: ibid ss 114, 119. Generally see ENVIRONMENT [\[180-1\]](#).
- 3 See, for example, the (NSW) [Lord Howe Island Act 1953](#) provides for the regulation of the erection and use of buildings (ibid s 12(1)(c)) and for the control and the regulation of the tourist trade to the island (ibid s 13(a)) by the Lord Howe Island Board, subject to the direction and control of the Minister: ibid s 10. As to territorial areas see DEPENDENCIES [\[155-60\]-\[155-90\]](#), [\[155-105\]-\[155-115\]](#).
- 4 (CTH) [Defence Act 1903](#) (authorises by-laws (ibid s 116Q) relating to areas declared to be defence areas (ibid s 116ZD) that can determine what use, if any, may be made by the public of the area declared).
- 5 There is considerable State and Commonwealth legislation providing for Aboriginal control of specific areas, for example:
(CTH) [Aboriginal Land \(Lake Condah and Framlingham Forest\) Act 1987](#)

(C) Freedom of Residence

(SA) [Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981](#).

There is also more general legislation granting powers of control (and sometimes specific areas of land) to Aboriginal communities, for example:

(CTH) [Aboriginal Land Rights \(Northern Territory\) Act 1976](#) (vests the Uluru area in traditional owners on condition that it is leased to the Director of National Parks to be used as a national park). See *Wurridjal v Commonwealth* (2009) 237 CLR 309 ; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) (disputing the validity of amendments to the permit system under (CTH) [Aboriginal Land Rights \(Northern Territory\) Act 1976](#)).

(NT) [Aboriginal Land Act 1978](#); (NT) [Cobourgh Peninsula Aboriginal Land, Sanctuary And Marine Park Act 1981](#)

(SA) [Aboriginal Lands Trust Act 2013](#)

(QLD) [Aboriginal and Torres Strait Islander Communities \(Justice, Land and Other Matters\) Act 1984](#)

(TAS) [Aboriginal Lands Act 1995](#).

Restrictions on movement and residence contained in the (SA) [Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981](#) were upheld in *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#). See also *Bropho v Western Australia* (2008) 169 FCR 59 ; [249 ALR 121](#); [\[2008\] FCAFC 100](#); [BC200804314](#) (challenge to directions of administrator under (WA) Reserves (Reserve 43131) Act 2003 (repealed) preventing entry to the reserve by its former inhabitants without express authority). As to access to Aboriginal land see ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-275\]](#), [\[5-415\]](#), [\[5-550\]](#), [\[5-562\]](#), [\[5-705\]](#)-[\[5-715\]](#), [\[5-915\]](#), [\[5-1015\]](#).

6 See ENVIRONMENT [\[180-9270\]](#)-[\[180-9625\]](#).

7 *B v B* [\(1997\) 21 Fam LR 676](#) , Fam C of A, Full Court.

End of Document

(A) Introduction — Right to Privacy and Reputation

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (5) PRIVACY AND REPUTATION

(5) PRIVACY AND REPUTATION

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(A) INTRODUCTION — RIGHT TO PRIVACY AND REPUTATION

[80-1230] No general right to privacy

The paragraph below is current to **07 March 2018**

At common law, there is no general recognition of the right to privacy.¹ However, rights exist that give protection in many of the circumstances in which a general right would be expected to provide relief.² Privacy analogous rights are contained in the common law of confidentiality, property, search and seizure, and liberty and security of person.³ Privacy-protecting legislation relating to information and data exists at Commonwealth and State levels in both direct legislation and through confidentiality and secrecy provisions contained in other legislation. These rights can be seen as having relevance in the context of the generalised right to privacy as defined in international law.⁴

Notes

- 1 *Wainwright v Home Office* [2004] 2 AC 406  ; [2003] 4 All ER 969 at 983; [2003] UKHL 53 per Lord Hoffman. Note, however, statements in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249 per Gummow and Hayne JJ, at 328 per Callinan J, (more obliquely) at 278 per Kirby J; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#) to the effect that a tort of privacy may exist in Australian common law.
- 2 See, for example, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479  at 494 per Latham CJ, at 507, 508 per Dixon J; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197 (relief and a general right to privacy denied). Compare (CLR) at 501, 502, 504 per Rich J dissenting, at 517, 521 per Evatt J dissenting (a remedy in nuisance would lie as 'although there is no general right of privacy recognised by the common law, neither is there an absolute and unrestricted right to spy on ... another person'). Note that British courts have found comprehensive protection of the right to privacy through the common law action of breach of confidence: *Campbell v MGN Ltd* [2004] 2

[AC 457](#)  ; [2004] UKHL 22; [\[2004\] 2 All ER 995](#); *Douglas v Hello! Ltd (No 2)* [\[2004\] All ER \(D\) 280 \(May\)](#) ; [2005] 2 FCR(UK) 487; [\[2006\] QB 125](#) ; [2005] EWCA Civ 595. See also *Tofilau v R* (2007) 231 CLR 396 ; [238 ALR 650](#); [\[2007\] HCA 39](#); [BC200707276](#) at [\[21\]](#) per Gleeson CJ (distinguishing right to silence from right of privacy (undercover operation producing confession)). On similar facts but with no reference to privacy see: *Em v R* (2007) 232 CLR 67 ; [239 ALR 204](#); [\[2007\] HCA 46](#); [BC200708428](#) (covert recording of accused).

3 See [\[80-1255\]-\[80-1290\]](#).

4 See [80-1235].

[80-1235] Right to privacy in international law

The paragraph below is current to **07 March 2018**

The Universal Declaration of Human Rights 1948¹ and the International Covenant on Civil and Political Rights 1966 (the 'ICCPR') contain almost identical statements on the right to privacy.² This statement confers a general right to protection of privacy by law. Specific areas identified as protected include the family, home, correspondence, and personal reputation. Article 17 of the ICCPR was the basis of challenge of the criminalisation in Tasmania of consensual male homosexual sex in private.³ Inherent in the protection of privacy is that it should not be interfered with arbitrarily or unlawfully. The requirement that the right be protected 'by law' has been held by the European Court of Human Rights to mean that any law abridging the right must nevertheless leave fundamentally intact the core right itself — the right itself cannot, consistently with the international provision, be eliminated simply by enacting legislation to that effect.⁴ The word 'arbitrary' has also been held by the European Court of Human Rights to connote an absence of reasonableness, procedural fairness or proportionality.⁵ Under the jurisprudence of the European Court of Human Rights the right to privacy has been held to prevail over freedom of expression where the expression is exclusively concerned with a person's private life and does not come within the sphere of any political or public debate.⁶ Important protection is also given to the protection of privacy for children in the Convention on the Rights of the Child.⁷ Another major international initiative led to guidelines issued by the Organisation for Economic Co-operation and Development, which apply to information privacy.⁸ Article 19 of the ICCPR embraces a right of access to information held by public bodies.⁹

Notes

- 1 (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions).

The (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 17 (the 'ICCPR') reads:

- (1) 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.'

- 2 On the meaning of privacy under the ICCPR see *Coriel and Aurik v The Netherlands* Communication No 453/1991, UN Doc CCPR/C/48/D/453/1991 (1993); *Hopu and Bessert v France* Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev 1 (1994); United Nations Human Rights Committee, *CCPR General Comment No 16: The Right to Respect Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*, adopted at the Thirty-second Session of the Human Rights Committee, 8 April 1988. Also see Sarah Joseph et al *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, Oxford, 2004, p 476.

(A) Introduction — Right to Privacy and Reputation

- 3 Toonen v Australia Communication No 488/1992, UN Doc A/49/40, Vol II (1994) 226-237 at [8.2] (undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'; interference with the privacy found in the criminalisation of all forms of sexual contact between consenting adult men in private).
- 4 The right to privacy is contained in the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 8. For a discussion of the limitations allowable under the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) see *Malone v United Kingdom* (1981) 4 EHRR 330 ; *Klass v Federal Republic of Germany* (1978) 2 EHRR (Pt 2) 214. For 'unlawful', see *Silver v United Kingdom* (1983) 5 EHRR 347  at [85]. The positive obligations arising from (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 8 are stated in *Marckx v Belgium* (1975) 3 EHRR 112 at [31]. See also *Craxi (No 2) v Italy* [2003] ECHR 369, 25337/94 and *Odievre v France* [2003] ECHR 86, 42326/98 .
- 5 *Rassemblement Jurassien and Unité Jurassienne v Switzerland* Decisions and Reports of the European Commission of Human Rights (1978) p 17; *Rassemblement Jurassien and Unité Jurassienne v Switzerland* Decisions and Reports of the European Commission of Human Rights (1979) p 120.
- 6 *Von Hannover v Germany* (2004) 16 BHRC 545 ; [2004] ECHR 294, 59320/00; *Karhuvaara and Iltalehti v Finland* [2004] ECHR 630, 53678/00.
- 7 (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/725; Aust TS 1991 No 4; 1977 UNTS 3; 28 ILM 1448 (1989); 29 ILM 1340 (1990)) art 16 states:

(1) 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

(2) The child has the right to the protection of the law against such interference or attacks.'

Further guarantees are found in *ibid* arts 8(1) (identification of child victims), 40(1), 40(2)(b)(vii) (penal law).

- 8 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Those guidelines are enshrined in the Commonwealth's legislation on privacy reproduced in *Federal Privacy Handbook: A guide to Federal Privacy Law and Practice*, Redfern Legal Centre Publishing, 1993. See also [80-1240].
- 9 United Nations Human Rights Committee, Draft of the *CCPR General Comment No 34: Freedoms of opinion and expression (Art 19)*, One Hundred and Second Session, 11-29 July 2011 at [18].

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(B) Privacy Legislation

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(5\) PRIVACY AND REPUTATION](#)

(B) PRIVACY LEGISLATION

[80-1240] Commonwealth

The paragraph below is current to **07 March 2018**

The (CTH) [Privacy Act 1988](#) regulates the way personal information is collected and handled by Commonwealth agencies¹ and some private organisations,² (collectively known as APP entities) through the operation of 13 Australian Privacy Principles based on the Organisation for Economic Cooperation and Development (the 'OECD') guidelines.³ It also covers Commonwealth government contracted service providers and subcontractors.⁴ Agencies and organisations are required to collect personal information and handle personal information in their possession in accordance with the 13 Australian Privacy Principles.⁵ Amendments in 1990 extended the legislation to cover credit providers and credit reporting agencies.⁶ To administer the legislation, a Privacy Commissioner (the 'Privacy Commissioner') was established, appointed by the Governor-General.⁷ In 2010 the Office of the Australian Information Commissioner (the 'Information Commissioner') was established with combined functions relating to privacy (under the (CTH) [Privacy Act 1988](#)) and freedom of information (under the (CTH) [Freedom of Information Act 1982](#)).⁸ The Information Commissioner (and thus the Privacy Commissioner)⁹ has powers under a range of Commonwealth legislation relating to the privacy of an individual,¹⁰ (though may also perform the freedom of information functions)¹¹ including to:

- (1) investigate complaints¹² that the Information Privacy Principles have been breached;¹³
- (2) approve privacy codes and variations of approved privacy codes;¹⁴
- (3) prepare and publish guidelines;¹⁵ and
- (4) conduct audits of records of personal information held by agencies, credit reporters and credit providers, and of tax file number practices.¹⁶

Complaints about an act or practice that may be an interference with the privacy of the individual may be taken direct to the Information Commissioner (where a complaint resolution procedure is not otherwise provided in an approved privacy code).¹⁷

(B) Privacy Legislation

The Information Commissioner is empowered to enforce the legislation against respondents other than Commonwealth agencies by making a determination that may involve performing an act or payment of compensation or costs,¹⁸ but the determination is not binding on the parties.¹⁹ The Information Commissioner or the complainant may take action in the Federal Court of Australia (the 'Federal Court') or Federal Circuit Court to enforce a determination.²⁰ Injunctions are also available.²¹ After a determination by the Information Commissioner neither a Commonwealth agency nor any other organisation is allowed to repeat or continue the conduct²² and Commonwealth agencies are additionally required to comply with the determination.²³

The Commonwealth has also legislated to authorise the transfer between agencies of data about persons, and the matching of data held by other agencies with that held by the Department of Social Security.²⁴ The steps in the matching cycle are laid down in the legislation.²⁵ Where an assistance agency (the Departments of Social Security, Human Services and Health, Employment, Education and Youth Affairs, and Veteran Affairs) proposes to reduce or cancel or otherwise take action relating to personal assistance, it must give the relevant person written notice.²⁶ Offences have been created to prevent unlawful access to or use of data held in the Commonwealth computers, and to cover damage to data held on them.²⁷ Further legislation complementary to the data matching provisions just described has also been enacted.²⁸ The (CTH) [Healthcare Identifiers Act 2010](#) prescribes the way healthcare identifiers (patient-unique identifiers) are assigned, used and disclosed (primarily the management of health information in the provision of healthcare and certain research undertakings).²⁹

Along with the other jurisdictions, the Commonwealth has provided protection in defined circumstances for persons whose convictions have been quashed, who have received pardons, and whose convictions have been spent.³⁰

Notes

- 1 See (CTH) [Privacy Act 1988](#) s 6 for definition of 'APP entity' which includes agencies. An agency is defined in ibid s 6 to include a variety of Commonwealth government entities.
- 2 See ibid s 6 for definition of 'APP entity' which includes organisations. Ibid s 6C defines organization as an individual, a body corporate, a partnership, any other unincorporated association or a trust. It excludes from the definition a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.
- 3 (CTH) [Privacy Act 1988](#) Preamble, s 14, Sch 1 Australian Privacy Principles:

- (1) open and transparent management of personal information;
- (2) anonymity and pseudonymity;
- (3) collection of solicited personal information;
- (4) dealing with unsolicited personal information;
- (5) notification of the collection of personal information;
- (6) use or disclosure of personal information;
- (7) direct marketing;
- (8) cross-border disclosure of personal information;
- (9) adoption, use or disclosure of government related identifiers;

(B) Privacy Legislation

- (10) quality of personal information;
- (11) security of personal information;
- (12) access to personal information; and
- (13) correction of personal information.

Ibid s 15 requires compliance by APP entities.

- 4 Ibid s 95B.
- 5 Ibid ss 13, 15. See also *Privacy Commissioner v Telstra Corp Ltd* (2017) 249 FCR 24 ; [347 ALR 1](#); [\[2017\] FCAFC 4](#); [BC201700165](#) (handling of metadata).
- 6 Ibid Pt IIIA. As to credit reporting generally see CONSUMER CREDIT [\[95-1065\]-\[95-1090\]](#).
- 7 (CTH) [Australian Information Commissioner Act 2010](#) s [14](#).
- 8 Ibid ss 5, 8, 9.
- 9 Ibid ss 9, 12.
- 10 (CTH) [Privacy Act 1988](#) Pt IV Div 2; (CTH) [Crimes Act 1914](#) Pt VIIC Div 5; (CTH) [Telecommunications Act 1997](#) s [309](#) (Information Commissioner monitoring compliance by carriers and carriage service providers); (CTH) [National Health Act 1953](#) s [135AA](#) (privacy guidelines on information about benefit payments under the Medicare Benefits Program or the Pharmaceutical Benefits Program), [135AB](#) (breaches of the guidelines); (CTH) [Data-matching Program \(Assistance and Tax\) Act 1990](#) ss [12-14](#); (CTH) [Australian Information Commissioner Act 2010](#) s [9](#).
- 11 (CTH) [Australian Information Commissioner Act 2010](#) s [12](#) (note also that certain functions may only be undertaken with the approval of the Information Commissioner: *ibid* s 12(4)).
- 12 (CTH) [Privacy Act 1988](#) ss [36\(1\)-\(2A\)](#) (standing), [36\(3\)](#) (complaint must be in writing), 42-51 (investigation process).
- 13 Ibid s 27(1)(a).
- 14 Ibid Pt IIIB, s 27(1)(a) subject to (CTH) [Australian Information Commissioner Act 2010](#) s [12\(4\)](#).
- 15 (CTH) [Privacy Act 1988](#) ss [27\(1\)\(b\)](#), (the Commissioner may conduct guidance related functions), [28](#) (guidance related functions).
- 16 Ibid ss 27(1)(c) (the Commissioner may conduct monitoring related functions), 28A (sets out guidance related functions).
- 17 Ibid s 36.
- 18 Ibid s 52(1), 52(1A), 52(3), 52(3A), 52(4).
- 19 Ibid s 52(1B).
- 20 Ibid s 55A.
- 21 Ibid s 55A(3). See also *ibid* s 98 (injunction where a contravention of the Act). See further *Seven Network (Operations) Ltd v Media Entertainment and Arts Alliance* (2004) 148 FCR 145 ; 134 IR 19; [\[2004\] FCA 637](#); [BC200402867](#) (injunction was granted under (CTH) [Privacy Act 1988](#) s 98 (polling of employees by a call centre on behalf of a union in breach of National Privacy Principles)).
- 22 (CTH) [Privacy Act 1988](#) ss [55](#) (for other organisations), [58](#) (for the Commonwealth agencies). See *Luck v Deakin University* [\[2009\] FCA 1032](#) ; [BC200908495](#) (Deakin University not an 'agency' within the meaning of (CTH) [Privacy Act 1988](#) s [6\(1\)](#)).
- 23 (CTH) [Privacy Act 1988](#) s [59](#).
- 24 (CTH) [Data-matching Program \(Assistance and Tax\) Act 1990](#).
- 25 Ibid s 7.
- 26 Ibid s 11.
- 27 (CTH) [Crimes Act 1914](#) Pt VIIC Div 5.
- 28 (CTH) [Crimes Act 1914](#) Pt VIIC Div 5.
(CTH) [National Health Act 1953](#) ss [135AA](#), [135AB](#), [135AC](#); (CTH) [Income Tax Assessment Act 1936](#) Pt VA; (CTH) [Taxation Administration Act 1953](#); (CTH) [Freedom of Information Act 1982](#); (CTH) [Archives Act 1983](#).
- 29 (CTH) [Healthcare Identifiers Act 2010](#) Pts 2, 3.

30 (CTH) [Crimes Act 1914](#) Pt VIIC. See also [\[80-400\]](#).

[80-1245] Specific provisions

The paragraph below is current to **07 March 2018**

Much Commonwealth legislation contains secrecy or confidentiality provisions. Some of these are designed to ensure that the information gathered by a Commonwealth agency is used only for the purposes of that agency.¹ Some of these provisions, however, include an exception that allows:

- (1) a court to require disclosure for purposes of proceedings under the legislation;²
- (2) disclosure by an official to specified persons in related administrative areas in the course of duty;³ and
- (3) disclosure by an official to specified persons in connection with freedom of information obligations.⁴

The Commonwealth freedom of information legislation exempts 'personal information' from its regime⁵ and in doing so leaves the field free for the operation of the privacy legislation, which uses the same term.⁶

Notes

- 1 See, for example:

(CTH) [Australian Human Rights Commission Act 1986](#) s 49; (CTH) [Sex Discrimination Act 1984](#) s 92; (CTH) [Racial Discrimination Act 1975](#) s 27F; (CTH) [Taxation Administration Act 1953](#) Sch 1 Div 355 (formerly (CTH) [Income Tax Assessment Act 1936](#) s 16 (repealed) but repealed by (CTH) [Tax Laws Amendment \(Confidentiality of Taxpayer Information\) Act 2010](#); (CTH) [National Health Act 1953](#) s 135A).

See also McGinness J, 'Secrecy Provisions in Commonwealth Legislation', (1990) 19 *Federal Law Review* pp 49-97 (contains a review of some 150 provisions included in a wide variety of Commonwealth legislation).

- 2 As to legislation containing such provisions see, for example:

(CTH) [Australian Human Rights Commission Act 1986](#) s 49(2); (CTH) [Racial Discrimination Act 1975](#) s 27F(3A); (CTH) [Taxation Administration Act 1953](#) Sch 1 Div 355 (formerly (CTH) [Income Tax Assessment Act 1936](#) s 16(3) (repealed) but repealed by (CTH) [Tax Laws Amendment \(Confidentiality of Taxpayer Information\) Act 2010](#); (CTH) [National Health Act 1953](#) s 135A(2).

- 3 See, for example:

(CTH) [Taxation Administration Act 1953](#) Sch 1 Div 355 (formerly (CTH) [Income Tax Assessment Act 1936](#) s 16(4) (repealed) but repealed by (CTH) [Tax Laws Amendment \(Confidentiality of Taxpayer Information\) Act 2010](#); (CTH) [Australian Human Rights Commission Act 1986](#) s 49(4B); (CTH) [National Health Act 1953](#) s 135A(3); (CTH) [Racial Discrimination Act 1975](#) s 27F(3A).

- 4 See, for example, (CTH) [Australian Human Rights Commission Act 1986](#) s 49(4); (CTH) [Racial Discrimination Act 1975](#) s 27F(3)(c).

- 5 (CTH) [Freedom of Information Act 1982](#) ss 4 (definition of 'personal information'), 27A (consultation where access is sought to a document containing personal information), 47F (personal privacy exemption). Note, however, that a new public interest test is to be applied, which is deliberately weighted towards disclosure, as part of a new regime for providing access to government information and promoting a culture of disclosure across government ((CTH) [Freedom of Information Amendment \(Reform\) Act 2010](#)).

6 (CTH) [Privacy Act 1988](#) ss 6 (definition of 'personal information'), 14.

[80-1250] States and Territories

The paragraph below is current to **07 March 2018**

The Australian Capital Territory and Victoria have each included among charter-listed rights a privacy right modelled on the International Covenant on Civil and Political Rights.¹ In relation to information privacy, the (CTH) [Privacy Act 1988](#) extends to the Australian Capital Territory but it otherwise does not regulate State or Territory agencies.² All jurisdictions apart from South Australia and Western Australia have enacted legislation in relation to their own agencies concerning collecting, managing and disclosing personal information, which adopts to one degree or other principles or guidelines similar to the Australian Privacy Principles in the Commonwealth legislation.³

A Privacy Commissioner or Information Commissioner has been established in many jurisdictions whose duties include:

- (1) conducting research and collating information on any matter relating to privacy of persons;⁴
- (2) receiving and investigating complaints and breaches;⁵
- (3) inquiring into and reporting on the desirability of legislative or administrative action in the interest of privacy of persons.⁶

The Information Commissioner has powers to gather evidence, and (in the case of New South Wales) has protections similar to those of a Royal Commission.⁷ He or she may publish material⁸ and is required to submit an annual report.⁹ Provision is also made for other reports.¹⁰

In addition to privacy-specific legislation, States and Territories have enacted individual aspects of a privacy right in areas relating to surveillance, telecommunications interception, spent convictions, freedom of information (access to government records) and health records.¹¹

Notes

1 (ACT) [Human Rights Act 2004](#) s 12. See *Australian Securities and Investments Commission v Sigalla (No 2)* (2010) 271 ALR 164 ; 240 FLR 327; [2010] NSWSC 792; BC201004955 at [126] per White J (observation that demanding information about personal finances pursuant to an invalid notice inconsistent with the () International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 17, even if it could be obtained lawfully)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 13. The nature of the privacy right was reviewed in *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; BC201004776 at [77], [78] per Emerton J (claim to interference in private life because the authorities controlled the way a prisoner could exercise her rights to family and privacy (when seeking IVF treatment)). See also *WBM v Chief Cmr of Police* (2010) 27 VR 469 ; 203 A Crim R 167; [2010] VSC 219; BC201003468 (the reporting obligations substituted in (VIC) [Sex Offenders Registration Act 2004](#) intrude on privacy but were clearly intended by parliament); *Jane Doe v Australian Broadcasting Corp* [2007] VCC 281



(B) Privacy Legislation

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 2 (CTH) [Privacy Act 1988](#); (CTH) [Australian Capital Territory Government Service \(Consequential Provisions\) Act 1994](#) s 23, Sch 3.

- 3 (ACT) [Information Privacy Act 2014](#) Sch 1, Pt 1.2

(NT) [Information Act 2002](#) Pt 5, Sch 2. See *R v Woods* (2010) 246 FLR 4 ; [\[2010\] NTSC 69](#); [BC201009534](#) at [\[92\]](#) ((NT) [Information Act 2002](#) does not prevent the Sheriff or Deputy Sheriff from collecting or using criminal records for the purpose of determining juror disqualification).

(NSW) [Privacy and Personal Information Protection Act 1998](#) Pts 2 (information protection principles), 3 (privacy codes of practice and management plans)

(QLD) [Information Privacy Act 2009](#) s 26, Sch 3. See *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706 ; [2003] QDC 151.

(TAS) Personal Information and Protection Act 2004 ss 6, 16, Sch 1 (personal information protection principles)

(VIC) [Privacy and Data Protection Act 2014](#) s 18. See *Jane Doe v Australian Broadcasting Corp* [2007] VCC 281 .

South Australia has established a Privacy Committee of South Australia, with six members appointed by the Minister assisting the Premier in Public Sector Management, to oversee application of the privacy principles (Cabinet Administrative Instruction 1/89, also known as the Information Privacy Principles Instruction, and Premier and Cabinet Circular 12, as amended by Cabinet on 18 May 2009).

In Western Australia, the (WA) Information Privacy Bill 2007 received its Legislative Council Second Reading on 4 December 2007.

- 4 For the Australian Capital Territory see (CTH) [Privacy Act 1988](#) s 27(1)(c) (broader functions in relation to interferences with privacy, health care identifiers, tax file numbers, credit reporting are set out in *ibid* ss 27-29)

(NT) [Information Act 2002](#) s 86(1)(g)

(NSW) [Privacy and Personal Information Protection Act 1998](#) s 36(2)(f)

(QLD) [Information Privacy Act 2009](#) ss 142 (privacy commissioner's role is as deputy to the information commissioner), 135(1)

(VIC) [Privacy and Data Protection Act 2014](#) s 8C(2)(h).

In Tasmania, (TAS) Personal Information and Protection Act 2004 is administered by the Department of Justice. The Tasmanian Ombudsman is responsible for complaint handling.

- 5 (ACT) [Information Privacy Act 2014](#) s 29(d)

(NT) [Information Act 2002](#) s 87

(NSW) [Privacy and Personal Information Protection Act 1998](#) s 36(2)(k)

(QLD) [Information Privacy Act 2009](#) s 136(d), Ch 5

(VIC) [Privacy and Data Protection Act 2014](#) s 8C(2)(d).

- 6 (NT) [Information Act 2002](#) s 86(1)(f)

(NSW) [Privacy and Personal Information Protection Act 1998](#) s 36(2)(j)

(QLD) [Information Privacy Act 2009](#) s 135(1)(a)

(VIC) [Privacy and Data Protection Act 2014](#) s 8C(1)(e), 8C(1)(h).

For the Australian Capital Territory see (CTH) [Privacy Act 1988](#) s 27(1)(b).

- 7 For the Australian Capital Territory, see (CTH) [Privacy Act 1988](#) ss 44-47.

In the Northern Territory, powers are more limited: (NT) [Information Act 2002](#) ss 87 (powers only that are necessary and convenient for the performance of his or her functions), 88 (duty to assist), 124 (power to compel evidence at hearing).

(NSW) [Privacy and Personal Information Protection Act 1998](#) ss 37, 38(1) (grants the Committee those powers, authorities, protections and immunities conferred by (NSW) [Royal Commissions Act 1923](#) Pt 2)

(B) Privacy Legislation

- (QLD) [Information Privacy Act 2009](#) Pt 6 (power to issue compliance notices)
- (VIC) [Privacy and Data Protection Act 2014](#) Div 9 (compliance notices, power to obtain documents and information and examine witnesses).
- 8** (NSW) [Privacy and Personal Information Protection Act 1998](#) s 36(2)(b), 36(2)(j)
- (QLD) [Information Privacy Act 2009](#) s 135(1)(b)
- (VIC) [Privacy and Data Protection Act 2014](#) s 8C(1)(b), 8C(1)(g).
- For the Australian Capital Territory see (CTH) [Privacy Act 1988](#) s [27\(1\)\(e\)](#).
- 9** (NT) [Information Act 2002](#) s [98](#)
- (NSW) [Privacy and Personal Information Protection Act 1998](#) s 61A
- (QLD) [Information Privacy Act 2009](#) s [193](#)
- (VIC) [Privacy and Data Protection Act 2014](#) s [116](#).
- 10** (NT) [Information Act 2002](#) s [99](#) (Commissioner is to report at Minister's direction)
- (NSW) [Privacy and Personal Information Protection Act 1998](#) s 61C
- (QLD) [Information Privacy Act 2009](#) s [194](#)
- (VIC) [Privacy and Data Protection Act 2014](#) s 8D(1)(f).
- For the Australian Capital Territory see (CTH) [Privacy Act 1988](#) ss [30-33B](#).
- 11** (ACT) [Listening Devices Act 1992](#); (ACT) Australian Capital Territory Government Service (Consequential Provisions) Act 1994; (ACT) [Health Records \(Privacy and Access\) Act 1997](#); (ACT) Freedom of Information Act 1989; (ACT) [Spent Convictions Act 2000](#); (ACT) [Territory Records Act 2002](#) (public records)
- (NT) [Criminal Records \(Spent Convictions\) Act 1992](#); (NT) [Telecommunications \(Interception\) Northern Territory Act 2001](#); (NT) [Surveillance Devices Act 2007](#)
- (NSW) [Telecommunications \(Interception and Access\) \(New South Wales\) Act 1987](#); (NSW) [State Records Act 1998](#); (NSW) [Criminal Records Act 1991](#) (spent convictions); (NSW) [Access to Neighbouring Land Act 2000](#); (NSW) [Crimes \(Forensic Procedures\) Act 2000](#); (NSW) [Health Records and Information Privacy Act 2002](#); (NSW) Workplace Surveillance Act 2005; (NSW) [Surveillance Devices Act 2007](#)
- (QLD) [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#); (QLD) [Invasion of Privacy Act 1971](#); (QLD) [Police Powers and Responsibilities Act 2000](#) Ch 4; (QLD) [Public Records Act 2002](#); (QLD) Private Employment Agents (Code of Conduct) Regulation 2005; (QLD) [Right to Information Act 2009](#)
- (SA) Listening and Surveillance Devices Act 1972; (SA) [State Records Act 1997](#); (SA) [Telecommunications \(Interception\) Act 2012](#)
- (TAS) [Archives Act 1983](#); (TAS) [Listening Devices Act 1991](#); (TAS) [Access to Neighbouring Land Act 1992](#); (TAS) [Telecommunications \(Interception\) Tasmania Act 1999](#); (TAS) [Annulled Convictions Act 2003](#) (spent convictions); (TAS) [Right to Information Act 2009](#)
- (VIC) [Public Records Act 1973](#); (VIC) [Surveillance Devices Act 1999](#); (VIC) [Freedom of Information Act 1982](#); (VIC) [Telecommunications \(Interception\) \(State Provisions\) Act 1988](#); (VIC) [Health Records Act 2001](#). For claims of legal professional privilege under (VIC) [Freedom of Information Act 1982](#) s [32](#), questions of waiver, and political accountability as a basis of preventing disclosure in the public interest under *ibid* s 50(4), see *Osland v Secretary to the Dept of Justice* (2008) 234 CLR 275 ; [249 ALR 1](#); [2008] HCA 37; [BC200807002](#).
- (WA) [Spent Convictions Act 1988](#); (WA) [Freedom of Information Act 1992](#); (WA) [Health and Disability Services \(Complaints\) Act 1995](#); (WA) [Telecommunications \(Interception and Access\) Western Australia Act 1996](#); (WA) [Surveillance Devices Act 1998](#); (WA) [State Records Act 2000](#).

(C) Right to Privacy of the Person

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(5\) PRIVACY AND REPUTATION](#)

(C) RIGHT TO PRIVACY OF THE PERSON

[80-1255] Body privacy

The paragraph below is current to **07 March 2018**

Privacy of the body can be infringed by laws relating to assault or battery, or authorising search or detention. There is protection from direct invasion or assault in the criminal law,¹ and in the law of tort by actions relating to trespass to the person and in negligence generally.² There is, in the common law, a fundamental right to personal inviolability.³ However, there is no movement in the law which would sustain the claim of an implied 'right to know' in relation to the request for information contained in personal medical records.⁴ In relation to search, the common law does not confer authority on police officers to 'frisk' persons without consent before their arrest,⁵ and requires return after arrest, or on release, of all articles not required for evidence.⁶ However, statutory provisions now allow police officers without warrant to search a person for goods reasonably suspected of being stolen.⁷ Legislation also authorises search after arrest.⁸ Legislation in all jurisdictions except the Commonwealth and Victoria also authorises, after arrest, medical examination of a kind reasonably necessary to obtain evidence.⁹

There is privacy protection in relation to Commonwealth records¹⁰ and also under the legislation of other jurisdictions.¹¹ In addition, legislation in most jurisdictions now provides protection from discrimination on grounds of disability or impairment¹² and there are limited protections in tort law relating to confidentiality and negligence.¹³

Breath testing of motor vehicle drivers may also be required, involving the taking of blood samples and the use of breathalysers. The testing may follow reasonable suspicion of driving under the influence of alcohol or may be random.¹⁴ Questions of unlawful detention or false imprisonment may also in some circumstances be relevant.¹⁵

Fingerprinting without consent is not permissible under common law,¹⁶ but is authorised by statute in all jurisdictions,¹⁷ subject to the measure being required for identification¹⁸ or to assist in connecting a suspect with an offence.

Photographs may be taken of persons under arrest, but for purposes of identification only.¹⁹

(C) Right to Privacy of the Person

Domestic violence legislation now in operation in most jurisdictions represents an important addition to body privacy, particularly in relation to women.²⁰

There are also limited possibilities of an action in tort or contract for mental or emotional distress or suffering.²¹

Notes

- 1 See CRIMINAL LAW [\[130-1000\]](#). See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 232; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 per Mason CJ, Dawson, Toohey and Gaudron JJ.
- 2 As to trespass see TORT [\[415-320\]-\[415-550\]](#).
- 3 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 253 per Mason CJ, Dawson, Toohey and Gaudron JJ, at 265, 266 per Brennan J; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 (a fundamental right to personal inviolability exists in the common law, a right which underscores the principles of assault, both criminal and civil); *RK v Mirik* [2009] VSC 14 ; [BC200900212](#) at [\[5\]](#) per Bell J; *Re S, a Medical Practitioner* (2008) 18 Tas R 269 ; [\[2008\] TASSC 73](#); [BC200810401](#) at [\[20\]](#) per Slicer J. Note in the context of the () International Covenant on Civil and Political Rights (New York, 19 December 1966; 999 UNTS 171) art 7, *Brough v Australia*, Communication No 1184/2003, CCPR/C/86/D/1184/2003 (2006) at [9.5] (no violation of () International Covenant on Civil and Political Rights (New York, 19 December 1966; 999 UNTS 171) art 7 (no one shall be subjected without free consent to medical or scientific experimentation) as a result of prescription of anti-psychotic medication without consent, noting that the prescription was intended to control the author's self-destructive behaviour).
- 4 *Breen v Williams* (1996) 186 CLR 71 ; [138 ALR 259](#); 70 ALJR 772; [BC9604086](#). It was held that a doctor may refuse to make available to a patient the contents of the records relating to that patient. The court unanimously agreed that there was neither a fiduciary obligation nor a contractual obligation nor a proprietary right involved. See also [\[80-390\]](#). Medical records also cannot be prevented from being revealed to administrative bodies and courts on the grounds of public interest immunity: *Royal Women's Hospital v Medical Practitioners Board of Victoria* [\(2006\) 15 VR 22](#) ; [\[2006\] VSCA 85](#); [BC200602419](#). See also *Maguire v Lynch* [\[2007\] QCA 290](#) ; [BC200707625](#) at [\[7\]](#) per Jerrard and Holmes JJA, and Philippides J (veterinary surgeon not bound to provide records of treatment for greyhounds (applying *Breen v Williams* (1996) 186 CLR 71 ; [138 ALR 259](#); 70 ALJR 772; [BC9604086](#)); *Victoria v Nine Network* [\(2007\) 19 VR 476](#) ; [\[2007\] VSC 431](#); [BC200710734](#) at [98](#) per Osborn J (noting that (VIC) *Health Records Act 2001*, (VIC) Information Privacy Act 2000 (repealed), (VIC) Evidence Act 1958 s 28 and (VIC) *Charter of Human Rights and Responsibilities Act 2006* s [13](#) tend to support the view that the privacy of medical records should be respected unless there is a demonstrable public interest requiring their disclosure); *C Inc v Australian Crime Commission* [\(2008\) 106 ALD 453](#) ; [251 ALR 424](#); [\[2008\] FCA 1806](#); [BC200810540](#) (failure to treat the best interests of a group of Aboriginal children as primary consideration in the privacy and confidentiality of their medical records); *NTD8 v Australian Crime Commission (No 2)* [\(2008\) 106 ALD 23](#) ; [\[2008\] FCA 1551](#); [BC200809115](#) (consideration of notice to produce medical records of patients presenting for treatment associated with family and domestic violence and/or other forms of assault including sexual assault failed to have proper regard to best interests of children).

For freedom of information requests see ADMINISTRATIVE LAW [\[10-60\]-\[10-310\]](#).

- 5 This would involve detention, and detention without arrest is unlawful: *Bessell v Wilson* (1853) 20 LTOS 233; [118 ER 518](#); *Leigh v Cole* (1853) 21 LTOS 144; 6 Cox CC 329. See also [\[80-1020\]-\[80-1085\]](#) and POLICE AND EMERGENCY SERVICES [\[320-375\]-\[320-410\]](#).
- 6 *R v Lawrence* (1890) 16 VLR 164 ; 11 ALT 147; *R v Cane* (1890) 16 VLR 303 ; 11 ALT 179.
- 7 (CTH) *Customs Act 1901* s [219M](#) (allows customs officers to frisk search suspects)
(NT) *Police Administration Act 1978* s [119](#) (urgent searches)
(ACT) *Crimes Act 1900* s [207](#)
(NSW) *Law Enforcement (Powers and Responsibilities) Act 2002* s 21

(C) Right to Privacy of the Person

(QLD) [Police Powers and Responsibilities Act 2000](#) s 29

(SA) [Summary Offences Act 1953](#) s 68(1)(b)

(TAS) [Police Offences Act 1935](#) s 57A (only hawkers' packs)

(VIC) Magistrates' Court Act 1989 s 78 (search warrant also authorises arrest)

(WA) [Criminal Investigation Act 2006](#) s 68.

As to search of premises with or without a warrant while searching for the perpetrator of a serious crime see [\[80-1285\]](#).

8 (CTH) [Crimes Act 1914](#) ss 3ZE, 3ZF, 3ZH

(ACT) [Crimes Act 1900](#) ss 223, 226

(NT) [Police Administration Act 1978](#) s 144

(NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 24

(QLD) [Police Powers and Responsibilities Act 2000](#) s 443

(SA) [Summary Offences Act 1953](#) s 81(1)

(TAS) [Police Offences Act 1935](#) s 58B

(WA) [Criminal Investigation Act 2006](#) ss 63, 64, 68, 69A, 69B.

9 (CTH) [Crimes Act 1914](#) s 3S (specifically provides that a warrant under the Act cannot authorise a body cavity search or a strip search)

(ACT) [Crimes \(Forensic Procedures\) Act 2000](#) (intimate forensic procedure)

(NT) [Police Administration Act 1978](#) s 145

(NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 138

(QLD) [Police Powers and Responsibilities Act 2000](#) Ch 17

(SA) [Summary Offences Act 1953](#) s 81(2)

(TAS) [Forensic Procedures Act 2000](#)

(WA) [Criminal Investigation Act 2006](#) Pt 9; (WA) [Criminal Investigation \(Identifying People\) Act 2002](#).

See *Sleiman v Murray* (2009) 231 FLR 224 ; [\[2009\] ACTSC 82](#); [BC200906022](#) at [\[18\]-\[21\]](#) per Refshauge J (review of the common law right to refuse forensic procedure or a medical examination, including *R v Boulton* (1871) 12 Cox CC 87  at 91; *McAneny v Kearney*; *Ex parte Kearney* [\[1966\] Qd R 306](#)  at [310-11](#)) (decision upheld on appeal in *Sleiman v Murray* [\(2010\) 173 ACTR 1](#) ; [\[2010\] ACTCA 2](#); [BC201000705](#)).

10 See [\[80-1240\]](#).

11 See [\[80-1250\]](#).

12 See [\[80-215\]-\[80-830\]](#).

13 As to negligence see NEGLIGENCE [\[300-5\]-\[300-60\]](#). As to confidentiality see INTELLECTUAL PROPERTY [\[240-500\]-\[240-1145\]](#).

14 (NT) [Traffic Act 1987](#) ss 23, 25, 26

(NSW) [Road Transport Act 2013](#) Sch 3 Pt 2 Div 2

(QLD) [Transport Operations \(Road Use Management\) Act 1995](#) s 80

(SA) [Road Traffic Act 1961](#) ss 47DA, 47E, 47F

(TAS) [Road Safety \(Alcohol and Drugs\) Act 1970](#) ss 7A, 7B, 8-10

(VIC) [Road Safety Act 1986](#) s 53

(WA) [Road Traffic Act 1974](#) ss 66, 68.

(C) Right to Privacy of the Person

- 15 See [\[80-1085\]](#). See also *Director of Public Prosecutions (DPP) v Piscopo* [\(2010\) 56 MVR 516](#) ; 201 A Crim R 429; [\[2010\] VSC 498](#); [BC201008419](#); *Director of Public Prosecutions (DPP) v Rukandin* (2010) 204 A Crim R 382 ; [\[2010\] VSC 499](#); [BC201008409](#).
- 16 *Carr v R* (1973) 127 CLR 662 ; 47 ALJR 562.
- 17 (CTH) [Crimes Act 1914](#) s [3ZJ](#). See also *ibid* s 23Q (provides rights for persons under arrest based on the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; 999 UNTS 171) art 7)
- (ACT) [Crimes \(Forensic Procedures\) Act 2000](#) ss [7](#), [18](#)
- (NT) [Police Administration Act 1978](#) s [146](#)
- (NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 133
- (QLD) [Police Powers and Responsibilities Act 2000](#) Ch 17, Pt 4
- (SA) [Summary Offences Act 1953](#) s [81\(4\)\(a\)](#)
- (TAS) [Forensic Procedures Act 2000](#) Pt 2
- (VIC) [Crimes Act 1958](#) ss [464K](#), [464L](#), [464M](#), [464N](#) (taking of finger prints). See *Grollo v Bates* (1994) 53 FCR 218 ; [125 ALR 492](#); 75 A Crim R 271; [BC9405908](#) (order under (VIC) [Crimes Act 1958](#) s [464M](#) an administrative act).
- (WA) [Criminal Investigation Act 2006](#) Pt 9. See also (WA) [Criminal Investigation \(Identifying People\) Act 2002](#) s [11](#).
- As to fingerprinting see also EVIDENCE [\[195-770\]](#), CRIMINAL LAW [\[130-1\]](#).
- 18 The identification is to be for the court and not the arresting police and the court always has a discretion to exclude the evidence: *R v Carr* [\[1972\] 1 NSWLR 608](#)  at [610](#), [611](#) per Kerr CJ, McClellens, Brereton JJ (affirmed *Carr v R* (1973) 127 CLR 662 ; 47 ALJR 562). See also *Callis v Gunn* [\[1964\] 1 QB 495](#) ; [\[1963\] 3 All ER 677](#); *R v Ireland* (1970) 126 CLR 321  at 334, 335; [1970] ALR 727; (1970) 44 ALJR 263; [BC7000120](#) per Barwick CJ; *Nicholas v R* (1998) 193 CLR 173  at 194; [151 ALR 312](#); 72 ALJR 456; [BC9800075](#) per Brennan CJ; *R v Swaffield* (1998) 192 CLR 159  at 176; [151 ALR 98](#); [BC9800011](#) per Brennan CJ.
- 19 (CTH) [Crimes Act 1914](#) s [3ZJ](#). See also *ibid* s 23Q (provides rights for persons under arrest based on (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; 999 UNTS 171) art 7)
- (ACT) [Crimes \(Forensic Procedures\) Act 2000](#) ss [5](#), [18](#)
- (NT) [Police Administration Act 1978](#) s [146](#)
- (NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 133
- (QLD) [Police Powers and Responsibilities Act 2000](#) Ch 17, Pt 4
- (SA) [Summary Offences Act 1953](#) s [81\(4\)\(a\)](#)
- (TAS) [Forensic Procedures Act 2000](#) ss [3](#), [8](#)
- (WA) [Criminal Investigation Act 2006](#) Pt 9. See also (WA) [Criminal Investigation \(Identifying People\) Act 2002](#) s [11](#).
- See *Re Application by Huy Huu Lee* [\[2009\] ACTSC 98](#) ; [BC200907759](#) ((ACT) [Human Rights Act 2004](#) s [12](#) may be relevant to photograph taken during execution of defective search warrant).
- There are no equivalent provisions in Victoria.
- See also *R v Ireland* (1970) 126 CLR 321 ; [1970] ALR 727; (1970) 44 ALJR 263; [BC7000120](#) (photographs of scratches on hands).
- 20 See FAMILY LAW [\[205-7690\]-\[205-7815\]](#).
- 21 Generally see CONTRACT [\[110-11340\]-\[110-11350\]](#) and TORT [\[415-215\]-\[415-235\]](#).

[80-1260] Privacy of the family

The paragraph below is current to **07 March 2018**

Legislation enacted by all jurisdictions has the effect of providing some protection to the family,¹ though only in the Australian Capital Territory and Victoria is the right to protection of families and children and privacy recognised in charter form.² To the extent that the privacy of families involves discrimination on account of race, disability or other grounds made unlawful under Commonwealth, State and Territory anti-discrimination legislation, remedies would be available to protect their interests. Protection is also available under the (CTH) [Family Law Act 1975](#).³ Families would also be able to claim a degree of protection of privacy under the laws of trespass⁴ relating to land and to person, under domestic violence legislation⁵ and under the confidentiality provisions contained in much Commonwealth and some State legislation.⁶

Notes

1 See [\[80-1240\]-\[80-1250\]](#).

2 (ACT) [Human Rights Act 2004](#) ss [11](#), [12](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss [13](#), [17](#).

As to protection of families and children see [\[80-1291\]](#). For significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

3 Generally see FAMILY LAW [\[205-7000\]-\[205-7176\]](#).

4 As to trespass generally see TORT [\[415-320\]-\[415-550\]](#).

5 See FAMILY LAW [\[205-7690\]-\[205-7815\]](#).

6 As to Commonwealth provisions see [\[80-1240\]](#), [\[80-1245\]](#). State legislation containing similar provisions protecting privacy, even if under the rubric of secrecy or confidentiality, include:

(ACT) [Listening Devices Act 1992](#); (ACT) Australian Capital Territory Government Service (Consequential Provisions) Act 1994; (ACT) [Health Records \(Privacy and Access\) Act 1997](#); (ACT) Freedom of Information Act 1989; (ACT) [Spent Convictions Act 2000](#); (ACT) [Territory Records Act 2002](#) (public records)

(NT) [Criminal Records \(Spent Convictions\) Act 1992](#); (NT) [Telecommunications \(Interception\) Northern Territory Act 2001](#); (NT) [Surveillance Devices Act 2007](#)

(NSW) [Community Welfare Act 1987](#) s 76 (no disclosure except on certain grounds including for legal proceedings and Ombudsman inquiries); (NSW) [Telecommunications \(Interception and Access\) \(New South Wales\) Act 1987](#); (NSW) [State Records Act 1998](#); (NSW) [Criminal Records Act 1991](#) (Spent Convictions); (NSW) [Access to Neighbouring Land Act 2000](#); (NSW) [Crimes \(Forensic Procedures\) Act 2000](#); (NSW) [Health Records and Information Privacy Act 2002](#); (NSW) Workplace Surveillance Act 2005; (NSW) [Surveillance Devices Act 2007](#); (NSW) [Mental Health Act 2007](#) s 189 (restrictions on disclosure of information obtained in connection with (NSW) [Mental Health Act 2007](#) or (NSW) [Mental Health \(Forensic Provisions\) Act 1990](#))

(QLD) [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#); (QLD) [Invasion of Privacy Act 1971](#); (QLD) [Police Powers and Responsibilities Act 2000](#) Ch 4; (QLD) [Public Records Act 2002](#); (QLD) Private Employment Agents (Code of Conduct) Regulation 2005; (QLD) [Right to Information Act 2009](#)

(SA) Listening and Surveillance Devices Act 1972; (SA) Telecommunications (Interception) Act 1988; (SA) [State Records Act 1997](#)

(TAS) [Archives Act 1983](#); (TAS) Freedom of Information Act 1991 (repealed); (TAS) [Listening Devices Act 1991](#); (TAS) [Access to Neighbouring Land Act 1992](#); (TAS) [Telecommunications \(Interception\) Tasmania Act 1999](#); (TAS) [Annulled Convictions Act 2003](#) (spent convictions)

(C) Right to Privacy of the Person

(VIC) [Public Records Act 1973](#); (VIC) [Surveillance Devices Act 1999](#); (VIC) [Freedom of Information Act 1982](#); (VIC) [Telecommunications \(Interception\) \(State Provisions\) Act 1988](#); (VIC) [Health Records Act 2001](#); (VIC) [Public Health and Wellbeing Act 2008](#) Pt 5 Div 4 (restrictions on disclosure)

(WA) [Spent Convictions Act 1988](#); (WA) [Freedom of Information Act 1992](#); (WA) [Health and Disability Services \(Complaints\) Act 1995](#); (WA) [Telecommunications \(Interception and Access\) Western Australia Act 1996](#); (WA) [Surveillance Devices Act 1998](#); (WA) [State Records Act 2000](#).

As to information privacy see [\[80-1240\]-\[80-1250\]](#). As to confidentiality requirements for the care and treatment of mental health patients see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-265\]](#).

[80-1265] Sexuality

The paragraph below is current to **07 March 2018**

Sexual conduct in private between consenting adults is not to be subject to any arbitrary interference with the privacy of the individuals concerned.¹ Such interference may not be made by or under the law of the Commonwealth, a State or Territory.² For this purpose, the term 'privacy' has the meaning contained in the International Covenant on Civil and Political Rights 1966.³ The phrase 'sexual conduct' has been narrowly construed to cover physical expression of sexual desire and exclude matters incidental to sexual conduct such as termination of pregnancy or the production and distribution of pornographic material.⁴ The term 'arbitrary' has been construed as governmental conduct manifesting capricious prejudice.⁵ It appears that the (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#) may not apply to prosecutions for physical expressions of sexual desire that were contrary to State legislation before the enactment of that Act.⁶ An application seeking a declaration that provisions in State legislation offend against the Commonwealth legislation⁷ may be available even if a person practising sexual conduct has not been, and is not intended to be, charged with an offence, on the grounds that the plaintiffs have sufficient interest to support the action, and that a matter that is justiciable has been raised.⁸

A prohibition on an employee to use the Commonwealth equipment to view pornography is not contrary to the right of privacy.⁹

The Australian Capital Territory and Victoria provide for persons to apply for the extinguishment of historical homosexuality convictions.¹⁰

Notes

- ¹ (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#). This legislation was enacted following a finding of the United Nations Human Rights Committee established under (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 28, in response to a complaint from an individual resident in Australia, that the existing law in Tasmania infringed the Covenant: *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994) to the United Nations Human Rights Committee established under the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) pursuant to the first Optional Protocol to that Covenant, *ibid* art 5. As to the right to free expression of sexuality see [\[80-2080\]](#).
- ² (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#) s 4. The offending provisions of the (TAS) Criminal Code (*ibid* ss 122(a), 122(c), 123), upon which the appeal to the Human Rights Committee was based, were repealed by (TAS) Criminal Code Amendment Act 1997 ss 4, 5. As a consequence, sexual intercourse in private between adult consenting males is no longer an offence in any Australian jurisdiction. See also CRIMINAL LAW [\[130-2120\]](#).
- ³ (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 17.

(C) Right to Privacy of the Person

- 4 *Cannavan v Lettvale Pty Ltd* [2003] QCA 528 ; [BC200307198](#) at [6] per de Jersey J.
- 5 *R v Stringer* (2000) 116 A Crim R 198 ; [2000] NSWCCA 293; [BC200004512](#) per Adams J (in dissent).
- 6 *R v Stringer* (2000) 116 A Crim R 198 ; [2000] NSWCCA 293; [BC200004512](#) per Grove J and Smart AJ. Although neither judge directly considers the (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#) in their reasoning this appears to logically follow from their conclusions.
- 7 (CTH) [Human Rights \(Sexual Conduct\) Act 1994](#).
- 8 *Croome v Tasmania* (1997) 191 CLR 119 ; [142 ALR 397](#); 71 ALJR 430; [BC9700297](#) at 410 per Gaudron, McHugh and Gummow JJ: 'Breach [of the criminal law] is attended by risk of prosecution and punishment and also may have consequences for the broader civil legal order as it applies to the individual. Thus, doctrines of illegality play a significant part in the operation of the law of tort and contract.'
- 9 *Griffiths v Rose* (2011) 192 FCR 130 ; 201 IR 216; [2011] FCA 30; [BC201100170](#) (privacy not infringed by a direction not to view pornography; no breach of () International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 17 or (CTH) [Privacy Act 1988](#) ss [14](#), [16](#)).
- 10 (ACT) [Spent Convictions Act 2000](#) s [19B](#) (inserted by the (ACT) Spent Convictions (Historical Homosexual Convictions Extinguishment) Amendment Act 2015 (repealed))
(VIC) [Sentencing Act 1991](#) Pt 8 (inserted by the (VIC) [Sentencing Amendment \(Historical Homosexual Convictions Expungement\) Act 2014](#)).

[80-1270] Privacy of correspondence

The paragraph below is current to **07 March 2018**

Although there is no general law protecting the privacy of personal correspondence,¹ there is an equitable principle that the courts will restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.² The principle 'was fashioned to protect the personal, private and proprietary interests of the citizen' and operates according to principles of public rather than private interest.³ Equitable measures of relief will be available, such as injunction, against both actual and threatened abuse of confidential information that does not involve a tort, a breach of contract, of some wider fiduciary duty or a copyright or trade mark right.⁴ The basis of the right is not proprietary but 'lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained'.⁵ To be operative, the equitable right needs to have a quality of confidence, and preservation of that confidentiality needs to be 'of substantial concern' to the plaintiff.⁶

Notes

- 1 Note, however, that the High Court of Australia left open the possibility of the existence of a right to privacy in Australian common law: *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249 per Gummow and Hayne JJ, at 328 per Callinan J and (more obliquely) at 278 per Kirby J; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#).
- 2 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39  at 50; [32 ALR 485](#); 55 ALJR 45 per Mason J (citing *Lord Ashburton v Pape* [1913] 2 Ch 469  at [475](#); [1911-13] All ER Rep 708 per Swinfen Eady LJ) (cited in *Minister For Immigration and Citizenship v Kumar* (2009) 238 CLR 448 ; [253 ALR 219](#); [2009] HCA 10; [BC200901361](#) at [21] French CJ, Gummow, Hayne, Kiefel and Bell JJ noting that when translated from private to public law this equitable principle must accommodate the scope and purpose of the public law regime). Note, English courts have relaxed the

(C) Right to Privacy of the Person

requirements that information be improperly or surreptitiously obtained or that the information be obtained in confidence by absorbing the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) arts 8, 10 concerning privacy into the cause of action; *Douglas v Hello! Ltd* (No 2) [2004] All ER (D) 280 (May) ; [2005] 2 FCR(UK) 487; [2006] QB 125 ; [2005] EWCA Civ 595; *Campbell v MGN Ltd* [2004] 2 AC 457  ; [2004] UKHL 22; [2004] 2 All ER 995. On applicable fiduciary relationships generally see *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (ACN 113 114 832) (No 4) (2007) 160 FCR 35 ; 241 ALR 705; [2007] FCA 963; BC200704944 at [270]-[275] per Jacobson J; *The Bell Group Ltd (in liq) v Westpac Banking Corp* (No 9) (2008) 225 FLR 1 ; 70 ASCR 1; [2008] WASC 239; BC200809492.

- 3 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39  at 51; 32 ALR 485; 55 ALJR 45 per Mason J. Note that in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ; 185 ALR 1; [2001] HCA 63; BC200107043 at [137], Gummow and Hayne JJ stated that *John Fairfax* should not be overruled on the question of protection of confidential information. Callinan J at [328]; however, was open to *John Fairfax* being overruled on the question of protecting the privacy of government information if the court were to find the existence of a common law right to privacy.
- 4 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (No 2) (1984) 156 CLR 414  at 438; 56 ALR 193; 59 ALJR 77; 3 IPR 545 per Deane J ('a general equitable jurisdiction to grant such relief has long been asserted and ... should now be accepted').
- 5 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (No 2) (1984) 156 CLR 414  at 438; 56 ALR 193; 59 ALJR 77; 3 IPR 545 per Deane J (cited with approval in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ; 185 ALR 1; [2001] HCA 63; BC200107043 at [168] by Kirby J).
- 6 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (No 2) (1984) 156 CLR 414  at 438; 56 ALR 193; 59 ALJR 77; 3 IPR 545 per Deane J. For summary of principles of breach of confidence see *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501 ; [2009] FCA 1220; BC200909776 at [626]-[638] per Finn J. On the distinction between objective and subjective factors see *Autodata Ltd v Boyce's Automotive Data Pty Ltd* [2007] FCA 1517 ; BC200708563 at [10] per Tamberlin J.

[80-1275] Protection of reputation

The paragraph below is current to **07 March 2018**

The law of defamation provides individuals with protection for their reputation and, to that extent, protects a privacy interest. At common law, defamation occurs if a statement is made or written that is 'of a kind likely to lead ordinary decent folk to think less of the person about whom it is made'.¹ Following federal threats to pass federal legislation to achieve uniform national defamation laws, all the States and Territories have passed uniform defamation Acts.² Apart from the Australian Capital Territory, these Acts not only have identical approaches but also share virtually identical forms. Under the uniform scheme, the common law position on defamation is preserved except to the limited extent it is altered by the various state and territory laws.³ The uniform Acts, however, have the effect of limiting the privacy protection given by the common law rules of defamation in many ways. Most importantly they increase the number of defences to defamation by retaining common law defences and adding a large number of statutory defences.⁴ These statutory defences include a defence of justification (that is, that the statement is substantially true) that is not limited by any requirement of public benefit.⁵ The uniform scheme also contains statutory provisions concerning offers to make amends⁶ and apologies⁷ that may limit the ability of some privacy and reputation interests to be actionable. Despite the intention of uniform laws and application inherent in these acts, this aim may be limited by statutory requirements in the Australian Capital Territory and Victorian human rights legislation (and not in the other States and Territories) that defamation provisions be interpreted in light of international standards on privacy and freedom of expression.⁸ Some jurisdictions have also enacted legislation that allows complaints to be

(C) Right to Privacy of the Person

made, and in serious cases criminal proceedings to be instituted, following group defamation on racial grounds.⁹

Notes

- 1 *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86  at 88; 66 WN (NSW) 7 per Jordan CJ. See also *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 .
- 2 (ACT) [Civil Law \(Wrongs\) Act 2002](#)
(NT) [Defamation Act 2006](#)
(NSW) [Defamation Act 2005](#). For a detailed review of public interest considerations under the (NSW) Defamation Act 1974 (repealed) see *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484 ; [2007] NSWCA 364; BC200710976 at [123]-[186] per McColl JA.
(QLD) [Defamation Act 2005](#)
(SA) [Defamation Act 2005](#). See *Sands v Channel Seven Adelaide Pty Ltd* [2010] SASC 202 ; BC201004874 (reconciling freedom of communication with protection for the individual's reputation).
(TAS) [Defamation Act 2005](#)
(VIC) [Defamation Act 2005](#)
(WA) [Defamation Act 2005](#).
- 3 (ACT) [Civil Law \(Wrongs\) Act 2002](#) s 118
(NT) [Defamation Act 2006](#) s 6
(NSW) [Defamation Act 2005](#) s 6
(QLD) [Defamation Act 2005](#) s 6
(SA) [Defamation Act 2005](#) s 6
(TAS) [Defamation Act 2005](#) s 6
(VIC) [Defamation Act 2005](#) s 6
(WA) [Defamation Act 2005](#) s 6.

Note that these sections preserve the common law position as if any previous State or Territory legislation concerning the subject matter had never been enacted.
- 4 (ACT) [Civil Law \(Wrongs\) Act 2002](#) ss 134-139D
(NT) [Defamation Act 2006](#) ss 21-30
(NSW) [Defamation Act 2005](#) ss 24-33
(QLD) [Defamation Act 2005](#) ss 24-33
(SA) [Defamation Act 2005](#) ss 22-31
(TAS) [Defamation Act 2005](#) ss 24-33
(VIC) [Defamation Act 2005](#) ss 24-33
(WA) [Defamation Act 2005](#) ss 24-33.
- 5 (ACT) [Civil Law \(Wrongs\) Act 2002](#) s 135
(NT) [Defamation Act 2006](#) s 22
(NSW) [Defamation Act 2005](#) s 25

(C) Right to Privacy of the Person

- (QLD) [Defamation Act 2005](#) s [25](#)
- (SA) [Defamation Act 2005](#) s [23](#)
- (TAS) [Defamation Act 2005](#) s [25](#)
- (VIC) [Defamation Act 2005](#) s [25](#)
- (WA) [Defamation Act 2005](#) s [25](#).
- 6** (ACT) [Civil Law \(Wrongs\) Act 2002](#) ss [124-131](#)
- (NT) [Defamation Act 2006](#) ss [11-18](#)
- (NSW) [Defamation Act 2005](#) ss 12-19
- (QLD) [Defamation Act 2005](#) ss [12-19](#)
- (SA) [Defamation Act 2005](#) ss [12-19](#)
- (TAS) [Defamation Act 2005](#) ss [12-19](#)
- (VIC) [Defamation Act 2005](#) ss [12-19](#)
- (WA) [Defamation Act 2005](#) ss [12-19](#).
- 7** (ACT) [Civil Law \(Wrongs\) Act 2002](#) s [132](#)
- (NT) [Defamation Act 2006](#) s [19](#)
- (NSW) [Defamation Act 2005](#) s 20
- (QLD) [Defamation Act 2005](#) s [20](#)
- (SA) [Defamation Act 2005](#) s [20](#)
- (TAS) [Defamation Act 2005](#) s [20](#)
- (VIC) [Defamation Act 2005](#) s [20](#)
- (WA) [Defamation Act 2005](#) s [20](#).
- 8** (ACT) [Human Rights Act 2004](#) ss [12](#) (privacy), [16](#) (freedom of expression), [30](#) (requirement that legislation be interpreted compatibly with human rights)
- (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss [13](#) (privacy and reputation), [15](#) (freedom of expression), [32](#) (requirement that legislation be interpreted compatibly with human rights).
- 9** See [\[80-700\]](#).

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(D) Right to Privacy of the Home

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(5\) PRIVACY AND REPUTATION](#)

(D) RIGHT TO PRIVACY OF THE HOME

[80-1280] Protection of those within the home

The paragraph below is current to **07 March 2018**

The adage 'an Englishman's home is his castle' dates in the common law from 1605,¹ and applies also in actions in trespass.² The ordinary laws of trespass to property can be used to prevent a person entering, or in other ways trespassing, on the land of another, including that on which a home is established.³ The common law of nuisance does not, however, prevent a person overlooking another's land, home or activities,⁴ or taking photographs.⁵ The common law does not recognise as an actionable wrong the invasion of privacy.⁶ However, criminal prosecution for stalking may protect against more serious invasions of privacy in the home.⁷

Telephone tapping has been made unlawful in most circumstances.⁸

Notes

- 1 Semayne's Case ([1604](#)) [5 Co Rep 91a](#) ⚠; 77 ER 194.

On the scope of the right of privacy and the home in the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) see *PJB v Melbourne Health (Patrick's Case)* [\[2011\] VSC 327](#) ⬆; [BC201105182](#) at [\[53\]-\[86\]](#) per Bell J (appointment of unlimited administrator over assets of mentally disabled individual with probable result of sale of individual's property); *Director Of Housing v Sudi* [2010] VCAT 328 ⚠ at [\[29\]-\[34\]](#) per Bell J (see also *Director Of Housing v Sudi* [\(2011\) 33 VR 559](#) ⬆; [\[2011\] VSCA 266](#); [BC201106824](#)).

- 2 *Entick v Carrington* (1765) 2 [Wils 275](#) ⬆; 19 State Tr 1030; 95 ER 807 at 817 (entry to a person's premises, unless duly authorised by law, is an unlawful trespass, even if unauthorised by a Minister of State, unless based on specific legal authority). *Entick* case was recently strongly approved and said to protect the right to privacy by the Victorian Supreme Court in *R v Nicholas* [2000] [1 VR 356](#) ⬆ at [384](#); 111 A Crim R 490; [\[2000\] VSCA 49](#); [BC200001871](#) per Phillips CJ, Ormiston and Chernov JJ. See also the Full court of the High Court of Australia (the 'High Court') in *George v Rockett* (1990) 170 CLR 104 ⚠ at 110; [93 ALR 483](#); 48 A Crim R 246; [BC9002921](#). The term 'dwelling place' has been given a wide construction so as to include an office that is directly connected by door with a dwelling house though under a separate roof and not used for sleeping. See *R v Nichol* (1844) Legge 233, SC(NSW) (meaning given in context of burglary rather than in connection with remedies for trespass to the home). As to trespass see further TORT

(D) Right to Privacy of the Home

[415-480] and CRIMINAL LAW [130-5275]. See also *New South Wales v Corbett* (2007) 230 CLR 606 ; [237 ALR 39](#); [\[2007\] HCA 32](#); [BC200705973](#) at [89] per Callinan and Crennan JJ ('castle' adage invoked). See further:

(NSW) [Access to Neighbouring Land Act 2000](#)

(QLD) [Invasion of Privacy Act 1971](#) Pt 4A (invasion of privacy with respect to dwelling houses)

(TAS) [Access to Neighbouring Land Act 1992](#).

- 3 See, for example, *Baten's Case* (1610) 9 Co Rep 53; [77 ER 810](#) (overhanging eaves); *Davies v Bennison* (1927) 22 Tas LR 52  (shooting bullets at a neighbour's cat); *Graham v KD Morris & Sons Pty Ltd* [\[1974\] Qd R 1](#)  (jib of a sky crane); *Lawlor v Johnston* [1905] VLR 714  (sewerage ventilation pipes built on a wall and overhanging a neighbour's property); *Lincoln Hunt Australia Pty Ltd v Willesee* [\(1986\) 4 NSWLR 457](#)  at 463; 62 ALJR 216 per Young J (entry of premises with television cameras; injunction possible where film footage the result of trespass to land if publication unconscionable). Compare *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#) at [51], [52] per Gleeson CJ; *Brighten Pty Ltd v Nine Network Australia Pty Ltd* [\[2009\] NSWSC 319](#) ; [BC200903090](#) (doubtful claim in trespass and none to unconscionability). Note, the consequence hinted at in *Lincoln Hunt Australia Pty Ltd v Willesee* [\(1986\) 4 NSWLR 457](#) ; 62 ALJR 216 to the effect that equity could issue an injunction to restrain the use of film and pictures taken while trespassing was discussed with approval by the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249; [185 ALR 1](#) at 16 per Gleeson CJ, at 29 per Gummow and Hayne JJ, at 51 per Kirby J; [2001] HCA 63; [BC200107043](#). See also *Halliday v Nevill* (1984) 155 CLR 1 ; [57 ALR 331](#); 59 ALJR 124; [BC8400463](#) (existence and scope of a licence to enter discussed in the joint judgment of Gibbs CJ, Mason, Wilson and Deane JJ); *Wheare v Police* (SA) (2008) 253 LSJS 99 ; (2008) 180 A Crim R 396; [\[2008\] SASC 13](#); [BC200800267](#) (right of a police officer to enter private property and remain when owners or occupiers of that property have demanded that police leave).

As to trespass see further TORT [\[415-480\]](#) and CRIMINAL LAW [\[130-5275\]](#).

- 4 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479  at 495, 496 per Latham CJ, at 507, 508 per Dixon J, at 517 per Evatt J; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197. Note, however, statements in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249 per Gummow and Hayne JJ, at 328 per Callinan J and (more obliquely) at 278 per Kirby J; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#) to the effect that a tort of privacy may exist in Australian common law. Such a tort could conceivably apply to such activities.
- 5 *Bathurst City Council v Saban* [\(1985\) 2 NSWLR 704](#) ; 55 LGRA 165. Note, however, statements in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249 per Gummow and Hayne JJ, at 328 per Callinan J and (more obliquely) at 278 per Kirby J; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#) to the effect that a tort of privacy may exist in Australian common law. Such a tort could conceivably apply to such activities.
- 6 (QLD) [Invasion of Privacy Act 1971](#). See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197. Note, however, statements in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 249 per Gummow and Hayne JJ, at 328 per Callinan J and (more obliquely) at 278 per Kirby J; [185 ALR 1](#); [2001] HCA 63; [BC200107043](#) to the effect that a tort of privacy may exist in Australian common law.
- 7 (ACT) [Crimes Act 1900](#) s 35(2)
- (NT) Criminal Code s 189
- (NSW) [Crimes \(Domestic and Personal Violence\) Act 2007](#) s 8
- (QLD) Criminal Code Ch 33A
- (SA) [Criminal Law Consolidation Act 1935](#) s 19AA
- (TAS) Criminal Code s 192
- (VIC) [Crimes Act 1958](#) s 21A(2) (stalking includes contact the victim by phone, fax, text message, e-mail and entering or loitering outside or near the victim's place of residence)
- (WA) Criminal Code ss 338D, 338E.
- 8 See [80-1290] and MEDIA AND COMMUNICATIONS [\[275-3035\]](#)-[\[275-3155\]](#).

[80-1285] Protection from search and seizure

The paragraph below is current to **07 March 2018**

Powers of search of a person's home are available in a range of circumstances to a person who has some right of entry. The common law rule is that a person's home may not be entered for the purposes of search for, and seizure of, goods except:¹

- (1) to allow search and seizure by the King's representatives in preserving the common seal;
- (2) in execution of a debt to the Crown; and
- (3) by a court officer for recovery of goods moved deceitfully to the defendant's house or otherwise not lawfully in the defendant's possession.

The broad common law protection of the dwelling place has been circumscribed partly by the acceptance by the courts of the practice developed by justices of issuing search warrants permitting police to enter premises and search for stolen goods,² and more extensively by statute.³ Statutory authorisation of search and seizure is associated with:

- (1) the investigation of crimes;
- (2) the discharge by public authorities of their functions; and
- (3) the satisfaction of civil debts, largely to public authorities.

Most jurisdictions now authorise the issue of various kinds of warrant to police officers, including:

- (1) general search warrants that allow entry into any house or building where there is reasonable suspicion of anything being present that is related to an offence;⁴
- (2) warrants available for use in respect of any offence,⁵ although the courts will read these strictly, particularly in requiring a justice to be satisfied of the need;⁶ and
- (3) warrants allowing entry for particular classes of offence.⁷

There is a substantial number of powers to enter, search, and sometimes to seize, related to the discharge by public statutory authorities of their statutory responsibilities. These authorities are usually given to officers of the agency.⁸ The courts will normally interpret the powers strictly.⁹

Legislation, in some cases, allows public authorities to seize assets in satisfaction of civil debts for goods or services supplied.¹⁰

(D) Right to Privacy of the Home

Notes

- 1 Semayne's Case ([1604](#)) [5 Co Rep 91a](#) ; 77 ER 194.
- 2 See, for example, Ward's Case (1636) Clay 44.
- 3 On statutory interpretation see *Coco v R* (1994) 179 CLR 427  at 437; [120 ALR 415](#) at [418-19](#); 68 ALJR 401; [BC9404609](#) (applied for example in *Police v Dafov* [[2007](#)] [SASC 451](#) ; [BC200711056](#)); *Ballis v Randall* [[2007](#)] [NSWSC 422](#) ; [BC200703308](#) (justices did not purport to authorise the covert execution of the warrants, but warrants were nevertheless properly issued).
- 4 (CTH) [Crimes Act 1914](#) ss [3E](#), [3P](#) (an occupier has a right to be present while a search under warrant is made)
(ACT) [Crimes Act 1900](#) s [194](#) (warrant issued by an issuing officer)
(NT) [Police Administration Act 1978](#) s [117](#) (ibid s 119 urgent searches without warrant)
(NSW) [Crime Commission Act 2012](#) s 17
(QLD) [Police Powers and Responsibilities Act 2000](#) Ch 7 Pt 1
(SA) [Summary Offences Act 1953](#) s [67](#) (warrant issued by Commissioner)
(WA) [Criminal Investigation Act 2006](#) Pt 5.
- 5 (CTH) [Crimes Act 1914](#) s [3E](#)
(ACT) [Crimes Act 1900](#) s [194](#)
(NT) [Police Administration Act 1978](#) s [117](#)
(QLD) [Police Powers and Responsibilities Act 2000](#) Ch 7 Pt 1
(SA) [Summary Offences Act 1953](#) s [67](#)
(WA) [Criminal Investigation Act 2006](#) Pt 5.
- 6 On search warrants and strictness requirements see *New South Wales v Corbett* (2007) 230 CLR 606 ; [237 ALR 39](#); [[2007](#)] [HCA 32](#); [BC200705973](#) at [\[16\]-\[22\]](#) per Kirby J, at [89]-[109] per Callinan and Crennan JJ ((NSW) Search Warrants Act 1985 (repealed) s 5(1)(b) warrant applicant must state reasonable grounds for believing a particular offence committed to ensure that issuing justice knows the specific object of the search warrant and accordingly limits its scope), at [105] (following *George v Rockett* (1990) 170 CLR 104 ; [93 ALR 483](#); 48 A Crim R 246; [BC9002921](#), and citing and approving (at [101]) *R v Tillett*; *Ex parte Newton* (1969) 14 FLR 101  (regarding (CTH) [Crimes Act 1914](#) s 10 (repealed))). See also *Cassaniti v Croucher* ([2000](#)) [48 NSWLR 623](#) ; [175 ALR 113](#) at [115](#) per Mason P, 133 per Foster JA; [[2000](#)] [NSWCA 95](#); [BC200002085](#) .
- 7 See, for example:
(NSW) [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) s 47 (child prostitution offence, indictable offence, firearms offence, prohibited weapons offence, narcotics offence, child pornography offence, thing stolen or unlawfully obtained)
(VIC) [Crimes Act 1958](#) s [465](#) (indictable offences); (VIC) Magistrates' Court Act 1989 ss 75, 78(1)(b)
- 8 See, for example:
(CTH) [Civil Aviation Act 1988](#) ss [32AD](#) (monitoring warrants), [32AF](#) (offence-related warrants);
(CTH) [Competition and Consumer Act 2010](#) ss [154X](#), [154Y](#); (CTH) [Customs Act 1901](#) ss [198](#), [199](#), [200](#) (customs warrants)
(NSW) [Local Government Act 1993](#) ss 191 (power of entry), 191A (power of entry for water supply, sewerage and stormwater drainage works), 192 (inspections and investigations), 199 (authority to enter premises), 201 (search warrants)
(QLD) [Drugs Misuse Act 1986](#) ss [98](#) (inspectors' power of entry), [100](#) (procedure for entry without consent), [101](#) (general powers), [107](#) (power to require production).

(D) Right to Privacy of the Home

See also *Gallen v Strathfield Municipal Council* [1971] 1 NSWLR 122 ; *Sheehan v Richmond River County Council* [1968] 2 NSW 431 ; (1968) 15 LGRA 212.

- 9 (NSW) *Public Works and Procurement Act 1912* s 80 (authorises construction of works on private land without owner's consent; the section will be construed strictly): *Cowan v Upper Hunter County District Council* [1970] 1 NSW 787 ; (1970) 20 LGRA 7; 92 WN (NSW) 10, (SC)NSW.
- 10 For example, a lease may be arranged under (VIC) *Local Government Act 1989* s 181 a council has the power to sell land to recover unpaid rates more than 3 years old if it has obtained a court order against the ratepayer. See also POLICE AND EMERGENCY SERVICES [320-375]-[320-390].

[80-1290] Information privacy and listening devices

The paragraph below is current to **07 March 2018**

The privacy legislation of the Commonwealth is designed to protect persons from unwarranted use of personal information in the hands of government agencies, credit reporters and credit providers.¹ Legislation prohibits telecommunications interception and access except as authorised in special circumstances.² However individuals are protected from telephonic eavesdropping by the use of electronic and other phone-tapping devices by legislation in all jurisdictions,³ although the Commonwealth legislation has been held to cover the field.⁴ The remedies are provided to protect the privacy interests of both individuals and corporate bodies.

Notes

- 1 See [80-1240].
- 2 (CTH) *Telecommunications (Interception and Access) Act 1979* ss 7 (listening or recording illegal unless for servicing, under warrant, or in emergency), 9 (the Attorney-General may authorise the Director-General of the Australian Security Intelligence Organisation and in special circumstances the Director-General, to tap), 39 (agency may apply for warrant), 83, 84 (Ombudsman has inspecting role, and must report to the Minister), 104 (reports to Parliament must be made on emergency tapping, and on the use and effectiveness of warrants). As to the validity of evidentiary certificates under (CTH) *Telecommunications (Interception and Access) Act 1979* s 18(2) see: *R (Commonwealth) v Baladjam* (No 17) (2008) 270 ALR 163 ; [2008] NSWSC 1439; BC200813553 ((CTH) *Telecommunications (Interception and Access) Act 1979* s 18(2) does not violate the separation of powers or the accused's right to a jury trial guaranteed by section 80 of the Commonwealth Constitution); *Cheikho v R* (2008) 234 FLR 124 ; 261 ALR 57; [2008] NSWCCA 191; BC200812995 (applying *Nicholas v R* (1998) 193 CLR 173 ; 151 ALR 312; 72 ALJR 456; BC9800075).
- 3 (CTH) *Telecommunications (Interception and Access) Act 1979*
(ACT) *Listening Devices Act 1992* ss 4 (prohibition on use of listening devices with exceptions), 5, 6 (prohibitions on communication of information obtained through illegal use of listening devices), 7 (prohibition on possession of records of information from illegal use of listening devices), 8 (prohibition on manufacture, supply and possession of listening devices), 10 (inadmissibility of information illegally obtained from listening devices in court proceedings).
(NT) *Surveillance Devices Act 2007* ss 4 (covers data, listening, optical surveillance and tracking devices), 11-13 (no use of listening, optical surveillance or tracking device without authorisation), 23 (surveillance device warrant), 31 (retrieval warrant), 33-40 (emergency authorisations, 55 (dealing with records obtained by use of surveillance devices), 66 (possession of a surveillance device for unlawful use); (NT) *Telecommunications (Interception) Northern Territory Act 2001* Pt 2 (keeping of records of telecommunications interceptions)
(NSW) *Surveillance Devices Act 2007* Pts 2 (regulation of installation, use and maintenance of surveillance devices (including listening devices, optical surveillance, tracking and data surveillance devices); prohibition on communication or publication of private conversations or recordings of activities), 3 (warrants)

(D) Right to Privacy of the Home

(QLD) [Invasion of Privacy Act 1971](#) Pt 4 (listening devices)

(SA) Listening and Surveillance Devices Act 1972 ss 4 (prohibition), 5 (communication of results forbidden), 6 (warrants), 6B (Minister must report on use each year)

(TAS) [Listening Devices Act 1991](#) ss [5\(1\)](#) (prohibition on interception), [5\(4\)](#) (report required to Chief Magistrate within 3 days if interception without warrant), [6](#) (Chief Magistrate may order the subject be informed of the surveillance), [8](#) (obtaining warrant and for use in emergency, when a report must be made to the Attorney-General after surveillance ceases), [17](#) (magistrate may issue warrants)

(VIC) [Surveillance Devices Act 1999](#) ss [3](#) (also covers data and optical surveillance in addition to listening devices), [6](#) (prohibitions on listening devices), [7](#) (prohibitions on optical devices), [8](#) (prohibitions on tracking devices), [11](#) (possession of records of information from unlawful surveillance device), Pt 4 (warrants)

(WA) [Surveillance Devices Act 1998](#) ss [3](#) (also covers data and optical surveillance in addition to listening devices), [5](#) (prohibitions on listening devices), [6](#) (prohibitions on optical devices), [7](#) (prohibitions on tracking devices), [9](#) (publication of private conversations or activities), Pt 4 (warrants).

- 4 *R v Catena* (2012) 273 FLR 469 ; 222 A Crim R 573; [\[2012\] WASC 144](#); [BC201211004](#) at [\[75\]](#) per EM Heenan J; *Edelsten v Investigating Committee of New South Wales* [\(1986\) 7 NSWLR 222](#) ; 14 ALD 751; [80 ALR 85](#); 86 FLR 388. See also *In the Marriage of Byrne* [\(2002\) 30 Fam LR 558](#) ; 172 FLR 81; [2002] FamCA 887.

End of Document

(6) PROTECTION OF FAMILIES AND CHILDREN — CIVIL RIGHTS

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#)

(6) PROTECTION OF FAMILIES AND CHILDREN — CIVIL RIGHTS

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[80-1291] Protection of families and children

The paragraph below is current to **07 March 2018**

Explicit protection of the family and children is found in articles 17 and 23 of the International Covenant on Civil and Political Rights (the 'Convention').¹ Articles 17 and 23 of the Convention have been invoked most conspicuously in Australia in the context of deportation orders that compel the family to choose whether children should stay in Australia.² Both articles 17 and 23 of the Convention are reflected in the Australian Capital Territory and Victorian human rights charters.³ Protection for the family has also been recognised in the context of adoption orders,⁴ public housing⁵ and indirectly in a mortgagor's interests when a mortgagee's exercised a power of sale⁶ but has not been applied successfully against a mortgagee taking possession of mortgaged land on default.⁷ It provides an ancillary form of property protection.⁸

Notes

- 1** () International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 23 states:

- (1) 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- (2) The right of men and women of marriageable age to marry and to found a family shall be recognised.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.

(6) PROTECTION OF FAMILIES AND CHILDREN — CIVIL RIGHTS

- (4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

Ibid art 17 states:

- (1) 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.'

On the interpretation of ibid arts 17, 23 see United Nations Human Rights Committee, *CCPR General Comment No 16: The Right to Respect Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)*, adopted at the Thirty-second Session, 8 April 1988; United Nations Human Rights Committee, *CCPR General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)*, adopted at the Thirty-ninth session, A/45/40 Vol I (1990) 175, 27 July 1990.

United Nations Human Rights Committee, *CCPR General Comment No 17: Rights of the Child (Art 24)*, adopted at the Thirty-fifth session, 7 April 1989 at [6]: '... in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require.'

- 2 *Winata v Australia*, Communication No 930/2000, CCPR/C/72/D/930/2000 at [7.2] (deportation order affecting parents of 13 year old child with citizenship and failure to provide the necessary measures of protection as a minor); *Madafferi v Australia* (Communication No 1011/2001), A/59/40 Vol II (2004) 208 at [9.7] (the mere fact that one member of the family is entitled to remain in the territory does not necessarily mean that requiring other members to leave involves interference but arbitrary as children would have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State; *Bakhtiyari v Australia* (Communication No 1069/2002), A/59/40 Vol II (2003) 301 at [9.6] (removing the applicant and her children without awaiting the final determination of her proceedings constitutes arbitrary interference in the family).

Note also Committee on the Elimination of Racial Discrimination General Recommendation XXX (Sixty-fifth session, 2004): Discrimination Against Non-Citizens, A/59/18 (2004) 93, (at 28) that states 'avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life'.

- 3 (ACT) [Human Rights Act 2004](#) ss [11](#), [12](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss [13](#), [17](#).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 4 *Re Adoption of D* [\[2008\] ACTSC 44](#) ; [BC200803433](#) at [\[6\]](#), [\[7\]](#) per Refshauge J (noting the seriousness of an order for adoption in severing family ties with a child's biological parent (as acknowledged in *Mace v Murray* (1955) 92 CLR 370  at 380; *Hitchcock v WB* [\[1952\] 2 QB 561](#)  at [568](#) ; [1952] 2 All ER 19; [1952] 1 TLR 1550, and as reinforced by (ACT) [Human Rights Act 2004](#) s [11](#)). See also (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) case of *Scozzari and Gunta v Italy* Applications Nos 39221/98 and 41963/98, 138 ECHR 2000-VIII.
- 5 See *Commissioner for Housing v Y* [\[2007\] ACTSC 84](#) ; [BC200708689](#) at [\[47\]](#), [\[48\]](#) per Higgins CJ (observation that the Tribunal observed the impact of (ACT) [Human Rights Act 2004](#) ss [11](#), [30](#) and the entitlement of the family unit as well as the rights of children to protection in the context of secure and appropriate housing). Note also (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966 Aust TS 1976 No 5; 993 UNTS 3) at [49] and United Nations Committee on Economic, Social and Cultural Rights, *CESCR General Comment No 4: The Right to Adequate Housing (Art 11(1))*, adopted at the Sixth session, E/1992/23 (1991) 114, 13 December 1991 at [9]: '[T]he right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. ... Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.'
- 6 *Nolan v MBF Investments Pty Ltd* [\[2009\] VSC 244](#) ; [BC200905292](#).
- 7 *Perpetual Trustee Ltd v Baranov* [\[2010\] VSC 18](#) ; [BC201000327](#) at [\[54\]](#) per Mukhtar AsJ.
- 8 As to protection of property see [\[80-1311\]](#). Note also the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 8 which states:

(6) PROTECTION OF FAMILIES AND CHILDREN — CIVIL RIGHTS

- (1) 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

End of Document

(7) PROTECTION OF PROPERTY — CIVIL RIGHTS

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#)

(7) PROTECTION OF PROPERTY — CIVIL RIGHTS

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[80-1311] Protection of property

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Protection of property as a human right has international recognition,¹ which has been acknowledged in Australia,² though in statutory form as a human right only in the Victorian Charter.³ It prevents deprivation of property other than in accordance with the law, which would include legislation concerning confiscation of crime-used property,⁴ proceeds of crime,⁵ customs forfeiture⁶ and other forms of property confiscation.⁷ Native title has significant recognition.⁸ Section 51(xxxi) of the Commonwealth Constitution embraces certain aspects of a property right,⁹ and it is well established that clear and unambiguous words must be used before legislation will be construed as expropriating or extinguishing valuable rights relating to property without fair compensation.¹⁰ There is also clear acknowledgment of freedom of testation as a human right.¹¹

Notes

- 1** Examples of an explicit property right are found in:

- (1) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions art 17 provides, 'Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property;' and
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) Protocol 1, art 1 which provides, 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to

(7) PROTECTION OF PROPERTY — CIVIL RIGHTS

control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

There is no equivalent provision in the International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).

See also Rodriguez LV, *The right to own property alone as well as in association with others*, report submitted to the Economic and Social Council of the United Nations Commission on Human Rights, E/CN4/1993/15, 1993) at [461]: 'It is generally recognised that a state has a right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties. It is important that those regulatory powers of the State should not result in seizure of property without compensation and in 'arbitrary' or 'illegal' seizure.'

Note also European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 8(1) does not create a right to be provided with a home (*Chapman v United Kingdom* Application No 27238/95, Judgment of the Court Chamber (ECHR) 18 January 2001, at [99]), but may be breached where a tenant is evicted from home because of insufficient procedural safeguards (*Furlepa v Poland* Application No 62101/00, Judgment of the Court Chamber (ECHR) 18 March 2008; *McCann v United Kingdom* Application No 19009/04, Judgment of the Court Chamber (ECHR) 13 May 2008); *Cosic v Croatia* Application No 28261/06, Judgment of the Court Chamber (ECHR First Section) 15 January 2009, all considered in *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 ; [BC200905292](#). See also European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) case of *Connors v United Kingdom* (2005) 40 EHRR 9 (damages awarded for loss of a home by gypsies when evicted by the city council).

- 2 *Director of Public Prosecutions v Logan Park Investments Pty Ltd* (1995) 37 NSWLR 118  at 125-126; 132 ALR 449; 125 FLR 359; [BC9505066](#) per Kirby ACJ (referring to the Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions art 17): 'The right to own and to control property is an important civic right in a society such as ours. Indeed, it is an attribute of economic liberty.') See also *Director of Public Prosecutions (DPP) v Ali* (No 2) [2010] VSC 503 ; [BC201008366](#) (partner's interest in property); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ; 237 FLR 369; [2010] QCA 037; [BC201001015](#) at [46]-[51] per McMurdo J (noting the right to own property in the form of general liquor licences). Note also *Bropho v Western Australia* (2008) 169 FCR 59 ; 249 ALR 121; [2008] FCAFC 100; [BC200804314](#) at [80], [81] per Ryan, Moore and Tamberlin JJ (a statutory right to occupy and manage land was subject to modification if necessary to protect vulnerable members of the community enjoying the right of occupation and management, noting that the right is not absolute (citing *Gerhardy v Brown* (1985) 159 CLR 70  at 120; 57 ALR 472; 59 ALJR 311; [BC8501115](#) per Mason JJ)).

- 3 (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 20 provides that a person must not be deprived of his or her property other than in accordance with law. For the significance of charter-listed rights see [80-27], [80-28]. See *Halwood Corp (in liq) v Roads Corp* [2008] VSC 28 ; [BC200800561](#) at [108] per Osborn J (noting that (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 20 did not provide for a right to just compensation upon the compulsory acquisition of land).

On the scope of the property right see *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327 ; [BC201105182](#) at [87]-[95] per Bell J.

- 4 *Director of Public Prosecutions (DPP) (WA) v White* (2009) 194 A Crim R 192 ; [2009] WASC 62; [BC200901701](#); *New South Wales Crime Commission v Kelaita* (2008) 75 NSWLR 564 ; 189 A Crim R 474; [2008] NSWCA 284; [BC200809932](#).
- 5 *Director of Public Prosecutions v Logan Park Investments Pty Ltd* (1995) 37 NSWLR 118 ; 132 ALR 449; 125 FLR 359; [BC9505066](#); *Lee v DPP (Cth)* (2009) 235 FLR 122 ; 261 ALR 123; [2009] NSWCA 347; [BC200909560](#).
- 6 (CTH) *Customs Act 1901*. See *Murphy v Farmer* (1988) 165 CLR 19 ; 79 ALR 1; 62 ALJR 420; [BC8802609](#).
- 7 *Director of Public Prosecutions (DPP) (Cth) v Della-Vedova* (2010) 75 NSWLR 602 ; 237 FLR 232; [2010] NSWSC 8; [BC201000149](#); *Mansfield v DPP (WA)* (2006) 226 CLR 486 ; 228 ALR 214; [2006] HCA 38; [BC200605514](#) (recognising the intended impact of legislation on property rights); *Director of Public Prosecutions v George* (2008) 102 SASR 246 ; 251 ALR 658; [2008] SASC 330; [BC200810436](#).

(7) PROTECTION OF PROPERTY — CIVIL RIGHTS

- 8 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#); *Akiba on behalf of Torres Strait Islanders of Regional Seas Claim Group v Queensland (No 2)* [\(2010\) 270 ALR 564](#) ; [\[2010\] FCA 643](#); [BC201004525](#); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ; [194 ALR 538](#); [\[2002\] HCA 58](#); [BC200207517](#). For characteristics of native title rights and interests see *Northern Territory v Alyawarr* (2005) 145 FCR 442 ; [220 ALR 431](#); [\[2005\] FCAFC 135](#); [BC200505385](#); *De Rose v South Australia (No 2)* (2005) 145 FCR 290 ; [\[2005\] FCAFC 110](#); [BC200503825](#); *Western Australia v Sebastian* (2008) 173 FCR 1 ; [248 ALR 61](#); [\[2008\] FCAFC 65](#); [BC200803037](#); *Queensland Construction Materials Pty Ltd (ACN 002 202 548) v Redland City Council* [\(2010\) 271 ALR 624](#) ; [\[2010\] QCA 182](#); [BC201005106](#) at [\[47\]-\[53\]](#), [\[55\]-\[92\]](#) per Chesterman JA and Applegarth J (McMurdo P agreeing).
- 9 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'
- 10 *Mabo v Queensland (No 2)* (1992) 175 CLR 1  at 111; [107 ALR 1](#); 66 ALJR 408; [BC9202681](#) per Deane and Gaudron JJ (cited in *Lehman Brothers Asia Holdings Ltd (in liq) v City of Swan* (2010) 240 CLR 509 ; [265 ALR 1](#); [\[2010\] HCA 11](#); [BC201002124](#) at [\[63\]](#) per Heydon J (the rationale being that the compulsory acquisition or extinguishment of property rights, whether by the legislature, the executive or by non-governmental entities taking advantage of a facility supposedly conferred by the legislature ((CTH) *Corporations Act 2001* s [444D\(1\)](#))) is a serious thing). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 ; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#).
- 11 *Grey v Harrison* [\[1997\] 2 VR 359](#)  at [363](#); [BC9606012](#) per Callaway JA; *Society for the Propagation of the Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9  at 19; [1962] ALR 775; (1962) 36 ALJR 1; [BC6200110](#) per Dixon CJ; *MacEwan Shaw v Shaw* [\(2003\) 11 VR 95](#) ; [\[2003\] VSC 318](#); [BC200305001](#); *Subasa v State Trustees Ltd* [\[2007\] VSC 399](#) ; [BC200708685](#); *Cangia v Cangia* [\[2008\] VSC 455](#) ; [BC200809697](#); *Sangster v Sangster* [\[2009\] NSWSC 695](#) ; [BC200906531](#); *Edwards v Edwards* [\(2009\) 25 VR 40](#) ; 2 ASTLR 256; [\[2009\] VSC 190](#); [BC200904195](#); *Robertson v Koska* [\[2010\] VSC 134](#) ; [BC201002212](#); *Nicholson v Knaggs* [\[2009\] VSC 64](#) ; [BC200900993](#).

End of Document

(A) Introduction — Freedom from Torture and Related Acts

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (8)
FREEDOM FROM TORTURE AND RELATED ACTS

(8) FREEDOM FROM TORTURE AND RELATED ACTS

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(A) INTRODUCTION — FREEDOM FROM TORTURE AND RELATED ACTS

[80-1345] Right in international law

The paragraph below is current to **07 March 2018**

The (INT) Universal Declaration of Human Rights 1948 declares that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹ This is repeated in Article 7 of the (INT) International Covenant on Civil and Political Rights 1966 (the 'ICCPR') with the addition that no one is to be subjected to medical or scientific experimentation without consent. Article 10 of the ICCPR contains the guarantee that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.²

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (the 'Convention') contains a more detailed definition of torture.³ The Convention definition confines the meaning of torture to acts causing severe pain or suffering to a person, either physical or mental, that are intentionally inflicted by, or at the instigation of, a public official, for purposes of punishment for an act or suspected act, intimidation or coercion, obtaining information or a confession or discrimination of any kind.⁴ The Convention explicitly sustains any wider definition in international law, such as article 7 of the ICCPR, or in national law.⁵ Also, the Convention provides that states parties, in addition to taking effective legal, judicial and administrative measures to prevent acts of torture,⁶ must prevent other acts of cruel, inhuman or degrading treatment or punishment.⁷ The Convention establishes the Committee Against Torture (the 'Committee'),⁸ and provides that a state party may make declarations that allow other states parties to communicate with the Committee about violations by that state party and also permit individuals within its jurisdiction to submit communications about violations by any state party.⁹

The prohibition on **torture** is guaranteed in absolute terms.¹⁰ It is also widely accepted as having the status of a principle of *jus cogens*, binding on all states, from which no derogation is permitted.¹¹ Furthermore, the Convention obliges states parties to establish jurisdiction with respect to **torture** not only in cases involving one of their nationals or committed on their territory, but also where a person alleged to be responsible for **acts of torture** is present within their territory and they are not being extradited.¹²

Although some allegations against Australia involve detention conditions,¹³ most are framed on the basis of a well-founded fear of persecution,¹⁴ or a foreseeable, real and personal risk of being **tortured** in the country to which a person is returned.¹⁵

Notes

1 (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part 1, Resolutions, p 71) art 5. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) (the 'European Convention') is in similar terms. As to the minimum level of ill-treatment to constitute infringement of the (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 art 3 see *Cenbauer v Croatia* (2007) 44 EHRR 49 ; [2006] ECHR 73786/01 at [43]-[44].

2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 10.

3 (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 1. The Convention commenced operation on 26 June 1987.

Australia ratified the Convention on 8 August 1989 and implemented it domestically by means of (CTH) Crimes (**Torture**) Act 1988 (repealed) (with the Convention scheduled to that **Act**), now repealed with the relevant provisions embodied in the (CTH) Criminal Code which operates concurrently with existing offences in State and Territory criminal laws.

More detailed distillations of the elements of **torture** appear in the Guidelines and Measures for the Prohibition and Prevention of **Torture**, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the 'Robben Island Guidelines') (adopted by the African Commission on Human and Peoples' Rights, 23 October 2002), and the Principles on the Effective Investigation and Documentation of **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (annexed to UNGA Res 55/89, 4 December 2000) <http://www.ohchr.org/english>. See also United Nations Committee Against **Torture**, CAT General Comment No 2: Implementation of Article 2 by State Parties, CAT/C/GC/2, 24 January 2008 (which explains the inter-relation between **torture** and ill-treatment).

4 (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 1(1).

5 Ibid art 1(2).

6 Ibid art 2.

7 Ibid art 16.

8 Ibid art 17.

9 Ibid arts 21, 22. The competence of the Committee to receive and consider communications from individuals, subject to domestic jurisdiction, was accepted by Australia as of 28 January 1993: see FOREIGN RELATIONS [215-670].

10 For instance, in the relevant international instruments no derogation is allowed from the **torture** provisions. The United Nations Human Rights Committee has noted 'no justification or extenuating circumstances may be invoked to excuse a violation' of the right in (INT) International Covenant on Civil and Political Rights 1966 art 7: United Nations Human Rights Committee, CCPR General Comment No 20: Replaces General Comment No 7 concerning Prohibition of **Torture** and Cruel Treatment or Punishment (Art 7), adopted at the Forty-fourth Session, 10 March 1992 at [3]. See

(A) Introduction — Freedom from Torture and Related Acts

also United Nations Human Rights Committee, *CCPR General Comment No 21: Replaces General Comment No 9 concerning Humane Treatment of Persons Deprived of Liberty (Art 10)*, adopted at the Forty-fourth Session, 10 April 1992; United Nations Committee Against **Torture**, *CAT General Comment No 2: Implementation of Article 2 by State Parties*, CAT/C/GC/2, 24 January 2008 at [5] notes 'no exceptional circumstances whatsoever may be invoked by a State Party to justify **acts of torture** in any territory under its jurisdiction'.

- 11 See *Prosecutor v Furundzija* Case IT-95-17/1-T, Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998 at [153].
- 12 (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 5(2).
- 13 *Cabal and Pasini v Australia* (Communication No 1020/2002), ICCPR, A/58/40 Vol II (2003) 346 (allegations of shackling during transport to and from prison and cavity searches after each visit were uncontested but justified in view of the applicant's flight risk at [8.2]).
- 14 *C v Australia* (Communication No 900/1999), ICCPR, A/58/40 Vol II (2002) 188 (deportation to a country where it is unlikely applicant would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation would amount to a violation of article 7 of the ICCPR at [8.5]).
- 15 *M S v Australia* (Communication No 154/2000), CAT, A/57/44 (2001) 124; *Y H A v Australia* (Communication No 162/2000), CAT, A/57/44 (2001) 137; *M P S v Australia* (Communication No 138/1999), CAT, A/57/44 (2002) 111; *H M H I v Australia* (Communication No 177/2001), CAT, A/57/44 (2002) 166 (the existence of a consistent pattern of gross, flagrant or mass violations of human rights, does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to **torture** upon his return to that country for the purposes of Convention Against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3 at 6.5); *Z T v Australia* (Communication No 153/2000), CAT, A/59/44 (2003) 132 *A K v Australia* (148/1999), CAT, A/59/44 (2004) 123.

See also United Nations Committee Against **Torture** (CAT) *General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and communications)* A/53/44, annex IX (available at <http://www.unhcr.org>).

[80-1350] Commonwealth and State legislation

The paragraph below is current to **07 March 2018**

The form of articles 3 and 10 of the International Covenant on Civil and Political Rights is reflected in the Australian Capital Territory and Victorian human rights charters.¹ The Commonwealth enacted the (CTH) Crimes (**Torture**) **Act** 1988 (repealed) to implement the Convention Against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Convention')² but the relevant provisions are now embodied in the (CTH) Criminal Code, which in substance incorporates the Convention's definition of **torture** and operates concurrently with existing offences in State and Territory criminal laws.³ It has extra-territorial application,⁴ and is not intended to exclude or limit the operation of any other Commonwealth, State or Territory law.⁵ A person is protected from double jeopardy.⁶ The defences of public emergency or war, or superior orders are not available to persons charged with an offence under the **Act**.⁷

The Commonwealth government has also implemented its obligations under the Geneva Conventions and the Rome Statute on the International Criminal Court. The legislation defines **torture** as an international crime.⁸ Furthermore, the (CTH) Extradition **Act** 1988 requires the Attorney-General to be satisfied that a person will not be subjected to **torture** if extradited.⁹

Australia's obligations under international law require the protection of individuals from being returned to a country where they have a well-founded fear of persecution.¹⁰ Under the (CTH) **Migration Act 1958**, 'persecution' must involve 'serious harm'.¹¹ However, this protection is tempered by the need to show that persecution will occur for a specific Convention reason, and a person is not excluded from protection where they have committed a serious non-political crime, war crime or crime against humanity.¹² The

(CTH) [Migration Act 1958](#) also empowers the Minister to grant a visa to someone who is not a person to whom Australia has protection obligations where it would be in the public interest to do so.¹³ Ministerial Guidelines directing this discretion refer to Australia's international obligations under the Convention against **Torture**, the Convention on the Rights of the Child and the International Convention on Civil and Political Rights (the 'ICCPR') as relevant factors in deciding whether the Minister should consider exercising these powers.¹⁴ However, the Minister's power under these sections is non-compellable and non-reviewable. As a result, the United Nations Committee against **Torture** has urged the Australian government to 'consider the desirability of providing a mechanism for independent review' of ministerial decisions in respect of cases coming under Part 3 of the Convention.¹⁵ The United Nations Human Rights Committee has also taken issue with prolonged detention under (CTH) [Migration Act 1958](#) without the availability of substantive judicial review.¹⁶

Despite verifying its status as a *jus cogens* offence in international law, the full Federal Court of Australia has refused to recognise **torture** as a justiciable offence in Commonwealth common law.¹⁷ The Australian Capital Territory and Queensland have both made **torture** a specific offence under criminal law, both adopting a definition consistent with the Convention, although the Australian Capital Territory legislation defines '**act of torture**' by reference to the purposes of obtaining information or a confession, punishment, intimidation or coercion.¹⁸ The laws of the Australian Capital Territory and Victoria must be read in the light of the enactment of provisions modelled on the ICCPR's prohibition on **torture** and cruel, inhuman or degrading treatment or punishment.¹⁹

Notes

1 (ACT) [Human Rights Act 2004](#) ss 10, 19

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss 10, 22.

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

2 See [\[80-1345\]](#) note 3.

3 (CTH) Crimes (**Torture**) Act 1988 (repealed) now (CTH) Criminal Code s 274.2 by virtue of (CTH) [Crimes Legislation Amendment \(Torture Prohibition and Death Penalty Abolition\) Act 2010](#), which was enacted to fulfill more clearly and explicitly Australia's obligations under the (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)). In its Concluding Observations on Australia, issued in May 2008, the United Nations Committee Against **Torture** recommended that Australia enact a specific offence of **torture** at the federal level. As to the Convention's definition of **torture** see [\[80-1345\]](#). For claim that husband's deportation to Malaysia (where he faced the death penalty) would violate his right to life see *G T v Australia*, Communication No 706/1996, CCPR/C/61/D/706/1996 (note in particular individual opinions of Scheinin (dissenting in concluding violation of ICCPR art 7 (prohibition of **torture** or cruel, inhuman or degrading treatment) and Klein and Kretzmer (dissenting in concluding violation of ICCPR art 6 (right to life))).

4 (CTH) Criminal Code s 274.3 (extra-territoriality). Giving the offence extra-territorial application was intended to reflect a key aim of the (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)), which is to end impunity for **torture** globally.

5 (CTH) Criminal Code s 274.6.

6 Ibid s 274.7.

7 Ibid s 274.4.

8 (CTH) [International Criminal Court Act 2002 1](#) (Rome Statute) (**torture** as a crime against humanity), [8\(2\)\(a\)\(ii\)](#) (**torture** as a war crime), [55\(1\)\(b\)](#) (prohibiting **torture** during investigation); (CTH) Criminal Code ss 268.13 (Crimes against humanity — **torture**), 268.25, 268.73 (War crime — **torture**).

These offences operate prospectively from 26 September 2002 and apply to conduct both within and outside Australia. The legislation replaces (CTH) [Geneva Conventions Act 1957](#) Pt 2 (repealed) which previously covered such crimes.

(A) Introduction — Freedom from Torture and Related Acts

- 9 (CTH) [Extradition Act 1988](#) s [22\(3\)\(b\)](#).
- 10 (INT) Convention relating to the Status of Refugees (Geneva, 28 July 1951; Aust TS 1954 No 5; 189 UNTS 150) (as amended by the () Protocol relating to the Status of Refugees (New York, 31 January 1967; Aust TS 1973 No 37; 606 UNTS 267)). Australia's obligations under these instruments have been incorporated into domestic law by (CTH) [Migration Act 1958](#) s [36](#). See also (INT) Convention against [Torture](#) and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 3 and United Nations Committee Against [Torture](#) (CAT) *General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and communications)* A/53/44, annex IX (available at <http://www.unhcr.org>).
- 11 (CTH) [Migration Act 1958](#) s [5J\(4\)\(b\)](#).
- 12 (INT) Convention relating to the Status of Refugees 1951 art 1(F) (as amended by the (INT) Protocol relating to the Status of Refugees 1967).
- 13 (CTH) [Migration Act 1958](#) ss [417](#), [501J](#).
- 14 See Migration Series Instructions 386 — Guidelines on Ministerial Powers Under Sections 345, 351, 391, 417, 454 and 501J of the Migration [Act](#) 1958, at [4.2.1].
- 15 See United Nations Committee Against [Torture](#), *Concluding Observations of the Committee against Torture: Australia*, UN Doc A/56/44, November 2000 at [47]-[53]. See also *Sadiq Shek Elmi v Australia* Communication No 120/1998, UN Doc CAT/C/22/D/120/1998 (1999) at [6.9], [7], where the Committee against [Torture](#) concluded that Australia was in breach of art 3 of the Convention on the basis that there were substantial grounds for believing that the author would be in danger of being subjected to [torture](#) if he returned to Somalia.
- 16 See *Shams v Australia* (2007) Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, CCPR/C/90/D/1255 (2007) (humanitarian or temporary protection visas granted after at least three but in most cases after over 4 years in detention where no grounds were advanced justifying continued detention for such prolonged periods and where detention for such a period was without any chance of substantive judicial review was arbitrary within (INT) Convention against [Torture](#) and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 9(1) (the 'Convention'); inability of the judiciary to challenge a detention that was contrary to *ibid* art 9(1) constituted a further violation of *ibid* art 9(4) at [7.2]). Note the (CTH) [Migration Act 1958](#) and (CTH) [Migration Regulations 1994](#) were since amended ((CTH) [Migration Amendment \(Detention Arrangements\) Act 2005](#) and the (CTH) [Migration and Ombudsman Legislation Amendment Act 2005](#)) to give the Minister the non-delegable and non-compellable power to grant a visa to any immigration detainee, detain an unlawful non-citizen in a form of community detention, or invite a detainee who cannot be removed in the foreseeable future to apply for a bridging visa. In response to the United Nations Human Rights Committee's finding under article 9(4) of the Convention, Australia commented: 'the obligation on states parties is to provide for review of the lawfulness of detention. In the view of the Government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary' (Response of the Australian Government to the Views of the Committee in Communications numbers 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004; Saed Shams, Kooreh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, Amin Houvedar Sefed). See also *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 ; 85 ALJR 133; [2010] HCA 41; [BC201008390](#).
- 17 See *Nulyarimma v Thompson* (1999) 96 FCR 153 ; [165 ALR 621](#); [1999] FCA 1192; [BC9905436](#). After noting that the Federal Parliament had abolished common law offences pursuant to (CTH) Criminal Code s 1.1, Whitlam J asserted ((ALR) at 637): 'The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of *jus cogens* under customary international law'.
- 18 (ACT) [Crimes Act 1900](#) s [36](#)
(QLD) Criminal Code s 320A.
- 19 (ACT) [Human Rights Act 2004](#) ss [10](#), [19](#)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss [10](#), [22](#).

For an unsuccessful claim by a couple that failure to pay Special Benefits payment by Centrelink constituted [torture](#) and cruel, inhuman or degrading treatment, or imposed upon them 'mental suffering and physical pain' see: *Scott v Human Rights and Equal Opportunity Commission* [2007] FCA 2055 ; [BC200711306](#). See also *White v South Australia* (2010) 106 SASR 521 ; [2010] SASC 95; [BC201001992](#) at [35], [335] per Anderson J (use of shipping container as a holding cell for protesters ill conceived and fundamental breach of human rights).

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(B) Freedom from Cruel, Inhuman or Degrading Treatment

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(8\) FREEDOM FROM TORTURE AND RELATED ACTS](#)

(B) FREEDOM FROM CRUEL, INHUMAN OR DEGRADING TREATMENT

[80-1355] Mentally ill persons

The paragraph below is current to **07 March 2018**

All jurisdictions have legislation that provides for the compulsory detention of persons with a mental illness who have caused, or are likely to cause, harm to themselves or others.¹ Special procedures have been instituted to ensure that no person is subjected to psychosurgery or electroconvulsive therapy without his or her consent, and an authorising order by a court or tribunal.²

Notes

- 1** As to the grounds for involuntary admission and detention see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-230\]-\[285-275\]](#).
- 2** See MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-360\]](#) (electroconvulsive therapy), [\[285-365\]](#) (psychosurgery). In addition, in New South Wales the administering of deep sleep therapy or insulin coma therapy is prohibited: see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-375\]](#).

[80-1360] Experimentation

The paragraph below is current to **07 March 2018**

It is not lawful to operate on, or otherwise treat a person without that person's consent.¹ Scientific experimentation, for the purposes of the article 7 of the International Covenant on Civil and Political Rights 1966, would also be included in this rule.²

(B) Freedom from Cruel, Inhuman or Degrading Treatment

Notes

- ¹ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 233, 234; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 per Mason CJ, Dawson, Toohey and Gaudron JJ ((NT) **Criminal** Code implies that non-consensual medical treatment including any physical contact or threat of such constitutes an assault). As to consent to medical procedures see MEDICINE [\[280-3000\]-\[280-3030\]](#). As to **criminal** assault see **CRIMINAL** LAW [\[130-1000\]-\[130-1047\]](#). As to **liability** in tort for assault see TORT [\[415-355\]](#).
- ² (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 7. See [\[80-1345\] note 2](#).

[80-1365] Treatment of children

The paragraph below is current to **07 March 2018**

Parents have the power to consent to treatment in the best interests of their children.¹ However, children are entitled to the full protection of article 7 of the International Covenant on Civil and Political Rights² and of the equivalent provision in the Convention on the Rights of the Child,³ which provide that children are entitled to be consulted and to have their views respected.⁴ A child of sufficient intelligence and understanding can consent to treatment notwithstanding the refusal of parents to consent.⁵ However, where a child and parents disagree, the child's view can be overridden by a court where the court considers it to be in the best interest of the child.⁶ In the case of an intellectually disabled child, a parent or person in whose care the child is kept does not have authority to authorise a serious treatment such as sterilisation, except where it is incidental to surgery or to cure a disease or correct a disability.⁷ Treatment of a non-therapeutic kind in serious cases that involves 'invasive, irreversible and major surgery'⁸ may only lawfully be performed with the authorisation of a court.⁹ The welfare jurisdiction of the Family Court has been held to extend to the States and Territories and is not susceptible of being overridden and displaced by a subsequent State or Territory scheme.¹⁰

Notes

- ¹ *R v Terry* [1955] VLR 114 . See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 295; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 per Deane J.
- ² (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).
- ³ (INT) Convention on the Rights of the Child 1989 (New York, 20 November 1989; Aust TS 1991 No 4) art 37(a). Entry into force for Australia on 16 January 1991.
- ⁴ Ibid art 12(1) ('States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child').
- ⁵ *Gillick v West Norfolk & Wisbech Area Health Authority* [\[1986\] AC 112](#)  ; [\[1985\] 3 All ER 402](#), HL. As to consent to medical procedures see MEDICINE [\[280-3000\]-\[280-3030\]](#).
- ⁶ *Re W (a minor) (medical treatment)* [\[1992\] 4 All ER 627](#) ; [\[1993\] Fam 64](#) ; [\[1992\] 3 WLR 758](#) .
- ⁷ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300 (court will decide whether the procedure is appropriate). See also MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-530\]](#).

(B) Freedom from Cruel, Inhuman or Degrading Treatment

- 8 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 250 per Mason CJ, Dawson, Toohey, Gaudron JJ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300. As to sterilisation of intellectually disabled children see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-530\]](#).
- 9 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218  at 258, 259 per Mason CJ, Dawson, Toohey, Gaudron JJ; [106 ALR 385](#); [15 Fam LR 392](#); 66 ALJR 300. See also MEDICINE [\[280-3010\]](#).
- 10 *P v P* (1994) 181 CLR 583 ; [120 ALR 545](#); [17 Fam LR 457](#); [BC9404622](#) at [\[48\]](#), [\[49\]](#).

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(C) Freedom from Cruel, Inhuman or Degrading Punishment

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(8\) FREEDOM FROM TORTURE AND RELATED ACTS](#)

(C) FREEDOM FROM CRUEL, INHUMAN OR DEGRADING PUNISHMENT

[80-1375] Sentencing

The paragraph below is current to **07 March 2018**

A mandatory punishment of life imprisonment for a series of crimes relating to the hijacking of aircraft has been held to lead to results 'that would be plainly unreasonable and unjust'¹ and possibly to amount to cruel and unusual punishment.² However, a claim that article 7 of the International Covenant on Civil and Political Rights 1966³ should be invoked to avoid sentencing two convicted persons to imprisonment for burglary, robbery and making demands with threats, with the serious risk that they might be subjected to physical and sexual assault by other prisoners, was not upheld.⁴ Persons of Aboriginal descent have had tribal penalties taken into account in sentencing.⁵ The accused should be treated with humanity and respect when sentenced even where the offender has committed a serious offence and the court expresses strong disapproval.⁶ If the conditions of incarceration are so harsh as to produce a particular consequence, that must be taken into account in determining the length of any appropriate sentence.⁷

Notes

- 1 *Sillery v R* (1981) 180 CLR 353; [35 ALR 227](#) at [230](#); 55 ALJR 509 at 511 per Gibbs CJ.
- 2 *Sillery v R* (1981) 180 CLR 353; [35 ALR 227](#) at [234](#); 55 ALJR 509 at 513 per Murphy J.
- 3 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) .
- 4 *R v Hollingshed* (1993) 112 FLR 109.
- 5 See [80-1390].
- 6 *Moh v Pine* [\[2010\] ACTSC 27](#); [BC201001894](#) ((**ACT**) [Human Rights Act 2004](#) s 19(1) requires a judicial officer in sentencing an offender to **act** with courtesy and dignity of the offender).
- 7 *R v Kent* [\[2009\] VSC 375](#); [BC200908093](#) at [\[32\]](#) per Bongiorno JA (also noting to place people in a custodial environment likely to result in their suffering a major psychiatric illness can hardly be said to be treating them with humanity). See also *IMO Major Review of Percy* [\[2010\] VSC 179](#); [BC201002694](#) at [33]-[34] per Coghlan J (provisions of the (VIC) [Crimes \(Mental Impairment and Unfitness to be Tried\) Act 1997](#) recognise the human rights of

the reviewee and (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) was not otherwise engaged). See also *Callanan v Attendee Z* [\[2014\] 2 Qd R 11](#); [\[2013\] QSC 342](#); [BC201315733](#).

[80-1380] Prisons

The paragraph below is current to **07 March 2018**

A custodial sentence inevitably involves the curtailment of rights otherwise enjoyed,¹ including the right to undertake work of the prisoner's choosing² but all rights and remedies available to prisoners as citizens are preserved save as restricted by statute.³ Most jurisdictions operate prisons or correctional institutions established under legislation.⁴ The legislation normally provides for the hearing of complaints by visitors or visiting justices, or in South Australia by inspectors.⁵ While an action in negligence may be brought against the Crown for failure to discharge a duty of care to an individual prisoner that results from application of a policy, the policy itself cannot be challenged⁶ and the courts are reluctant to intervene in the internal administration of a prison.⁷ The exercise of authority within the scope of prison regulations is regarded as not reviewable by the courts,⁸ and in relation to early release, such regulations do not confer actionable rights.⁹ In most jurisdictions a prisoner may be put in separate confinement as a penalty for committing an offence in prison.¹⁰ However, prison authorities are by common law required to exercise reasonable care over the safety of prisoners,¹¹ and a prisoner can obtain compensation by way of damages for serious assaults by other prisoners.¹² A declaratory remedy may be available for calculation of remissions according to law,¹³ and a writ of habeas corpus is the proper mode of questioning sentencing by a court.¹⁴ In all jurisdictions there are provisions for the censoring of mail to and from prisoners.¹⁵ However, unrestricted correspondence is permitted to certain persons and agencies.¹⁶ In most jurisdictions legislation guarantees some privileges for prisoners, such as a proper diet, health care, exercise in open air and the right to practise religion.¹⁷ Confinement in a small space even for a short time has constituted a violation of the right of those deprived of their liberty to be treated with humanity.¹⁸ New South Wales prohibits **torture** as a punishment for correctional centre offences, as well as solitary confinement, corporal punishment, cruel, inhuman or degrading treatment, or any other punishment which can reasonably be expected to adversely affect an inmate's physical or mental health.¹⁹ The Australian Capital Territory and Victorian human rights charters offer protection concerning humane treatment when deprived of liberty.²⁰ Anti-discrimination legislation in the Commonwealth and States and Territories of course provides direct general protection against discrimination for prisoners.²¹

Notes

- 1** *R v Secretary of State for the Home Dept; Ex parte Daly* [\[2001\] 2 AC 532](#); [\[2001\] 3 All ER 433](#); [\[2001\] 2 WLR 1622](#); [\[2001\] UKHL 26](#) at [5] per Bingham LJ ('Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights').
- 2** See *Eastman v Chief Executive Officer, Dept of Justice and Community Safety* (2010) 4 ACTLR 161; [172 ACTR 32](#); [\[2010\] ACTSC 4](#); [BC201000192](#) (arguable case that (ACT) [Human Rights Act 2004](#) s 19 required a prisoner be given opportunity for useful work and the benefit of rehabilitative measures but there is no authority that includes a right to work, as chosen by the prisoner). Among European sources cited in *Eastman v Chief Executive Officer, Dept of Justice and Community Safety*, above were: *Enea v Italy* [\[2009\] ECHR 74912/01](#); *Kudla v Poland* [\(2000\) 10 BHRC 269](#); [\[2002\] 35 EHRR 11](#); [\[2000\] ECHR 30210/96](#); and the Standard Minimum Rules for the Treatment of Prisoners art 71 (the 'Standard Minimum Rules') adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Geneva in 1955 and approved in 1977:

(C) Freedom from Cruel, Inhuman or Degrading Punishment

- (1) Prison labour must not be of an afflictive nature.
- (2) All prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by the medical officer.
- (3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.
- (4) So far as possible the work provided shall be such as will maintain or increase the prisoners' ability to earn an honest living after release.
- (5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.
- (6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.

3 *Muir v R* (2004) 206 ALR 189 ; 78 ALJR 780; [2004] HCA 21; BC200402608 at [25] per Kirby J; *Lukatela v Birch* (2008) 223 FLR 1 ; 164 ACTR 24; [2008] ACTSC 99; BC200808513 at [5] per Rares J. In the military context see *Groves v Commonwealth* (1982) 150 CLR 113 ; 40 ALR 193; 56 ALJR 570; BC8200060. See also Brown D and Wilkie M (eds), *Prisoners as Citizens: Human Rights in Australian Prisons*, 2002, Federation Press, Annandale.

4 (CTH) *Removal of Prisoners (Territories) Act 1923* ss 3-5 (the Governor-General may, with the concurrence of the Government of the State or Territory to which it is proposed to remove the prisoner, order the prisoner to be removed to a prison in a State or Territory)

(ACT) *Corrections Management Act 2007*; (ACT) *Crimes (Sentence Administration) Act 2005* s 7

(NT) *Correctional Services Act 2014*

(NSW) *Crimes (Administration of Sentences) Act 1999*. See also *Hamzy v Cmr of Corrective Services (NSW)* (2011) 80 NSWLR 296 ; [2011] NSWSC 120; BC201101840 (claim for deprivation of 'residual liberty' in breach of (NSW) *Crimes (Administration of Sentences) Act 1999* s 10 where detention not unlawful because of the conditions of imprisonment but because of further restrictions).

(QLD) *Corrective Services Act 2006*

(SA) *Correctional Services Act 1982*

(TAS) *Corrections Act 1997*

(VIC) *Corrections Act 1986*

(WA) *Prisons Act 1981*. See also (WA) *Acts Amendment (Safety and Human Rights of Persons in Custody) Bill 2009*.

These provisions are supplemented by:

(ACT) *Human Rights Act 2004*; see *Lukatela v Birch* (2008) 223 FLR 1 ; 164 ACTR 24; [2008] ACTSC 99; BC200808513 ((ACT) *Human Rights Act 2004* s 19 rights of prisoners recognised in the context of a police officer tried for applying capsicum foam to watchhouse detainees without reasonable necessity)

(VIC) *Charter of Human Rights and Responsibilities Act 2006*. For recognition of prisoners' equality before the law and a prison's status as public authority see *Rich v Secretary, Dept of Justice* [2010] VSC 390 ; BC201006250.

As to the general legislative framework relating to prisons see PRISONS [335-1].

5 (ACT) *Official Visitor Act 2012* s 14(1)(c)

(NT) *Correctional Services Act 2014* ss 30 (official visitors making inquiries only), 31 (an official visitor must not, during a visit to a prison, interfere with the control or management of the prisoners)

(NSW) *Crimes (Administration of Sentences) Act 1999* ss 228 (5)(c)(official visitors must receive and deal with complaints), 229 (powers of judges and magistrates to visit and examine)

(QLD) *Corrective Services Act 2006* Ch 6 Pt 12A (discrimination complaints by prisoners)

(SA) *Correctional Services Act 1982* s 20 (inspectors)

(C) Freedom from Cruel, Inhuman or Degrading Punishment

(TAS) [Corrections Act 1997](#) s [10](#)

(VIC) [Corrections Act 1986](#) ss [33-43](#) (various forms of visit with independent prison visitors under ibid s 35 having terms and conditions stated in the instrument of appointment).

(WA) [Prisons Act 1981](#) s 57 (visiting justices and independent prison visitors).

As to the inspection of prisons generally see PRISONS [\[335-105\]-\[335-120\]](#).

- 6 *Prisoners A to XX Inclusive v New South Wales* (1995) 79 A Crim R 377  (policy decision not to issue condoms). As to Crown **liability** to prisoners see PRISONS [\[335-85\]](#).
- 7 *Quinn v Hill* [\[1957\] VR 439](#)  at [444](#), [445](#) per Herring CJ and Gavan Duffy J; [1957] ALR 1127; *Re Batley* [\[1971\] VR 344](#)  at [346](#); *Rich v Secretary, Dept of Justice* [\[2010\] VSC 390](#) ; [BC201006250](#). See also PRISONS [\[335-965\]](#).
- 8 *Flynn v R* (1949) 79 CLR 1 ; [1949] ALR 850; [BC4900290](#); *Vezitis v McGeechan* [\[1974\] 1 NSWLR 718](#)  at [721](#); *McEvoy v Lobban* [\[1990\] 2 Qd R 235](#) ; (1990) 48 A Crim R 412.
- 9 *Flynn v R* (1949) 79 CLR 1 ; [1949] ALR 850; [BC4900290](#); *Sellers v Nielsen* [\[1943\] St R Qd 217](#) ; (1943) 37 QJPR 130.
- 10 (ACT) [Corrections Management Act 2007](#) ss [184](#) (prison penalties can include solitary confinement for 3, 7 or 28 days), [187](#) (solitary confinement conditions). See *Eastman v Chief Executive Officer, Dept of Justice and Community Safety* [\[2011\] ACTSC 33](#) ; [BC201100880](#) (asserted non-compliance with (ACT) [Corrections Management Act 2007](#) s [78\(2\)\(d\)](#)).

(NT) [Correctional Services Act 2014](#) s [78\(2\)\(b\)](#) (not exceeding 7 days). See also ibid s 41 (General Manager of a prison may separate a prisoner from other prisoners as they consider appropriate)

(NSW) Crimes (Administration of Sentences) **Act** 1999 ss 53 (general manager can impose penalty of confinement to a cell for up to 7 days), 56 (similar power of Visiting Magistrate). The **Act** has removed the distinction between major and minor correctional centre offences. See also ibid s 10 (power of Commissioner to segregate inmates for personal safety, security or good order).

(QLD) [Corrective Services Act 2006](#) ss [122](#) (separate confinement up to 7 days), [136](#) (temporary detention for security offence, max 4 hours)

(SA) [Correctional Services Act 1982](#) s 36 (up to 30 days on the order of the Chief Executive Officer of the Department of Correctional Services). See ibid s 36(9) (if a prisoner is segregated for more than 5 days, the Chief Executive must provide the Minister with a report of the circumstances relating to the direction)

(TAS) [Corrections Act 1997](#) s 61(b) (segregation can be used as a penalty for a period of up to 30 days)

(VIC) [Corrections Act 1986](#) s [112](#) (privileges are permitted by regulation, but may be withdrawn: ibid s 54A); (VIC) Corrections Regulations 2009 reg 27 (but segregation under this regulation is protective not punitive)

(WA) [Prisons Act 1981](#) ss 77(1)(e) (by superintendent, up to 72 hours in prisoner's sleeping quarters), 78(1)(a) (by visiting justice, up to 7 days per offence, but not exceeding 21 days in total). See ibid s 78(3) for prisoner's rights when a period longer than 7 days segregation is imposed. Separate confinement must be in quarters of a reasonable size, and have reasonable light and ventilation: ibid s 82.

The (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 7 may prohibit solitary confinement as a 'cruel, inhuman or degrading punishment' (see [\[80-1345\]](#)). See also *Fricker v Dawes* (1992) 57 SASR 494 ; 165 LSJS 464 (solitary confinement is not permissible but prisoner's detention did not amount to solitary confinement); *Holden v South Australia* (1992) 62 A Crim R 308 ; [BC9200326](#) ((UK) Bill of Rights 1688 is in force in South Australia, it was not cruel and unusual punishment to lock prisoner in cell for 18.25 hours per day); *Williams v Home Office (No 2)* [\[1981\] 1 All ER 1211](#)  (prison unit where prisoners not allowed to associate with one another was not cruel and unusual punishment under (UK) Bill of Rights 1688).

See further PRISONS [\[335-675\]-\[335-710\]](#) (segregation).

- 11 *Howard v Jarvis* (1958) 98 CLR 177 ; 32 ALJ 40; [BC5800370](#) (person in police detention) (followed, in relation to detention in prison in *Nada v Knight* (1990) Aust Torts Reports ¶181-032, SC(WA), Full Court).
- 12 *L v Commonwealth* [\(1976\) 10 ALR 269](#) , SC(NT).

(C) Freedom from Cruel, Inhuman or Degrading Punishment

- 13 *Cheetham v McGeechan* [1971] 2 NSWLR 222 .
- 14 *Re Forbes* (1887) 3 WN (NSW) 111c . See also *Flynn v R* (1949) 79 CLR 1  at 7 per Dixon J, at 9 per McTiernan J; [1949] ALR 850; [BC4900290](#).
- 15 See PRISONS [335-800] note 6.
- 16 See PRISONS [335-800] note 8.
- 17 (ACT) [Corrections Management Act 2007](#) ss 40-55
(NT) [Correctional Services Act 2014](#) ss 59, 60 (religion and belief systems)
(NSW) [Crimes \(Administration of Sentences\) Regulation 2014](#) cl 36(2) (suitable clean bedding), 48 (inmate access to books and other material), 50 (food), 53 (exercise), 54 (provision of healthcare), 59 (condoms and dental dams must be made available to inmates free of charge) Pt 4, Div 6 (spiritual and pastoral care)
(QLD) [Corrective Services Regulation 2006](#) s 19 (privileges of prisoners include participating in an activity, using electronic media, using library facilities, buying anything other than essential toiletries, writing materials and stamps, among other things)
(SA) [Correctional Services Act 1982](#) s 34 (right to visitors)
(TAS) [Corrections Act 1997](#) ss 29, 47 (prisoners' rights including food, clothing, health care, visits, religion, care for mentally ill and intellectually disabled persons) (VIC) [Corrections Act 1986](#) s 47 (prisoners' rights including food, clothing, health care, visits, religion, care for mentally ill and intellectually disabled persons)
(WA) [Prisons Act 1981](#) ss 95-95E (health care, practise of religion).
As to conditions of detention generally see PRISONS [\[335-780\]-\[335-875\]](#).
As to access to medical services under the European Convention see *Sarban v Moldova* [2005] ECHR 3456/05 ; *Paladi v Moldova* (2008) 45 EHRR 15; [\[2009\] ECHR 39806/05](#).
- 18 *Cabal and Pasini v Australia* (Communication No 1020/2002), ICCPR, A/58/40 Vol II (2003) 346 (detention of two adults in a small space for an hour violated International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 10(1). See also *Brough v Australia*, Communication No 1184/2003, CCPR/C/86/D/1184/2003 (2006) (violation in (INT) International Covenant on Civil and Political Rights 1966 art 10 as a result of placement in a safe cell and confinement to a dry cell on at least two occasions, in a manner incompatible with the age, disability and status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect (not justified to prevent self-harm)) at [9.1].
- 19 (NSW) [Crimes \(Administration of Sentences\) Regulation 2014](#) cl 164 (prohibited punishments).
- 20 (ACT) [Human Rights Act 2004](#) s 19; see *Eastman v Chief Executive Officer, Dept of Justice and Community Safety* [2011] ACTSC 33 ; [BC201100880](#) (unsuccessful claim that taunts by prison officers and passive smoking breach of (ACT) [Human Rights Act 2004](#) ss 18(2), 19(1)).
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 22.
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 21 See [\[80-175\]-\[80-830\]](#). See, for example, *Queensland v Mahommed* (2007) EOC ¶93-452 ; [\[2007\] QSC 018](#); [BC200700466](#) (denial of access to Muslim prisoner of halal meat over 2 years amounted to a serious disadvantage for the purpose of (QLD) [Anti-Discrimination Act 1991](#)); *Castles v Secretary of Dept of Justice* [2010] VSC 310 ; [BC201004776](#) per Emerton J (regard had to the right of prisoners to be treated with humanity and with respect for their human dignity in (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 22(1) and this confirmed his reasoning to allow IVF treatment (at prison) on the basis of the express right in the (VIC) [Corrections Act 1986](#) allowing prisoners access to medical care (even though no finding of discrimination on the basis of 'infertility impairment' in denying access to clinic of her choice where she was undergoing treatment before imprisonment).

[80-1385] Corporal punishment at home and in schools

The paragraph below is current to **07 March 2018**

(C) Freedom from Cruel, Inhuman or Degrading Punishment

The United Nations (the 'UN') Convention on the Rights of the Child requires parties to take all appropriate steps to 'protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child'.¹ The Australian Government views this article as not requiring prohibition of reasonable correction.²

Under common law, a parent has power to discipline a child.³ However, the discipline may involve only reasonable and moderate corporal punishment for correcting behaviour⁴ and must bear a proper relationship to the age, physique and mentality of the child and be carried out with a reasonable instrument.⁵ For example, leaving a 13 year old boy tied to a tree with face and mouth taped is unlawful,⁶ as would be a father presenting a loaded pistol to a son with the object of frightening him.⁷ Lawful parental correction is only applicable to a child capable of appreciating it,⁸ and for a child under 1 year, lawful parental correction does not include physical hurt.⁹ Some jurisdictions have prohibited the corporal punishment of a child placed in a residential care facility and in juvenile detention centres.¹⁰ Only New South Wales has amended its legislation, consistent with recommendations of the Model **Criminal** Code Officers Committee,¹¹ so as to restrict the right of parents to use excessive punishment by banning physical force to the head or neck of the child, and any force which might cause harm to the child.¹²

The common law rule is that a teacher at a school may use only such force as is reasonable in punishing a pupil.¹³ This rule is embodied in those **criminal** codes which authorise reasonable force in relation to discipline in government schools.¹⁴ However, most jurisdictions have now prohibited corporal punishment in State schools, and in some non-government schools.¹⁵

Every jurisdiction has passed a version of the Education and Care Services National Law, which bans corporal punishment in day care, outside school hours care and preschools and kindergartens.¹⁶

The UN Committee on the Rights of the Child has expressed concern at the justification of 'reasonable chastisement' in the home in Australia, the legality of corporal punishment in many private education institutions and in both government and private schools in the Northern Territory and South Australia.¹⁷ Corporal punishment also raises issues of compatibility with the right to education in the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, with clear direction provided on the subject by the UN Human Rights Committee¹⁸ and the UN Committee on Economic, Social and Cultural Rights respectively.¹⁹

Notes

- 1** (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 19(1). See also (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 3, as interpreted by the European Court of Human Rights in *A v United Kingdom* [1998] ECHR 85, 25599/94 (23 September 1998) at [22], which found the prohibition against **torture** and inhuman or degrading treatment or punishment applicable to such ill-treatment administered by private individuals.
- 2** See Model **Criminal** Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Non Fatal Offences Against the Person* September 1998, pp 131-139; United Nations Committee on the Rights of the Child, *Australia's Second and Third Period Reports of States parties under Article 44 of the Convention on the Rights of the Child*, CRC/C/129/Add 4, 29 December 2004, at [184]-[188].
- 3** *R v Terry* [1955] VLR 114 . As to the **criminal** code jurisdictions, where 'reasonable force' is permitted, see:
(NT) **Criminal** Code s 27(p) (force that is not unnecessary and not likely to cause death or grievous harm to discipline, manage or control a child)
(QLD) **Criminal** Code s 280 (reasonable force by way of correction, discipline, management or control)
(TAS) **Criminal** Code s 50 (reasonable force by way of correction)

(C) Freedom from Cruel, Inhuman or Degrading Punishment

(WA) **Criminal** Code s 257 (reasonable force by way of correction).

See also (SA) **Criminal Law Consolidation Act 1935** s 20(2)(a) (exception to assault for conduct generally accepted in the community as a normal incident of social interaction)

As to the parental right to chastise see **CRIMINAL LAW** [130-1160], **FAMILY LAW** [205-1770]. As to the distinction between common law and code jurisdictions see **CRIMINAL LAW** [130-5].

- 4 *R v Terry* [1955] VLR 114 .
- 5 *R v Terry* [1955] VLR 114 . For a review of authorities on lawful correction or chastisement of children as a defence to assault see *Lumb v Police* [2008] SASC 198 ; BC200806597.
- 6 *Bedelph v R* (1981) 4 A Crim R 192, CA(TAS), Full Court.
- 7 *R v Hamilton* (1891) 8 WN (NSW) 9 .
- 8 *R v Griffin* (1869) 11 Cox CC 402 .
- 9 *R v Miller* [1951] VLR 346  at 350; [1951] ALR 749 per Martin J.
- 10 (NSW) **Children and Young Persons (Care and Protection) Regulation 2012** cl 41(1)(a) (child in the residential care of an authorized carer); (NSW) **Children (Detention Centres) Regulation 2015** cl 66 (child in detention centre)
(QLD) **Youth Justice Regulation 2016** s 16 (child in detention centre); (QLD) **Child Protection Act 1999** s 122(2) (statement of standards for children in care)
(SA) **Family and Community Services Regulations 2009** ss 7, 8 (child in detention centre)
(TAS) **Youth Justice Act 1997** s 132 (child in detention centre)
(VIC) **Children, Youth and Families Act 2005** s 487 (child detained in remand centre, youth residential centre, youth justice centre or police gaol).
- 11 As to the report of the Model **Criminal** Code Officers Committee see note 2 above.
- 12 (NSW) **Crimes Act 1900** s 61AA (defence of lawful correction).
- 13 *Byrne v Hebden; Ex parte Hebden* [1913] St R Qd 233 . As to corporal punishment in schools see EDUCATION AND RESEARCH [160-600]. See also **FAMILY LAW** [205-1775].
- 14 (QLD) **Criminal** Code s 280
(WA) **Criminal** Code s 257
In the Northern Territory, see (NT) **Criminal** Code s 11 (presumption that a school teacher of the child may apply force for the purpose of discipline).
See also *White v Weller; Ex parte White* [1959] Qd R 192 , SC(QLD), Full Court (slapping a 15 year old boy on face and shoulder with an open hand was not illegal, even though some bruising was caused); *King v Nichols; Ex parte White* (1939) 33 QJP (Mag Cas) 171 (reasonable corporal punishment not illegal even if in breach of regulations).
- 15 (**ACT**) **Education Act 2004** s 7(4) (corporal punishment is not allowed in any **ACT** school)
(NT) **Education Act 2015** ss 5 (definition of school), 162 (banning of corporal punishment in any government or non-government school and excluding any provision in (NT) **Criminal** Code s 11 to the contrary)
(NSW) **Education Act 1990** ss 35(2A) (discipline guidelines and codes must not permit corporal punishment), 47(h) (requirements for registration of a non-government school: school policies must not permit corporal punishment of students)
(TAS) **Education Act** 1994 s 82A
(VIC) **Education and Training Reform Regulations 2017** reg 14
(WA) **School Education Regulations 2000** reg 40 (student at a government school is not to be disciplined by way of corporal punishment).

(C) Freedom from Cruel, Inhuman or Degrading Punishment

- 16** (UL) Education and Care Services National Law s 166 (1). The (UL) Education and Care Services National Law is found in (VIC) [Education and Care Services National Law Act 2010](#) Sch and is adopted by the States and Territories through the following provisions:
- (ACT) [Education and Care Services National Law \(ACT\) Act 2011](#) s 6
- (NT) [Education and Care Services \(National Uniform Legislation\) Act 2011](#)
- (NSW) [Children \(Education and care Services National Law Application\) Act 2010](#) s 4
- (QLD) [Education and Care Services National Law \(Queensland\) Act 2011](#) s 4
- (SA) [Education and Early Childhood Services \(Registration and Standards\) Act 2011](#) s 10
- (TAS) [Education and Care Services National Law \(Application\) Act 2011](#) s 4
- (VIC) [Education and Care Services National Law Act 2010](#) s 4
- (WA) [Education and Care Services National Law \(WA\) Act 2012](#) s 4.
- 17** United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add 268, 20/10/20 at [35], [36].
- 18** United Nations Human Rights Committee, *General Comment 20: Replaces General Comment No 7 concerning Prohibition of **Torture** and Cruel Treatment or Punishment (Art 7)*, adopted at the Forty-fourth Session, 10 March 1992 at [5]: 'The prohibition in article 7 ... must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions'.
- 19** (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) (signed by Australia on 18 December 1972 and ratified on 10 December 1975). See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Art 13)*, adopted at the Twenty-first session, E/C.12/1999/10, 8 December 1999 at [41]: 'In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline, which is inconsistent with the Covenant, does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties, which actively encourage schools to introduce "positive", non-violent approaches to school discipline'.

[80-1387] Female genital mutilation

The paragraph below is current to **07 March 2018**

Female genital mutilation is widely viewed as a breach of the prohibition against cruel, inhuman or degrading treatment, and the right to physical integrity, as well as a form of gender-based violence and discrimination.¹ The United Nations Declaration on Violence Against Women asserts that custom, tradition or religion cannot be invoked by States to avoid their obligations with respect to the elimination of violence against women.² All States and Territories have legislated to prohibit female genital mutilation, unless performed for therapeutic purposes.³ It is not a defence that the person upon whom the mutilation is performed, or, if the other person is a child, a parent or guardian of the other person, consented to the mutilation.⁴ The legislation is designed to both prevent the mutilation of girls and to prevent the removal of a girl from a jurisdiction for the purposes of mutilation.⁵ In the Northern Territory and South Australia, child welfare legislation provides explicitly for a child to be taken into care where there is a reasonable risk of female genital mutilation.⁶

(C) Freedom from Cruel, Inhuman or Degrading Punishment

- 1 Provisions cited against the practice include (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 7 (prohibition against **torture** and cruel, inhuman or degrading treatment), 23 (equality of rights and responsibilities of spouses regarding marriage), 24 (protection of the child on the part of family, society and the State); (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) arts 2 (freedom from discrimination based on sex), 19 (protection from all forms of physical or mental violence, injury or abuse), 24 (right to enjoyment of highest attainable standard of health), 24(3) (abolition of traditional practices prejudicial to the health of children), 37(a) (**torture** or other cruel, inhuman or degrading treatment); (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York; 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980)) art 5 (elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes). See also United Nations Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No 14: Female Circumcision*, A/45/38 and Corrigendum (1990) (calling on all states to eliminate the practice) and United Nations Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No 19: Violence against women*, UN Doc A/47/38 (1993) at 1.
- 2 United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 48/104 of 20 December 1993, art 4.
- 3 (ACT) [Crimes Act 1900](#) ss [73](#) (definition), [74](#) (prohibition)
(NT) **Criminal** Code ss 186A (definition), 186B (prohibition)
(NSW) [Crimes Act 1900](#) s 45
(QLD) **Criminal** Code s 323A
(SA) [Criminal Law Consolidation Act 1935](#) ss [33](#) (definition), [33A](#) (prohibition)
(TAS) **Criminal** Code ss 1 (definition), 178A (prohibition)
(VIC) [Crimes Act 1958](#) ss [15](#) (definition), [32](#) (prohibition)
(WA) **Criminal** Code s 306(1) (definition), 306(2) (prohibition).

The practice also constitutes the offence of assault under the general law.

- 4 (ACT) [Crimes Act 1900](#) s [74\(2\)](#)
(NT) **Criminal** Code s 186D
(NSW) [Crimes Act 1900](#) s 45(5)
(QLD) **Criminal** Code s 323A(2)
(SA) [Criminal Law Consolidation Act 1935](#) s [33A\(2\)](#)
(TAS) **Criminal** Code s 178A(2)
(VIC) [Crimes Act 1958](#) s [34](#)
(WA) **Criminal** Code s 306(3).
- 5 (ACT) [Crimes Act 1900](#) s [75](#)
(NT) **Criminal** Code s 186C
(NSW) [Crimes Act 1900](#) s 45(2) ('offence is committed ... even if one or more of the **acts** constituting the offence occurred outside New South Wales if the person mutilated by or because of the **acts** is ordinarily resident in the State')
(QLD) **Criminal** Code s 323B
(SA) [Criminal Law Consolidation Act 1935](#) s [33B](#)
(TAS) **Criminal** Code s 178A
(VIC) [Crimes Act 1958](#) s [33](#)
(WA) **Criminal** Code s 306(4), 306(5).

Other than in New South Wales, legislation provides that where female genital mutilation has been performed on a child taken from the State, there is a presumption that the child was taken with the intention of having the mutilation performed.

- 6 (SA) Children's Protection Act 1993 ss 26A (definition), 26B (Court can make protective orders where reasonable grounds to suspect a child is at risk of female genital mutilation).

[80-1390] Aboriginal persons

The paragraph below is current to **07 March 2018**

Aboriginal persons are subject to the ordinary law of the land,¹ even if they do not understand the law or the nature of the guilty or not guilty plea.² However, the fact of tribal punishment for an offence that is also an offence under the criminal law may in some circumstances lead to mitigation of the penalty imposed by a court.³ This has been justified on the basis that considerations of fairness and justice require a sentencing court to have regard to all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group,⁴ and that a court can ordinarily take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence.⁵ Recent judicial ambivalence about this practice has concerned the extent to which it allows private revenge or punishment to replace punishment by the State.⁶ A court may also inquire into, and receive evidence on, tribal attitudes, but this may not necessarily result in lower penalties,⁷ and may result in customary law being disregarded.⁸ A question of double jeopardy may arise.⁹

Notes

- 1 *Ngatayi v R* (1980) 147 CLR 1 ; [30 ALR 27](#); 54 ALJR 401; [BC8000076](#); *Walker v New South Wales* (1994) 182 CLR 45  at 50; [126 ALR 321](#); 69 ALJR 111; [BC9404667](#) per Mason CJ. See further ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-3500\]](#).
- 2 *Ngatayi v R* (1980) 147 CLR 1 ; [30 ALR 27](#); 54 ALJR 401; [BC8000076](#). See, however, *Ngatayi v R* (1980) 147 CLR 1  at 10, 11; [30 ALR 27](#); 54 ALJR 401; [BC8000076](#) per Gibbs, Mason, and Wilson JJ ('It is no doubt a question of high legislative policy whether tribal Aboriginals who are unable to understand the concepts of the ordinary law, ought to be tried under that law'). See also (CLR) at 14 per Murphy J (dissenting, and commenting on the holding of Aboriginal persons in custody). In relation to the latter see *Royal Commission on Aboriginal Deaths in Custody, National Report* Vol 1 AGHPS, Canberra, 1991 at [9.4.1] (the proportion of Aboriginal persons in detention in Australia considerably exceeds their proportion of the Australian population: in 1989 14.3 per cent of prisoners and 28.6 per cent of persons taken into police custody). See further ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-3525\]](#)-[\[5-3560\]](#).
- 3 *R v Minor* [\(1992\) 79 NTR 1](#)  at [11](#); 105 FLR 180; 59 A Crim R 227 per Mildren J (court may take pay back into account for the purposes of sentencing). See also *R v Jungarai* [\(1981\) 9 NTR 30](#)  (appeal *Jungarai* (1982) 5 A Crim R 319 , Fed C of A) (term of sentence takes account of payback administered while prisoner on bail prior to sentencing); *Mamarika v R* [\(1982\) 42 ALR 94](#) ; 63 FLR 202; 5 A Crim R 354, Fed C of A (suspended sentence for manslaughter and separation from the community for 3 years ordered in view of injuries suffered through pay back). As to tribal punishment see ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-3760\]](#), [\[5-3765\]](#). Generally see *The Recognition of Aboriginal Customary Law*, AGPS, Canberra, 1986, Vol 1, Chs 17, 21.
- 4 *R v Minor* [\(1992\) 79 NTR 1](#)  at [13](#); 105 FLR 180; 59 A Crim R 227 per Mildren J, citing Brennan J in *Neal v R* (1982) 149 CLR 305  at 326; [42 ALR 609](#); [BC8200107](#).
- 5 See discussion of precedents in *R v Daetz* (2003) 139 A Crim R 398 ; [\[2003\] NSWCCA 216](#); [BC200304488](#) at [\[62\]](#) per James J (applied in *R v SS* [\[2010\] NSWSC 1169](#) , [BC201008288](#); *R v Fryar* (2008) 187 A Crim R 8 , [\[2008\] NSWCCA 171](#); [BC200807322](#)).
- 6 See, for example, in *Munda v Western Australia* (2013) 249 CLR 600 , [302 ALR 207](#); [\[2013\] HCA 38](#); [BC201313362](#) at [\[61\]](#)-[\[63\]](#) per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ; *R v Gooley* (1996) 66 SASR 380 ; 186

(C) Freedom from Cruel, Inhuman or Degrading Punishment

LSJS 33; 87 A Crim R 209; [BC9602067](#) per Doyle CJ. Whether Australian law is sanctioning or facilitating cruel, inhuman or degrading treatment or punishment by incorporating payback into sentencing has yet to be considered by a domestic court or international body.

- 7 See *Jabanunga v Williams* ([1980](#)) 6 NTR 19  at 22 per Muirhead J (the strong community attitude against bringing liquor into a restricted area was seen to warrant the offence 'not be[ing] dealt with lightly'). As to the wishes of the Aboriginal community see ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-3775\]](#).
- 8 *R v Herbert* ([1983](#)) 23 NTR 22  (affirmed an appeal relating to inadequacy of sentence *R v Sampson* (1984) 54 FCR 125; [53 ALR 542](#); 68 FLR 331). See also *Barnes v R* (1997) 96 A Crim R 593 ; [BC9705220](#) (bail application refused as court considered the applicant's physical well-being was at risk, by not granting bail which would permit the applicant to return to his community to submit himself for traditional tribal punishment). Compare *R v Barnes* (unreported, SC(NT), Mildren J, 28 November 1997) (sentencing decision taking into account the traditional payback punishment, not 'because the court approves' but because it is 'not right that a person should be punished twice').
- 9 *R v Alsop* (unreported, SC(SA), Mathieson J, 3 July 1981) noted in Reference on Aboriginal Customary Law Research Paper 6A, *Cases on Traditional Punishment and Sentencing*, ALRC, 1982, p 49; *R v Yulidjirri* (unreported, SC(NT), Forster CJ, 1981) noted in Reference on Aboriginal Customary Law and Research Paper 6A, *Cases on Traditional Punishment and Sentencing*, 1982, p 39.

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(9) FREEDOM FROM SLAVERY

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#)

(9) FREEDOM FROM SLAVERY

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[80-1391] Right in international law

The paragraph below is current to **07 March 2018**

Article 8 of the International Covenant on Civil and Political Rights (the 'ICCPR') provides that no one shall be held in slavery; all forms of slavery and the slave-trade are prohibited and no one shall be held in servitude.¹ It also states that no one shall be required to perform forced or compulsory labour² but this does not prevent hard labour under a sentence by a competent court, work or service normally required of prisoners under a lawful sentence or on conditional release, military service (or alternatives to military service where conscientious objection is recognised), service required in cases of emergency or life-threatening calamity, or work which forms part of normal civil obligations.³

Although the United Nations Human Rights Committee has not issued a general comment specifically on article 8 of the ICCPR, it is clear from its concluding observations⁴ and from its general comment on article 3 of the ICCPR (equality of rights between men and women)⁵ that one of its key contemporary concerns is with the trafficking of women and children, particularly cross-border trafficking, and forced prostitution, including slavery, disguised as domestic or other kinds of personal service. Likewise the United Nations Committee on the Rights of the Child in relation to the Convention on the Rights of the Child⁶ in its general comment has drawn attention to pressing issues affecting *inter alia* trafficking of women and children, child soldiers, child labour, refugee and migrant children,⁷ and the United Nations Committee on Economic, Social and Cultural Rights in its concluding observations in relation to the International Covenant on Economic, Social and Cultural Rights⁸ has raised with states matters of forced labour, the treatment of migrant workers and convicted prisoners.⁹

(9) FREEDOM FROM SLAVERY

The racial dimensions of labour, for example in the caste system, migrant workers and the exploitation of indigenous children have received consideration by the United Nations Committee on the Elimination of Racial Discrimination under the Convention.¹⁰

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 8(1), 8(2).
- 2 Ibid art 8(3). On conscientious objection see *Krygger v Williams* (1912) 15 CLR 366 ; 18 ALR 518; [BC1200026](#). See also [\[80-1485\]](#).
- 3 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 8(3).
- 4 See concluding observations of the United Nations Human Rights Committee at A/57/40 Vol I (2002) 32 at [74.18] (Ukraine); A/57/40 Vol I (2002) 47 at [77.15] (Azerbaijan); A/60/40 Vol I (2005) 83 at [95.20] (Thailand); A/59/40 Vol I (2004) 68 at [75.16] (Serbia and Montenegro).
- 5 United Nations Human Rights Committee, *CCPR General Comment No 28: Equality of Rights Between Men and Women (Art 3)*, UN Doc CCPR/C/21/Rev 1/Add 10, 29 March 2000 art 12.
- 6 (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4).
- 7 United Nations Committee on the Rights of the Child, United Nations Committee on the Rights of the Child, *CRC General Comment No 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, UN Doc CRC/GC/2002/2, A/59/41 (2004), 15 November 2002 at [82.29].
- 8 International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) signed by Australia on 18 December 1972 and ratified on 10 December 1975.
- 9 See, for example, ICESCR, E/2006/22 (2005) 41 at [285] (Serbia and Montenegro); ICESCR, E/2005/22 (2004) 23 at [138] (Greece) (forced labour); ICESCR, E/2003/22 (2002) 68 at [496] (Estonia) (convicted prisoners); ICESCR, E/2005/22 (2004) 29 at [190] (Kuwait) (migrant labour).
- 10 International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195). The Convention became effective for Australia on 30 October 1975. See for example CERD, A/59/18 (2004) 61 at [342]-[343] (Mauritania) (caste system); CERD, A/60/18 (2005) 22 at [85] (Bahrain) (migrant labour); CERD, A/60/18 (2005) 71 at [381] (Venezuela (Bolivarian Republic of)) (exploitation of indigenous children).

[80-1393] Commonwealth and State legislation

The paragraph below is current to **07 March 2018**

The text of article 8 of the International Covenant on Civil and Political Rights¹ is reflected in the Australian Capital Territory and Victorian human rights charters.² However at Commonwealth level slavery is the subject of specific offences in the (CTH) Criminal Code concerned with slavery, sexual servitude and deceptive recruiting.³ What is critical is the character of the exercise of power over the individual, including the power in the case of sex industry workers to make them objects of purchase, the capacity (for the duration of their contracts) to use them and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation.⁴

(9) FREEDOM FROM SLAVERY

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).
- 2 (ACT) [Human Rights Act 2004](#) s 26
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 11.
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 3 (CTH) Criminal Code Div 270 (giving effect to Australia's obligations under the 1929 Convention to Suppress the Slave Trade and Slavery, 60 UNT.S. 253). In the context of foreign sex workers see: *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [\[2008\] HCA 39](#); [BC200807527](#); *Director of Public Prosecutions (Cth) v Kam Tin Ho* [\[2009\] VSC 437](#) ; [BC200910089](#).
- 4 *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [\[2008\] HCA 39](#); [BC200807527](#) at [\[30\]-\[32\]](#), [\[50\]](#) per Gleeson CJ (observing the European Convention decision of *Siliadin v France* (2006) 43 EHRR 16  which distinguished 'modern' from 'classic' slavery within the 1926 Slavery Convention (when claimed in that case by a domestic servant), and noting that it is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context and purpose of the 1926 Slavery Convention). See also *Director of Public Prosecutions (Cth) v Kam Tin Ho* [\[2009\] VSC 437](#) ; [BC200910089](#) (foreign nationals contracted to travel to Australia to engage in prostitution).

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(A) Introduction — Freedom of Thought, Conscience and Religion

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > (10)
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

(10) FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

This chapter was updated by

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(A) INTRODUCTION — FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

[80-1445] Right in Australian law

The paragraph below is current to **07 March 2018**

The right to freedom of thought, conscience and religion is one of the freedoms recognised by the common law in the negative sense that it is assumed to exist if there are no legislative limitations imposed on it,¹ and its existence may lead a court to construe legislation in a restrictive way.² However, the constitutional implications³ upon which the High Court of Australia has based decisions⁴ concerning freedom of communication relating to public affairs and political discussion⁵ are expressed in such a way that the implications extend to a guarantee of freedom of religious communication, at least when part of political communication, and possibly expression (including conduct).⁶ The freedom does not extend to rendering invalid Commonwealth legislation which prohibits misleading or deceptive statements,⁷ to regulating the making of protests on Commonwealth or Territory land,⁸ to conferring a discretion to determine award provisions⁹ or to setting up a scheme regulating the appointment of marriage celebrants.¹⁰

Aspects of the right are included in section 116 of the Commonwealth Constitution (the 'Constitution') and section 46 of the (TAS) Constitution Act 1934.¹¹ However, section 116 of the Constitution has not been found to support freedom of discussion or communication of religious matters.¹² The right is closely related to the rights to freedom of expression¹³ and freedom of association,¹⁴ and discrimination related to some aspects of the right is unlawful in some jurisdictions.¹⁵ Religious vilification is similarly covered in several jurisdictions.¹⁶

(A) Introduction — Freedom of Thought, Conscience and Religion

- 1 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 48; [108 ALR 681](#) at [704](#), [705](#); 66 ALJR 658; [BC9202684](#) per Brennan J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 182, 183; [108 ALR 577](#) at [628](#), [629](#); 66 ALJR 577; [BC9202654](#) per Dawson J. See also *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376  at 385; [54 ALR 571](#) per White J. For discussion on what is conscience, and conscience and the criminal law see *R v AM* (2010) 245 FLR 410 ; [2010] ACTSC 149; [BC201008957](#) at [\[31\]-\[47\]](#) per Refshauge J.
- 2 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145  at 149; 61 LGRA 148; [69 ALR 641](#) at [644](#); [BC8701763](#) per the court. Note, however, that statutory construction of the (VIC) Children and Young Persons Act 1989 (repealed) (replaced by (VIC) [Children, Youth and Families Act 2005](#)) in relation to protection applications made for 81 children within the group formerly known as the Children of God was held to permit the magistrate to hear together the cases of the 81 children and to make decisions about the mode of child-rearing and the children's prospects of integration into the general community without apparent reference to the right to freedom of religious practice: *M v M* [\[1993\] 1 VR 391](#) , CA(VIC).
- 3 See [\[80-45\]](#) for constitutional implications.
- 4 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 141 per Mason CJ, at 211 (public importance), 212 (freedom of speech generally) per Gaudron J; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 103; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#) per McHugh J (fair comments on matters of public interest). The test was authoritatively restated in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 ; [145 ALR 96](#) at [112](#); 71 ALJR 818; [BC9702860](#), and restated in *Coleman v Power* (2004) 220 CLR 1 ; [209 ALR 182](#); [2004] HCA 39; [BC200405576](#) at [\[196\]](#). For protection of non-verbal conduct, see *Levy v Victoria* (1997) 189 CLR 579 ; [146 ALR 248](#) at [252](#) per Brennan CJ, at 267 per Toohey and Gummow JJ, at 274 per McHugh J, at 286 per Kirby J; 71 ALJR 837; [BC9703254](#); *Roach v Electoral Cmr* (2007) 233 CLR 162 ; [239 ALR 1](#); [2007] HCA 43; [BC200708182](#) at [\[87\]](#); *Coleman v Power* (2004) 220 CLR 1 ; [209 ALR 182](#); [2004] HCA 39; [BC200405576](#) at [\[104\]](#), [\[105\]](#) per McHugh J (on intimidating participants in discussion)).
- 5 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 142 per Mason CJ (freedom of communication, speech or expression), at 150 per Brennan J (the freedom includes, but is not confined to, a freedom to communicate information and ideas), at 212 per Gaudron J (the notion of a free society); [108 ALR 577](#); 66 ALJR 577; [BC9202654](#).
- 6 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 ; 192 LGRA 185; [2013] HCA 3; [BC201300754](#) at [\[67\]](#) per French CJ. See also *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 ; [113 ALR 257](#); [25 IPR 509](#) (provisions in the (CTH) Trade Practices Act 1974 (replaced by the (CTH) [Competition and Consumer Act 2010](#) as of 1 January 2011)).
- 7 *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 ; [112 ALR 529](#); [29 ALD 119](#); [BC9203830](#) (majority held (CTH) [Diplomatic Privileges and Immunities Regulations 1989](#) reg 5A, allowing removal of white crosses placed on Commonwealth land in protest, valid). Compare Einfeld J dissenting (interpretation should be narrow to contain restrictions on freedom of expression).
- 8 *Concept Products v Forest Products Furnishing & Allied Industries Industrial Union of Workers* (1994) 74 WAIG 843  at 846 per Kennedy J.
- 9 *Nelson v Fish* (1990) 21 FCR 430 ; [92 ALR 187](#) (refusal to recognise denomination of which applicant a leading member).
- 10 See [\[80-1455\]](#).
- 11 See *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 178 LGRA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) (affirmed on appeal: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 344 ALR 101 ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)); *Harkianakis v Skalkos* (1999) 47 NSWLR 302 ; 150 FLR 330; [\[1999\] NSWSC 505](#); [BC9907110](#) at [\[16\]-\[19\]](#) per Dunford J. Freedom of religion in the context of political communication was touched upon in *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) (no purpose disclosed to prohibit free exercise of religion).
- 12 See [\[80-1945\]-\[80-2080\]](#).
- 13 See [\[80-1945\]-\[80-2080\]](#).

14 See [\[80-2135\]-\[80-2195\]](#).

15 See [\[80-1495\]](#). As to discrimination on the grounds of religious belief, see [\[80-370\]](#), [\[80-375\]](#). There are also various exemptions in the legislatively protected areas of discrimination relating to religious beliefs: see [\[80-450\]](#) (work), [\[80-510\]](#) (education in religious institutions), [\[80-545\]](#) (provision of goods and services), [\[80-620\]](#) (general exemptions for religious bodies and practices). See further RELIGION [\[365-145\]-\[365-180\]](#).

16 (QLD) [Anti-Discrimination Act 1991](#) s [124A](#) (racial and religious vilification)

(TAS) [Anti-Discrimination Act 1998](#) s [19](#) (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity)

(VIC) [Racial and Religious Tolerance Act 2001](#).

A private member's bill to amend the (NSW) [Anti-Discrimination Act 1977](#) to make religious vilification unlawful was rejected by the New South Wales legislature in March 2006 despite the Legislative Review Committee's conclusion that it did not unduly trespass on the right to free speech and that religious vilification represented a highly compelling public interest reason to limit free speech. See Legislation Review Committee, Legislation Review Digest No 10, 2005 available at <http://www.parliament.nsw.gov.au>.

[80-1450] Right in international law

The paragraph below is current to **07 March 2018**

The right to freedom of thought, conscience and religion is expressed in the International Bill of Rights in its simplest form in the Universal Declaration of Human Rights (the 'UDHR').¹ It is stated in greater detail in article 18 of the International Covenant on Civil and Political Rights (the 'ICCPR').² The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the 'Declaration')³ states the right in greater detail again and elaborates in considerable detail on various forms of manifestation of religion or belief. While following the formulation in the UDHR and the ICCPR, the Declaration provides that nothing it contains is to be construed as restricting the UDHR and ICCPR rights⁴ and requires states to take effective measures to prevent and eliminate discrimination based on religion or belief.⁵ It confirms the right of parents or legal guardians to organise the life of the family in accordance with their religion and belief,⁶ and of children to be protected from discrimination⁷ and injurious practices⁸ related to religion and belief. The right covers both belief, in relation to which there may be no coercion,⁹ and its manifestation, though the manifestation may be subject to limitations prescribed by law which are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.¹⁰ However, the fundamental character of the freedom protected in the ICCPR is reflected in the fact that the provision cannot be derogated from, even in time of public emergency.¹¹ The rights of the child to freedom of thought, conscience and religion are specifically protected in the Convention on the Rights of the Child.¹² In each of the instruments referred to above, discrimination on the ground of religion and political or other opinion is proscribed in relation to all of the rights recognised.¹³ Both the ICCPR¹⁴ and the International Covenant on Economic, Social and Cultural Rights¹⁵ require states to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions. They permit public school instruction in subjects such as the general history of religions and ethics if given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression but if it includes instruction in a particular religion or belief, provision must be made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. A right to conscientious objection to military service can be derived from article 18 of the ICCPR.¹⁶

(A) Introduction — Freedom of Thought, Conscience and Religion

- 1** (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) adopted and proclaimed by the General Assembly of the United Nations.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance: *ibid* art 18. As to the Universal Declaration of Human Rights see FOREIGN RELATIONS [\[215-630\]](#).

- 2** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) .

Ibid art 18 provides:

- (1) 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship observance, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect safety, order, health or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

For interpretation of the international right, see United Nations Human Rights Committee *CCPR General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, CCPR/C/21/Rev 1 Add 4, 30 July 1993.

- 3** (INT) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55, 25 November 1981.
- 4** *Ibid* art 8.
- 5** *Ibid* art 4.
- 6** *Ibid* art 5(1).
- 7** *Ibid* art 5(3). See also (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18(4).
- 8** (INT) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981art 5(5).
- 9** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18(2).
- 10** *Ibid* art 18(3).
- 11** *Ibid* art 4(2).
- 12** (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 14. As to the Convention on the Rights of the Child generally see FOREIGN RELATIONS [\[215-675\]](#) and RELIGION [\[365-235\]](#).
- 13** (INT) Universal Declaration of Human Rights (GA Res 217A (III), 10 December 1948; GAOR 3rd Sess Part I, Resolutions, p 71) art 2; (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 2; (INT) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (GA Res 36/55, 25 November 1981) art 2; (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/736; Aust TS 1991 No 4) art 2.
- 14** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18(4). See United Nations Human Rights Committee *CCPR General Comment No 22: The right to freedom of thought, conscience and religion (Art 18)*, CCPR/C/21/Rev 1 Add 4, 30 July 1993 at [6].
- 15** (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) art 13(3) (signed by Australia on 18 December 1972 and ratified on 10 December 1975). See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Art 13)*, adopted at the Twenty-first session, E/C.12/1999/10, 8 December 1999 at [28].
- 16** In relation to conscientious objection to military service see United Nations Human Rights Committee *CCPR General Comment No 22: The right to freedom of thought, conscience and religion (Art 18)*, CCPR/C/21/Rev 1 Add 4, 30 July

(A) Introduction — Freedom of Thought, Conscience and Religion

1993 at [11]. (The ICCPR does not explicitly refer to a right to conscientious objection but such a right can be derived from article 18 in as much as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognised by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.) See also *Brinkhof v The Netherlands* (Communication No 402/1990), A/48/40 Vol II (1993) 124; *Foin v France* (Communication No 666/1995), A/55/40 Vol II (1999) 30; *Westerman v The Netherlands* (Communication No 682/1996), A/55/40 Vol II (1999) 41; *Maille v France* (Communication No 689/1996), A/55/40 Vol II (2000) 62; *Venier and Nicolas v France* (Communication Nos 690/1996 and 691/1996), A/55/40 Vol II (2000) 75.

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(B) Constitutional Protections — Freedom of Thought, Conscience and Religion

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(10\) FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION](#)

(B) CONSTITUTIONAL PROTECTIONS — FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

[80-1455] Constitutional protections

The paragraph below is current to **07 March 2018**

A right to freedom of religion is provided for in the Commonwealth Constitution (the 'Constitution')¹ and the (TAS) [Constitution Act 1934](#)² but not in the constitutions of the other jurisdictions. Section 116 of the Constitution prohibits laws directed against establishing any religion,³ imposing religious observance,⁴ prohibiting free exercise of any religion,⁵ and requiring a religious test as a qualification for Commonwealth public office.⁶ It proclaims not only the principle of tolerance towards all religions, but also the principle of tolerance towards the absence of religion.⁷ The Executive Government acting under statutory powers is bound by this provision,⁸ but not where, although religious figures are involved, the determination is made not on the basis of religion but of divisiveness in the community.⁹ It has yet to be firmly established that the Territories power is restricted by this provision.¹⁰ References to God in the Preamble do not affect the scope of section 116 of the Constitution.¹¹

Notes

- 1** (CC) Commonwealth Constitution s 116. See also RELIGION [\[365-145\]-\[365-180\]](#). See *Cheedy obh Yindjibarndi People v Western Australia* [\[2010\] FCA 690](#) ; [BC201004571](#) at [\[72\]-\[90\]](#) per Mckerracher J (the test for inconsistency between (CTH) [Native Title Act 1993](#) ss [38](#), [39](#) and (CC) Commonwealth Constitution s 116 was not primarily the 'effect' or 'result' of a statute but the purpose of the law; there was no indication that the purpose of (CTH) [Native Title Act 1993](#) s [38](#) or [39](#) was 'for' prohibiting the free exercise of religion) (citing *Kruger v Commonwealth* (1997) 190 CLR 1  at 160; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) per Gummow J (Dawson J and McHugh J agreeing) (purpose refers not to the underlying motive but to the end or object the legislation serves), (CLR at 132) per Gaudron J: ('for' indicates that purpose is the criterion and the sole criterion selected by (CC) Commonwealth Constitution s 116 for invalidity)). The decision of Mckerracher J was upheld in *Cheedy obh Yindjibarndi People v Western Australia* (2011) 194 FCR 562 ; [\[2011\] FCAFC 100](#); [BC201106027](#) at [\[95\]](#) per North, Mansfield and Gilmour JJ: there was simply no prohibition on the free exercise of the appellants' religion; no occasion for the application of the section 116 of the Commonwealth Constitution arose. See also *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120  at 135-136; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#) and following (scope of protection for those exercising religious beliefs).

(B) Constitutional Protections — Freedom of Thought, Conscience and Religion

- 2 (TAS) [Constitution Act 1934](#) s 46.
- 3 For the meaning of 'establish' see *Attorney-General (Vic) (Ex rel Black) v Commonwealth (DOGS Case)* (1981) 146 CLR 559  at 606, 610 per Stephen J, at 579, 582-3 per Barwick CJ, at 594-598 per Gibbs J, at 612-618 per Mason J, at 653 per Wilson J; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#) (applied in *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 178 LGERA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) at [\[31\]](#) per Rein J; affirmed on appeal: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 344 ALR 101 ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)). As to no established religion see [80-1470].
- 4 The imposition of a requirement by legislation for religious observance by those of another faith or no religion is wholly inconsistent with religious freedom, including the freedom to have no religious beliefs: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 178 LGERA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) at [\[46\]-\[47\]](#) per Rein J (no such requirement in Commonwealth funding to Islamic School) (citing *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116  at 123; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#) per Latham CJ; *Kruger v Commonwealth* (1997) 190 CLR 1  at 160; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) per Gummow J; affirmed on appeal: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 344 ALR 101 ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)). See also RELIGION [\[365-170\]](#).
- 5 For a law to infringe the free exercise limb, it must have as its end or object the prohibition of the free exercise of a religion: *Hoxton Park Residents' Action Group Inc v Liverpool City Council* (2010) 178 LGERA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) at [\[42\]](#) per Rein J (citing *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#); affirmed on appeal: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2016) 344 ALR 101 ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)).
For the meaning of 'free exercise' see also [80-1465].
- 6 See *Williams v Commonwealth* (2012) 248 CLR 156 ; [288 ALR 410](#); [\[2012\] HCA 23](#); [BC201204253](#) at [\[109\]](#) per Gummow and Bell JJ (French CJ, Hayne, Crennan and Kiefel JJ concurring) (Even if the money to fund an employee's position was received from the Commonwealth, unless there is direct contractual arrangement between the employee and the Commonwealth, the employee will not be an officer of the Commonwealth).
- 7 See *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116  at 123; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#) per Latham CJ.
- 8 See *Attorney-General (Vic) (Ex rel Black) v Commonwealth (DOGS Case)* (1981) 146 CLR 559  at 580, 581; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#) per Barwick CJ, discussed in *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Assn* (1987) 17 FCR 373 ; [71 ALR 578](#).
- 9 *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Assn* (1987) 17 FCR 373 ; [71 ALR 578](#), Full Court (issue of a deportation order for a religious leader).
- 10 The Territories power is contained in (CC) Commonwealth Constitution s 122. See *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#) at [203](#) per Gaudron J (Commonwealth Constitution s 122 is confined by *ibid* s 116), at 167 per Toohey J (compared with Gaudron J and with which McHugh J concurred); 71 ALJR 991; [BC9703253](#).
- 11 *Daniels v DCT* [\[2007\] SASC 431](#) ; [BC200710905](#) at [\[13\]](#) per Debelle J (Vanstone and Sulan JJ agreeing).

[80-1460] Meaning of 'religion'

The paragraph below is current to **07 March 2018**

The High Court of Australia has unanimously held that the beliefs, practices and observances of the Church of the New Faith (Scientology) are a religion.¹ The narrowest definition of 'religion' requires a belief in a supernatural being, thing or principle.² However, the more inclusive definitions given by some members of the court recognise that a number of features such as belief in the supernatural, a code of conduct and a community of believers may be considered when determining whether a particular faith or set of practices is a religion,³ or that the critical determinant is primarily that the relevant believers see

(B) Constitutional Protections — Freedom of Thought, Conscience and Religion

themselves as religious, and offer a way to find meaning and purpose in life.⁴ It is likely that the Aboriginal religion would be included in the definition.⁵

Notes

- 1 *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#) (while the case was, strictly, about the interpretation of the Victorian pay-roll tax legislation, it was recognised that the definition of religion there given was relevant, and likely to be adopted in relation to (CC) Commonwealth Constitution s 116). For an earlier discussion see *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116  at 123, 124; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#) per Latham CJ, whose definition was in accord with the general consensus appearing from *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#).

For the definition of 'religion' see RELIGION [\[365-10\]](#), [\[365-160\]](#) (Commonwealth Constitution).

- 2 *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120  at 136; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#) per Mason ACJ and Brennan J.
- 3 *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120  at 174; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#) per Wilson and Deane JJ.
- 4 *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#).
- 5 *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [\[2002\] HCA 28](#); [BC200204355](#) at [\[586\]](#) per Kirby J (citing *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120  at 151; [49 ALR 65](#) at [86](#); 57 ALJR 785; [BC8300099](#)); *Cheedy obh Yindjibarndi People v Western Australia* [\[2010\] FCA 690](#) ; [BC201004571](#); *Cheedy obh Yindjibarndi People v Western Australia* (2011) 194 FCR 562 ; [\[2011\] FCAFC 100](#); [BC201106027](#).

[80-1465] Meaning of 'free exercise'

The paragraph below is current to **07 March 2018**

The definition of 'religion' by the High Court of Australia¹ gives section 116 of the Commonwealth Constitution a relatively wide initial application, but the right to free exercise has been less amply interpreted.² For example, there is no protection from conscription to military service for a person who claims it is against his or her conscience and the word of God to attend drill,³ a regulation that dissolved a group of Jehovah's Witnesses has been upheld,⁴ an attempt to prevent refusal to vary an industrial award at the request of a religious group has failed⁵ and there is no exoneration from voting for a person who refuses to vote because a socialist party of which he or she is a member instructs against voting for a system that supports capitalism.⁶ Free exercise is not infringed merely by government funding for religious schools.⁷ The free exercise of religion can be limited in order to preserve and protect the social order.⁸ Despite these limitations, courts have interpreted legislative instruments (such as State-based environmental plans) in light of the constitutional concern to preserve religious equality.⁹

Notes

- 1 See [80-1460].

(B) Constitutional Protections — Freedom of Thought, Conscience and Religion

- 2 *Church of the New Faith v Cmr of Pay-roll Tax (Vic)* (1983) 154 CLR 120  at 133, 135, 136; [49 ALR 65](#); 57 ALJR 785; [BC8300099](#) per Mason ACJ and Brennan J ('The law seeks to leave man as free as possible in conscience to respond to the abiding and fundamental problems of human existence ... But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act ... is not as inviolate as the freedom to believe'). See also *Nelson v Fish* (1990) 21 FCR 430  at 434; [92 ALR 187](#) at [192](#) per French J. See further RELIGION [\[365-175\]](#).
- 3 *Krygger v Williams* (1912) 15 CLR 366 ; 18 ALR 518; [BC1200026](#). As to conscientious objection to compulsory military service see [\[80-1485\]](#). See also *Wong v Commonwealth* (2009) 236 CLR 573 ; [252 ALR 400](#); [\[2009\] HCA 3](#); [BC200900209](#) at [\[209\]](#), [\[226\]](#) per Hayne, Crennan and Kiefel JJ (compulsion to participate in the Medicare scheme under (CTH) [Health Insurance Act 1973](#) does not mean the provisions provided for a form of civil conscription within Commonwealth Constitution s 51(xxiii) — the provisions did not compel, legally or practically, a medical practitioner to perform any service, neither does the requirement to comply with a specified standard).
- 4 *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#); *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145  at 149, 150; 61 LGRA 148; [69 ALR 641](#); [BC8701763](#) per Mason, Wilson, Brennan, Deane and Dawson JJ (a broad interpretation of 'public worship' was adopted in relation to a house not open to the public but used inter alia for worship, though this related to local government zoning regulations, not (CC) Commonwealth Constitution s 116). For a broad approach in interpretation of a zoning law see *Newcastle City Council v Kermir Pty Ltd* (1989) 69 LGRA 289  at 293 per Stein J, LEC(NSW). As to zoning laws generally see ENVIRONMENT.
- 5 *Concept Products v Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA* (1994) 36 AILR ¶209; 74 WAIG 843; [BC9401498](#).
- 6 *Judd v McKeon* (1926) 38 CLR 380 ; [1926] ALR 389; [BC2600013](#). Compare at 390 per Higgins J (dissenting) (not for a court to determine whether a person's views are 'valid and sufficient' (under (CTH) [Commonwealth Electoral Act 1918](#) s [245\(15\)\(a\)](#)) but only whether the scruples are valid).
- 7 *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 178 LGRA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) at [\[44\]](#) per Rein J (affirmed on appeal: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [\(2016\) 344 ALR 101](#) ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)).
- 8 See, for example, *Director of Public Prosecutions (DPP) (Cth) v Fattal* [\[2013\] VSCA 276](#) ; [BC201313401](#) at [\[125\]-\[128\]](#) per the court (Victorian Supreme Court reinforced the exception for social order, suggesting that a law against doing in act in preparation for a terrorist attack could prohibit seeking a fatwa about the permissibility of a terrorist attack without breaching Commonwealth Constitution s 116).
- 9 See *Canterbury Municipal Council v Moslem Alawy Society Ltd* [\(1985\) 1 NSWLR 525](#)  at [544](#), [545](#); 55 LGRA 318 per McHugh JA ('Australian courts should be slow to adopt an interpretation of a legislative instrument which would have the effect of preventing the use of premises in a neighbourhood by some of those who wish to practise their religion while at the same time allowing others to practise their religion in the same neighbourhood.'). *House of Peace Pty Ltd v Bankstown City Council* [\(2000\) 48 NSWLR 498](#) ; 106 LGRA 440; [\[2000\] NSWCA 44](#); [BC200001039](#); *New Century Developments v Baulkham Hills Shire Council* (2003) 127 LGRA 303 ; [\[2003\] NSWLEC 154](#); [BC200304337](#) per Lloyd J.

[80-1470] No established religion

The paragraph below is current to **07 March 2018**

There is no established church or religion in Australia¹ nor is any religious test for obtaining or holding a public office permitted by the Commonwealth Constitution,² the (TAS) Constitution Act 1934³ or by the anti-discrimination legislation in all jurisdictions except New South Wales and South Australia.⁴ The payment of grants by the Commonwealth to the States to provide financial assistance to schools, including independent and church schools, does not amount to a law establishing a religion.⁵ In most jurisdictions, the absence of any requirement for adherence to a particular, or any, religion is emphasised by providing for the making of an affirmation as an alternative to the swearing of an oath.⁶

Apart from the protection granted by section 116 of the Commonwealth Constitution against restrictive Commonwealth laws relating to religion, the High Court of Australia has held that it is not within the power of the Commonwealth Parliament to legislate to abolish an association whose members hold views unacceptable to the government simply by use of the incidental power or the defence power, where such a power was unreviewable and unfettered.⁷ Legislation giving power to the executive to proscribe organisations, most of which are religious-oriented, under anti-terrorism legislation is reviewable and thus may not fall foul of this aspect of the *Communist Party* case doctrine, although other impediments to the proscription power may exist.⁸

Notes

- 1 See RELIGION [\[365-165\]](#).
- 2 (CC) Commonwealth Constitution s 116. For the meaning of 'establishing' see *Attorney-General (Vic) (Ex rel Black) v Commonwealth (DOGS Case)* (1981) 146 CLR 559  at 606, 610 per Stephen J, at 579, 582-3 per Barwick CJ, at 594-598 per Gibbs J, at 612-18 per Mason J, at 653 per Wilson J; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#) (applied in *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 178 LGERA 275 ; 246 FLR 207; [\[2010\] NSWSC 1312](#); [BC201008666](#) at [\[31\]](#) per Rein J; affirmed on appeal: *Hoxton Park Residents' Action Group Inc v Liverpool City Council* [\(2016\) 344 ALR 101](#) ; 310 FLR 193; [\[2016\] NSWCA 157](#); [BC201611889](#)).
- 3 (TAS) [Constitution Act 1934](#) s 46.
- 4 See [\[80-1495\]](#). Note that these provisions do not prevent the reciting of the Lord's Prayer as Parliament opens each day in each jurisdiction.
- 5 *Attorney-General (Vic) (Ex rel Black) v Commonwealth (DOGS Case)* (1981) 146 CLR 559 ; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#); *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156 ; [\[2011\] NSWCA 363](#); [BC201109095](#) at [\[27\]](#), [\[28\]](#), [\[34\]](#) per Basten JA.
- 6 See, for example:
(CC) Commonwealth Constitution Sch; (CTH) [Judiciary Act 1903](#) s 77F; (CTH) [Federal Court of Australia Act 1976](#) s 44; (CTH) [Federal Magistrates Act 1999](#) s 58; (CTH) [Evidence Act 1995](#) s 21
(ACT) [Oaths and Affirmations Act 1984](#) ss 14, 15
(NT) [Oaths, Affidavits And Declarations Act 2010](#) ss 5, 6 (form and content of oaths)
(NSW) [Oaths Act 1900](#) ss 12, 13 (oath, declaration or affirmation); (NSW) [Evidence Act 1995](#) s 21
(QLD) [Oaths Act 1867](#) s 37
(SA) [Oaths Act 1936](#) s 13; (SA) [Evidence Act 1929](#) s 6(3)
(TAS) [Oaths Act 2001](#) s 16; (TAS) [Evidence Act 2001](#) s 21
(VIC) [Evidence \(Miscellaneous Provisions\) Act 1958](#) s 102.
- 7 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 ; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#); *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#). As to religious associations see RELIGION [\[365-290\]](#)-[\[365-415\]](#). See also *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) (validity of interim control order affecting individual trained by Al Qa'ida in Afghanistan).
- 8 See Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, Tabled 8 May 2002, available at <http://www.aph.gov.au>.

[80-1475] Commonwealth places

The paragraph below is current to **07 March 2018**

The Commonwealth has legislated to the effect that applicable State or Territory legislation will apply in Commonwealth places such as property owned by the Commonwealth.¹ Where a State or Territory law is made applicable to a Commonwealth place, it will not apply if the State or Territory Parliament has no authority to make the law, and this includes State law that would, if applied, cause the Commonwealth to infringe section 116 of the Commonwealth Constitution.²

Notes

- ¹ (CTH) [Commonwealth Places \(Application of Laws\) Act 1970](#) s 4. See also *ibid* s 3 (definition of 'Commonwealth place').
- ² See *ibid* s 4(5)(c). See also *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 ; 22 LGRA 417; 44 ALJR 230 (clarifies the meaning of 'Commonwealth place'); *Construction Industry Training Board v Transfield Services (Australia) Pty Ltd* (2017) 349 ALR 270 ; 323 FLR 166; [2017] SASCFC 103; [BC201706508](#).

[80-1480] Commonwealth Territories

The paragraph below is current to **07 March 2018**

There has been no decision that specifically determines whether Commonwealth legislation, in its application to a Territory, must conform with the protective limitations imposed by section 116 of the Commonwealth Constitution, but there is judicial comment to this effect.¹

Notes

- ¹ *Lamshed v Lake* (1958) 99 CLR 132  at 143; [1958] ALR 388; (1958) 32 ALJ 75; [BC5800530](#) per Dixon CJ; *Spratt v Hermes* (1965) 114 CLR 226  at 247; [1966] ALR 597; (1965) 39 ALJR 368 per Barwick CJ. See also *Kruger v Commonwealth* (1997) 190 CLR 1 ; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) (all justices held that the relevant law was not offensive to (CC) Commonwealth Constitution s 116, and only Dawson J at 1011 with whom McHugh J agreed (commented that the power of the Commonwealth to legislate under *ibid* s 122 is not limited by *ibid* s 116)). For discussion on the interaction between Commonwealth Constitution ss 116 and 122 see *Wurridjal v Commonwealth* (2009) 237 CLR 309 ; [252 ALR 232](#); [2009] HCA 2; [BC200900208](#) at [48]-[64] per French CJ. See also *Bennett v Commonwealth* (2007) 231 CLR 91 ; [235 ALR 1](#); [2007] HCA 18; [BC200702905](#). See also *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* (2014) 205 LGRA 278 ; 286 FLR 355; [2014] ACTSC 165; [BC201405306](#) at [311], [312] per Mossop M (reviewed all High Court authority on the point; based on the weight of authority and the 'integrationist trend in recent High Court authority' Mossop M proceeded on the assumption that (CC) Commonwealth Constitution s 116 constrains *ibid* s 122).

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(C) Non-Constitutional Protections — Freedom of Thought, Conscience and Religion

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(10\) FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION](#)

(C) NON-CONSTITUTIONAL PROTECTIONS — FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

[80-1485] Conscientious objection — compulsory military service

The paragraph below is current to **07 March 2018**

There is statutory provision to protect a person whose conscientious beliefs do not allow engagement in any form of military service, or in military duties of a non-combatant nature, from being required, in time of war, to engage in duties of a combatant nature.¹ A person has a conscientious belief in relation to **liability** to serve in time of war if he or she has a fundamental conviction,² whether religious or not,³ that is so compelling that it must be espoused,⁴ and that is likely to be of long standing nature.⁵ The conviction may relate to participation in war or warlike operations generally,⁶ or to participation in a particular war or warlike operation.⁷ The conscientious belief, if upheld, does not exempt a person from **liability** to serve, but from combatant duties, and lasts while the belief continues.⁸ A Conscientious Objection Tribunal (the 'Tribunal') is established to determine whether a person is exempt from combatant duties,⁹ and is required to **act** according to substantial justice and the merits of the case.¹⁰ The onus of proving exemption rests with the applicant.¹¹ Review of the Tribunal's determination may be sought from the Administrative Appeals Tribunal (the 'AAT') by a party to the determination.¹² A review of the AAT's decision may be made, on questions of law, by the Federal Court of Australia.¹³

Notes

- ¹ (CTH) [Defence Act 1903](#) Pt IV. See further DEFENCE [\[150-155\]](#). As to the procedure for determination of conscientious objection and the availability of review and appeal see DEFENCE [\[150-164\]](#)–[\[150-175\]](#).
- ² Ibid s 4(3)(a).
- ³ Ibid s 4(3)(a).
- ⁴ Ibid s 4(3)(b).
- ⁵ Ibid s 4(3)(c).
- ⁶ Ibid s 61A(1)(h).
- ⁷ Ibid s 61A(1)(i).
- ⁸ Ibid s 61A(1A).
- ⁹ Ibid ss 61CA, 61CC(1).

10 Ibid s 61CP(b).

11 Ibid s 61CV.

12 Ibid s 61CZB.

13 Ibid s 61CZD.

As to rights in international law see also [\[80-1450\]](#).

[80-1490] Conscientious objection — membership of registered industrial organisations

The paragraph below is current to **07 March 2018**

Legislation in the Commonwealth, New South Wales, Queensland and South Australia contains provisions for the protection of persons having a conscientious objection to joining a union or other registered organisation.¹

Notes

1 See [\[80-2160\]](#).

[80-1495] Anti-discrimination legislation

The paragraph below is current to **07 March 2018**

In all jurisdictions, except New South Wales and South Australia, anti-discrimination or equal opportunity legislation makes it unlawful generally to discriminate on grounds of religious belief.¹ However, the latter jurisdictions may preclude discrimination on the grounds of religion in specific contexts, such as the provision of family and community services² or provision of free education.³ In South Australia specific provision is made for discrimination in relation to religious appearance or dress.⁴ Freedom of thought, conscience and religion is included in the Australian Capital Territory and Victorian human rights charters.⁵

Notes

1 (CTH) [Australian Human Rights Commission Act 1986](#) ss 3 (definition of 'discrimination'), 30-35 (applies only to functions relating to equal opportunity in employment). See: *Hanes v Human Rights and Equal Opportunity Commission* (2007) 98 ALD 544 ; [2007] FCA 751; [BC200704143](#) (practising neo-pagan doctor used plant salvia divinorum for purposes of facilitating ability to experience deep communion with nature and spirit of earth and claimed restrictions on possession, use and supply of plant manifested restriction on applicant's belief — it was not in dispute that the 'Nature Philosophy' could be considered a belief and the use of the plant 'to facilitate a communion with Nature and the Spirit of the Earth' constituted a manifestation of his religion or belief); *Bahonko v Nurses Board of Victoria* (No 4) (2007) 97 ALD 721 ; [2007] FCA 1449; [BC200707898](#) (unsuccessful claim based on a direction by employer 'not to show outside religious terms' (wearing a Virgin Mary on a chain visible outside uniform)).

(ACT) [Discrimination Act 1991](#) s 7 (religious or political conviction)

(NT) [Anti-Discrimination Act 1992](#) s 19(1) (religious belief or activity)

(C) Non-Constitutional Protections — Freedom of Thought, Conscience and Religion

(QLD) [Anti-Discrimination Act 1991](#) s 7 (religious belief or religious activity). See *Queensland v Mahommed* (2007) EOC ¶93-452 ; [\[2007\] QSC 018](#); [BC200700466](#) (denial of access to Muslim prisoner of halal meat amounted to a serious disadvantage in a discrimination claim on the basis of religious belief or religious activity in the areas of the provision of goods and services and the administration of State laws and programs).

(TAS) [Anti-Discrimination Act 1998](#) ss 14, 15 and 16(o) (religious belief or affiliation)

(VIC) [Equal Opportunity Act 2010](#) s 6(n) (religious belief or activity). Note also *ibid* s 66A was added by (VIC) [Equal Opportunity Amendment Act 2011](#) to allow clubs principally established for a political purpose to restrict membership on the basis of political belief or activity.

(WA) [Equal Opportunity Act 1984](#) s 53 (religious or political conviction).

There are no equivalent provisions in New South Wales and South Australia (note however, (SA) [Equal Opportunity Act 1984](#) s 85T does make provision for discrimination on the ground of religious appearance or dress).

As to discrimination on the grounds of religious belief see [\[80-370\]](#), [\[80-375\]](#).

2 See, for example, (SA) [Family and Community Services Act 1972](#) s 10(3).

3 (NSW) [Education Act 1990](#) s 6(1)(b)

For exemptions in the legislatively protected areas of discrimination relating to religious beliefs see [\[80-450\]](#) (work), [\[80-510\]](#) (education in religious institutions), [\[80-545\]](#) (provision of goods and services), [\[80-620\]](#) (general exemptions for religious bodies and practices).

4 (SA) [Equal Opportunity Act 1984](#) ss 85T, 85ZD.

5 (ACT) [Human Rights Act 2004](#) s 14

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 14. For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

[80-1500] Blasphemy

The paragraph below is current to **07 March 2018**

The common law offence of blasphemy and legislation relating to objectionable publications provide, in a form related exclusively to the Christian religion,¹ protection against certain forms of expression.² Some judges have doubted whether the common law offence has survived in all Australian jurisdictions, and if it has, whether there may be a place in a multicultural society for the offence of blasphemous libel of any recognised faith.³

Notes

1 See discussion in *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2005) EOC ¶93-377 ; [2004] VCAT 2510 (appeal allowed in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 206 FLR 56 ; [235 ALR 750](#); [\[2006\] VSCA 284](#); [BC200610408](#) (matter discontinued). The crime at common law consists of the publication of words concerning the Christian religion are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with Christianity: *R v Rowed* (1842) 3 QB 180 . This is also reflected in the defences, for example, in (NSW) [Crimes Act 1900](#) s 574.

2 See [\[80-1990\]](#). See also RELIGION [\[365-685\]-\[365-725\]](#), DEFAMATION [\[145-3290\]](#) (blasphemous libel).

3 See comments by Harper J in *Pell v Council of Trustees of the National Gallery of Victoria* [\[1998\] 2 VR 391](#)  at [394](#); [BC9705176](#).

[80-1505] Disturbance of religious meetings

The paragraph below is current to **07 March 2018**

In all jurisdictions except the Australian Capital Territory and Western Australia, it is an offence to interfere with a minister of religion in the course of practising his or her religion.¹ In New South Wales, Queensland, South Australia, Tasmania and Victoria it is an offence to disturb religious worship.²

Notes

- 1** (NT) [**Criminal**](#) Code s 125 (violence to officiating ministers of religion)
(NSW) [Imperial Acts Application Act 1969](#) s 39 (assaulting a person officiating at a meeting for religious worship)
(QLD) [**Criminal**](#) Code s 206 (violence to officiating minister of religion)
(SA) [Summary Offences Act 1953](#) s [7A\(1\)\(b\)](#) (obstructing or disturbing religious services)
(TAS) [**Criminal**](#) Code s 120 (interfering with an officiating minister)
(VIC) [Summary Offences Act 1966](#) s [21](#) (disturbing religious worship).
There are no equivalent provisions in the Australian Capital Territory and Western Australia. In the Australian Capital Territory there is a more general legislative provision:
(ACT) [Crimes Act 1900](#) s [379](#) (misbehaviour at public meetings). See further RELIGION [\[365-675\]](#).
- 2** (NSW) [Imperial Acts Application Act 1969](#) s 39 (disquieting a meeting lawfully assembled for religious worship)
(QLD) [**Criminal**](#) Code s 207 (disturbing religious worship)
(SA) [Summary Offences Act 1953](#) s [7A\(1\)\(a\)](#) (interrupting or disturbing religious worship)
(TAS) [**Criminal**](#) Code s 121
(VIC) [Summary Offences Act 1966](#) s [21](#) (interfering with religious worship).
See further RELIGION [\[365-680\]](#).

[80-1510] Sacrilege

The paragraph below is current to **07 March 2018**

In New South Wales and South Australia, the offence of sacrilege, through breaking or entering any place of divine worship, is proscribed by legislation.¹

Notes

- 1** (NSW) [Crimes Act 1900](#) ss 112, 113 (breaking and entering any building and committing/with intent to commit any serious indictable offence)
(SA) [Criminal Law Consolidation Act 1935](#) s [167](#). See also (VIC) [Crimes Act 1958](#) s [206](#) (Rioters demolishing buildings) which expressly protects places of divine worship.

See *R v Ho* [\[2004\] SADC 130](#). As to sacrilege see also RELIGION [\[365-755\]](#). In other jurisdictions, the offence of malicious injury to property would operate: see CRIMINAL LAW [\[130-5000\]-\[130-5825\]](#) (property offences). See also TORT [\[415-445\]-\[415-475\]](#) (trespass to goods).

[80-1515] Provisions in wills

The paragraph below is current to **07 March 2018**

At common law, restrictive provisions in restraint of marriage in wills have been held to be permissible, provided they do no more than impose a partial restraint.¹

Notes

- 1 See SUCCESSION [\[395-1135\]](#). It is to be noted that (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 23(4) provides for equality of rights and responsibilities of spouses during and after marriage, and *ibid* art 2(1) proscribes discrimination on grounds of religion in recognition of rights.

[80-1520] Right of parents to provide religious education

The paragraph below is current to **07 March 2018**

Under the principal education legislation in all jurisdictions, it is possible for schools to be established, often with State subsidies, that reflect the religious or other views of parents.¹ All jurisdictions provide for religious education within the State school curriculum, taught by outside teachers who are either ministers of religion or authorised by the religious body.² If a group wishes to educate its own children within its own community,³ the outcome of protection proceedings by welfare authorities need not necessarily lead to a breach of natural justice if, with precautions, the cases are heard as a group.⁴ An adverse conclusion in protection proceedings need not necessarily involve removal of the child from parental custody or from the community in which the child is living,⁵ unless the conditions under which the child is living are unsatisfactory,⁶ which is a matter to be determined as a question of fact.⁷

Notes

- 1 (ACT) [Education Act 2004](#) ss [7](#) (general principles include recognising the religious needs of students), [75](#) (non-government school sector consists of schools from a range of different educational and religious philosophies)
(NT) [Education Act 2015](#) ss [15\(5\)\(h\)](#) (Minister may provide financial assistance as desirable), [124](#) (non-governmental education institutions must be registered; no specific reference is made to religious schools)
(NSW) [Education Act 1990](#) ss 21 (Minister may provide financial assistance to non-government school children), 37-39 (non-government schools or school systems may be registered (*ibid* s 38); no specific reference is made to religion, but exemption may be granted from registration if an objection based on religious grounds is accepted (*ibid* Pt 7 Div 7))
(QLD) [Education \(Accreditation of Non-State Schools\) Act 2017](#) s [184](#) (consideration by accreditation committee of religious needs of students in catchment area); (QLD) [Education \(General Provisions\) Act 2006](#) s [8](#), Sch 4 ('non-State school' is a school accredited under the (QLD) [Education \(Accreditation of Non-State Schools\) Act 2017](#))

(C) Non-Constitutional Protections — Freedom of Thought, Conscience and Religion

(SA) [Education Act 1972](#) s 5(1) (definition of 'non-Government school'). The Board considering the compulsory registration of non-Government schools is constituted by nominees of the South Australian Commission for Catholic Schools and the Independent Schools Board Inc: *ibid* ss 72, 72G (compulsory registration)

(TAS) Education [Act](#) 1994 s 51 (non-State schools may provide educational instruction if registered; no specific reference is made to religious instruction)

(VIC) [Education and Training Reform Act 2006](#) ss 1.1.3 (definition of 'non-Government school', required to be registered under *ibid* Pt 4.3); no specific reference is made to religious schools). Note that Parliament has had regard to freedom of religion in the legislation: *ibid* s 1.2.1.

(WA) [School Education Act 1999](#) ss 160 (registration of non-government schools), 182 (Minister may allocate money that have been appropriated by Parliament for the purpose of assisting registered schools and school systems; no specific reference is made to religious schools).

2 (ACT) [Education Act 2004](#) s 29 (religious education in government schools)

(NT) [Education Act 2015](#) s 86 (provision may be made, and on request by parents must, if practicable, be made, for a minister of religion or a person authorised by the Minister to teach religion in a public school)

(NSW) [Education Act 1990](#) s 32 (time up to 1 hour each week is to be allowed for religious education by arrangement with each school principal, but no child is to be required to receive religious education: *ibid* s 33)

(QLD) [Education \(General Provisions\) Act 2006](#) s 76(1) (any minister of religion or representative of a religious denomination approved by the Minister is entitled to give religious instruction up to 1 hour each week in school hours, but the teaching is not to include 'teaching in the distinctive tenets or doctrines of any religious denomination, society or sect', and a parent may withdraw a student from such instruction: *ibid* s 76(5)). See also (QLD) [Education \(General Provisions\) Regulation 2006](#) regs 25-33.

(SA) [Education Act 1972](#) s 102 (regular provision is to be made by regulation for religious education, but there may be exemption from it on conscientious grounds)

(TAS) Education [Act](#) 1994 s 34 (number of hours of instruction in a year not to exceed number of weeks the school is open that year; instruction may be given by a clergy member or person authorised by a religious body; attendance is not compulsory)

(VIC) [Education and Training Reform Act 2006](#) s 2.2.11 (religious instruction may be given but, if so, must not be compulsory and must be given by persons who are accredited representatives of religious bodies and are approved by the Minister)

(WA) [School Education Act 1999](#) s 69(1) (special religious education may be provided to students in government schools), 69(3) (regulations may authorise the chief executive officer to approve persons as being authorised to give special religious education). See (WA) [School Education Regulations 2000](#) regs 47 (principal to provide for a student at the school to participate in special religious education, and for a student who does not participate in special religious education), 48 (persons authorised to give special religious education; the provision no longer refers to ministers of religion specifically).

For a High Court of Australia challenge to the chaplaincy program in public schools see *Ronald Williams v Commonwealth* No S307 of 2010.

- 3 *M v M* [1993] 1 VR 391 , CA(VIC) (a claim by the Children of God that proceedings against them were potentially in denial of natural justice; there were similar proceedings in New South Wales, but they were concerned solely with procedural matters).
- 4 *M v M* [1993] 1 VR 391  at 403, 404 per Nathan J (81 protection applications were involved).
- 5 *M v M* [1993] 1 VR 391  at 405 per Byrne J.
- 6 *M v M* [1993] 1 VR 391  at 405, 406 per Byrne J (applying (VIC) Children's Court [Act](#) 1973 (repealed) s 41(7), 41(7B), 41(7C) and (VIC) Children and Young Persons [Act](#) 1989 (repealed) s 93).
- 7 *M v M* [1993] 1 VR 391  at 405, 406 per Byrne J (applying (VIC) Children's Court [Act](#) 1973 (repealed) s 41(3), 41(7), 41(7B), 41(7C) and (VIC) Children and Young Persons [Act](#) 1989 (repealed) s 93). See further RELIGION [\[365-235\]](#).

[80-1525] Protection of refugees fearing religious persecution

The paragraph below is current to **07 March 2018**

Australia's obligations under international law require the protection of individuals from being returned to a country where they have a well-founded fear of persecution for reasons of religion.¹ This definition has been incorporated into the (CTH) [Migration Act 1958](#).² In determining whether a fear is well-founded, the focus will often be on the applicant's religion.³ The Federal Court of Australia is divided on whether the religion ground extends to the perception of religious belief or imputed religious belief.⁴

The Courts have generally taken a broad view of what constitutes the practice of religion.⁵ They have also held that the necessary nexus between persecution and religion will be established where prohibitions against, restrictions on, or punishment for a particular religious practice, is established.⁶

Notes

- 1 (INT) Convention relating to the Status of Refugees (Geneva, 28 July 1951; Aust TS 1954 No 5; 189 UNTS 150) (as amended by the (INT) Protocol relating to the Status of Refugees (New York, 31 January 1967; Aust TS 1973 No 37; 606 UNTS 267) art 1(A)). See *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 ; [237 ALR 634](#); [\[2007\] HCA 40](#); [BC200707277](#) at [\[26\]](#), [\[32\]](#) per Gummow, Hayne and Crennan JJ (Ukrainian journalist facing persecution for political beliefs, territorial distinctions may have a connection with the particular reason for the asserted well-founded fear of persecution, Tribunal erred in sidestepping consideration of what might reasonably be expected of the appellant with respect to his relocation in Ukraine). Compare *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 ; [237 ALR 660](#); [\[2007\] HCA 41](#); [BC200707278](#) at [\[15\]](#) per Gummow, Hayne, Callinan and Crennan JJ (fear of persecution for political beliefs in his home state of Tamil Nadu but not another Indian state, open to the Tribunal to conclude that could safely relocate and that it would not be unreasonable to expect him to do so). In its concluding observations in CCPR/C/AUS/CO/5 7 May 2009 at [19], the United Nations Human Rights Committee expressed concern at reports of cases in which Australia has not fully ensured respect for the principle of non-refoulement (arts 2, 6, 7) and recommended it take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.
- 2 Australia's obligations under these instruments have been incorporated into domestic law by (CTH) [Migration Act 1958](#) s [36](#), as qualified by *ibid* s 5J(4)(a) which provides that a Convention reason must constitute at least the essential and significant reason for persecution. On the interpretation of *ibid* s 5J(4)(a) see *Minister for Immigration and Citizenship v SZJGV*; *Minister for Immigration and Citizenship v SZJXO* (2009) 238 CLR 642 ; [259 ALR 595](#); [\[2009\] HCA 40](#); [BC200908881](#). (CTH) [Migration Act 1958](#) s [5J\(6\)](#) prohibits a decision-maker, in determining whether the person has a well-founded fear, from drawing inferences adverse to a visa applicant based on their conduct within Australia (to ensure reliance is not placed on conduct to strengthen the claim).
- 3 *Cameirao v Minister for Immigration and Multicultural Affairs* [\[2000\] FCA 1319](#) ; [BC200005534](#) per O'Loughlin J. It has also been held that the ground extends to those persecuted because they do not hold a religious belief, or because the applicant's conduct offends against the religion of the alleged persecutor: see also *Prashar v Minister for Immigration and Multicultural Affairs* [\[2001\] FCA 57](#) ; [BC200100646](#) per Madgwick J.
- 4 Compare *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ; [179 ALR 1](#); [\[2000\] FCA 1599](#); [BC200006835](#) at [\[90\]](#) per Merkel J (the question was how the purported conversion would be viewed by the authorities) and *WAEW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [\[2002\] FCAFC 260](#) ; [BC200204749](#) at [\[14\]](#), [\[17\]](#) per Marshall, Weinberg and Jacobson JJ (the religion ground requires a manifestation or practice of personal faith or doctrine in a like-minded community and does not extend to the perception of religious belief or imputed religious belief). See *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [\[2006\] FCA 42](#) ; [BC200600293](#) per Nicholson J.
- 5 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ; [179 ALR 1](#); [\[2000\] FCA 1599](#); [BC200006835](#) at [\[5\]](#) per Wilcox J who considered the dictionary definition of religion and concluded that the term

(C) Non-Constitutional Protections — Freedom of Thought, Conscience and Religion

'includes the element of manifestation or practice of a religious faith in community with others'. Justice Merkel in the same case endorsed the Canadian view that religious persecution might include a prohibition on worshipping in public or private, giving religious instruction or the implementation of serious discriminatory policies against persons on account of the practice of their religion.

- 6 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ; [179 ALR 1](#); [\[2000\] FCA 1599](#); [BC200006835](#). See also *Minister for Immigration and Multicultural Affairs v Zheng* [\[2000\] FCA 50](#) ; [BC200000205](#) at [\[41\]](#) per Hill J, at [57] per Carr J; *Liu v Minister for Immigration and Multicultural Affairs* [\[2001\] FCA 257](#) ; [BC200102365](#) per Cooper J.

[80-1530] Parenting orders and religious upbringing

The paragraph below is current to **07 March 2018**

In making parenting orders that determine matters such as a child's day to day and long term care, welfare and development, as well as their times of contact with a parent, a Family Court judge may examine the tenets and practices of a particular faith in the exercise of their discretion.¹ A Family Court may also decide upon issues such as a child's attendance at church and enrolment in a religiously-oriented school, taking into account that a child should not be placed in a position of conflict with the religion of the parent with whom they reside, nor forced to attend a school where they will be victimised for not practising their father's religion.²

Notes

- 1 *In the Marriage of H* [\(2003\) 198 ALR 383](#) ; [30 Fam LR 264](#); (2003) FLC ¶93-162; [\[2003\] FMCAfam 31](#). The Court held that a decision that it is detrimental to the welfare of a child to be brought up adhering to certain practices will not constitute a breach of (CC) Commonwealth Constitution s 116 when this is one of many factors being considered. See also *Firth v Firth* (1988) FLC ¶91-971 and *Hornsey* (1998) Fam CA 7.
- 2 *In the Marriage of H* [\(2003\) 198 ALR 383](#) ; [30 Fam LR 264](#); (2003) FLC ¶93-162; [\[2003\] FMCAfam 31](#) at [\[44\]](#) per Ryan FM. An injunction had been sought by the mother concerning the child's attendance at church with his father and the father's application that the child be enrolled in a religiously-orientated school. The Court also considered a discussion of religion to be important because of its relevance as a determinant of cultural values and norms within the Lebanese Australian community and the potential impact upon the child if a decision is made inconsistent with the community's belief systems.

[80-1535] Indigenous land rights and religion

The paragraph below is current to **07 March 2018**

The relationship of Aboriginal people to their land often has a religious or spiritual dimension. While this connection may be reflected in a native title determination,¹ the Court has held that a right to maintain, protect and prevent the misuse of cultural knowledge is not a right in relation to land of the kind that can be the subject of a determination of native title.² The United Nations Declaration on the Rights of Indigenous Peoples affirms the rights of indigenous people individually and collectively, including many rights recognised in other United Nations instruments.³

(C) Non-Constitutional Protections — Freedom of Thought, Conscience and Religion

Notes

- 1 See ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-5000\]-\[5-9210\]](#).
- 2 *Western Australia v Ward* (2002) 213 CLR 1 ; [191 ALR 1](#); [\[2002\] HCA 28](#); [BC200204355](#) at [\[57\]](#) per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Croft obh of Barngarla Native Title Claim Group v South Australia* [\(2015\) 325 ALR 213](#) ; [\[2015\] FCA 9](#); [BC201500252](#) at [\[733\]](#) per Mansfield J.
- 3 (INT) United Nations Declaration on the Rights of Indigenous Peoples (GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007)), (opposed by Australia at vote on adoption but endorsed 3 April 2009). Ibid art 11 affirms the right of indigenous people have the right to practise and revitalise their cultural traditions and customs. Ibid art 12 states:
 - (1) Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
 - (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

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(A) Introduction — Right to a Fair Trial

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > **(11) RIGHT TO A FAIR TRIAL**

(11) RIGHT TO A FAIR TRIAL

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(A) INTRODUCTION — RIGHT TO A FAIR TRIAL

[80-1575] Approach of Australian law

The paragraph below is current to **07 March 2018**

The right to a fair trial is a fundamental element of Australia's criminal justice system,¹ although there has not been a judicial attempt to list exhaustively the attributes of a fair trial.² Although strictly, it is a right not to be tried unfairly, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial.³ A number of features have been identified by the courts and in international law as potentially necessary to be present if a person is to be regarded as having received a fair trial.⁴ For example, a person has a right to be present at the hearing of a criminal charge against him or her because otherwise, it would not be possible to assume a fair trial.⁵ On the other hand, the person charged may have a fair trial although there is no defending counsel present.⁶ The court will decide whether, in the circumstances of each particular case, the presence of the accused, the lack of counsel or the presence or absence of some other recognised feature will have precluded a fair trial, even though that concept itself is not fully defined. If the court is not satisfied that the trial has been fair, it will order a retrial in the event of a miscarriage of justice,⁷ or may order a stay of proceedings.⁸ At the same time, there is a developing willingness to speak of a fair trial as one which is fair to both sides and in which the judge holds the scales so as to maintain an even balance.⁹

A charter right to have charges decided by 'a competent, independent and impartial court or tribunal after a fair and public hearing' is provided for in the Australian Capital Territory¹⁰ and Victoria.¹¹ In Victoria, the right also extends expressly to civil proceedings.¹² While the Australian Capital Territory refers to determination of rights and obligations recognised by law,¹³ As neither jurisdiction provides a definition of a 'fair and public hearing', international and comparative jurisprudence is likely to be useful in assessing how the fair hearing provision is likely to be interpreted.¹⁴ However, both jurisdictions include rights in criminal proceedings which essentially mirror the protections that appear in article 14 of the International Covenant on Civil and Political Rights.¹⁵ Separate provisions in both jurisdictions cover

protection from double jeopardy,¹⁶ the prohibition on retrospective criminal legislation,¹⁷ and rights and interests of children in the criminal process.¹⁸

Notes

- 1 *Dietrich v R* (1992) 177 CLR 292  at 298-300, 311 per Mason CJ and McHugh J, at 326 per Deane J, at 353 per Toohey J, at 363, 371, 372 per Gaudron J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) (referred to a notion of fairness). See also *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518  at 541, 542 per Isaacs J; 29 ALR 353; *Barton v R* (1980) 147 CLR 75  at 96, 97 per Gibbs ACJ and Mason J (Aitkin J agreeing), at 104 per Stephen J; [32 ALR 449](#); 55 ALJR 31; [BC8000111](#). On the distinction between the common law right not to have an unfair trial, and a right to a fair trial under the (ACT) *Human Rights Act 2004* s 21 see: *R v DA* [\[2008\] ACTSC 26](#) ; [BC200802271](#) at [\[71\]-\[10\]](#) per Higgins CJ (citing *Nudd v R* [\(2006\) 225 ALR 161](#) ; 80 ALJR 614; [\[2006\] HCA 9](#); [BC200601022](#) at [\[64\]-\[100\]](#) per Kirby J); *R v Griffin* [\[2007\] ACTCA 6](#) ; [BC200702339](#) at [\[4\]](#) per Higgins CJ, Gray and Madgwick JJ.
- 2 *Dietrich v R* (1992) 177 CLR 292  at 300 per Mason CJ and McHugh J, at 353 per Toohey J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) (accused has a negative right not to be treated unfairly). See also *TKWJ v R* (2002) 212 CLR 124  at 130; [193 ALR 7](#); [\[2002\] HCA 46](#); [BC200205984](#) per Gleeson CJ ('It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial.')
- 3 *Dietrich v R* (1992) 177 CLR 292  at 299 per Mason CJ and McHugh J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#).
- 4 See [\[80-1605\]](#).
- 5 See [\[80-1645\]](#). See also CRIMINAL LAW [\[130-13170\]](#).
- 6 *McInnis v R* (1979) 143 CLR 575 ; [27 ALR 449](#); 54 ALJR 122; *Dietrich v R* (1992) 177 CLR 292 ; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). See [\[80-1650\]](#). See also CRIMINAL LAW [\[130-13170\]](#).
- 7 *McInnis v R* (1979) 143 CLR 575 ; [27 ALR 449](#); 54 ALJR 122. See also CRIMINAL LAW [\[130-13980\]](#).
- 8 *Dietrich v R* (1992) 177 CLR 292  at 300 per Mason CJ, at 311-15 per McHugh J, at 332 per Deane J, at 356, 357 per Toohey J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). See also *Barton v R* (1980) 147 CLR 75  at 96, 97; [32 ALR 449](#); 55 ALJR 31; [BC8000111](#) per Gibbs ACJ and Mason J. See also CRIMINAL LAW [\[130-13630\]](#).
- 9 *McKinney v R* (1991) 171 CLR 468  at 488; [98 ALR 577](#); 65 ALJR 241; 52 A Crim R 240 per Dawson J (a rule relating to warning of unrecorded police evidence in all cases may lead to unfairness). See also *McKinney v R* (1991) 171 CLR 468  at 486; [98 ALR 577](#); 65 ALJR 241; 52 A Crim R 240 per Brennan J.
- 10 (ACT) *Human Rights Act 2004* s 21. See for example *Capital Property Projects (ACT) Pty Ltd v Australian Capital Territory Planning & Land Authority* (2008) 2 ACTLR 44 ; 227 FLR 136; [\[2008\] ACTCA 9](#); [BC200803630](#). For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 11 (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 24. Note that any attempt to apply the (VIC) *Charter of Human Rights and Responsibilities Act 2006* to a trial in federal jurisdiction may well raise questions which may require notices to be issued to all State Attorneys-General and the Federal Attorney-General pursuant to (CTH) *Judiciary Act* [1903](#) s 78B; *R v Benbrika (Ruling No 20)* [\(2008\) 18 VR 410](#) ; 182 A Crim R 205; [\[2008\] VSC 80](#); [BC200801727](#).
- 12 (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 24.
- 13 (ACT) *Human Rights Act 2004* s 21(1). Civil proceedings are referred to in *ibid* s 21(3).
- 14 This is provided for by the *Acts* themselves. Generally see [\[80-1615\]](#).
- 15 *Ibid* s 22. (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25. For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#). The provision differs from the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) in some respects. For example, (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(j) recognises that those charged with a criminal offence will need, and are entitled to, specialised communication tools and technology in order to understand the nature and the reason for the criminal charge and to participate in the judicial process.

(A) Introduction — Right to a Fair Trial

- 16** These are modelled on (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(7).

See:

(ACT) [Human Rights Act 2004](#) s [24](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [26](#).

- 17** These are modelled on (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 15.

See:

(ACT) [Human Rights Act 2004](#) s [25](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [27](#).

- 18** These are modelled on (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 10(1).

See:

(ACT) [Human Rights Act 2004](#) s [20](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [23](#).

As to whether protection proceedings are covered by the right to a fair hearing see *Secretary, Department of Human Services v Sanding* [2011] VSC 42; [BC201100569](#) at [211] per Bell J (the requirements of a fair hearing to a child in protection proceedings depend on the capacity of the child, the nature of the proceeding, the issues at stake and the circumstances of the case).

[80-1580] Right in international law

The paragraph below is current to **07 March 2018**

Article 14 of the International Covenant on Civil and Political Rights (the 'ICCPR') sets out what the international community considers to be the main attributes of a fair trial and a fair determination of rights and obligations.¹ Although the terms of the ICCPR are not legally binding unless given effect by enactment, they are not without significance.² Other relevant norms are included in treaties concerned with racial discrimination,³ **torture** and cruel, inhuman or degrading treatment⁴ and the rights of children.⁵ These fair trial standards apply to all kinds of legal proceedings, both civil and criminal, and to all parties.⁶ Notably, they apply to all stages of the criminal process from investigation through to charge, trial and punishment.

Notes

- 1** The (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14 which provides:

- (1) 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'

(A) Introduction — Right to a Fair Trial

- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
 - (g) Not to be compelled to testify against himself or to confess guilt.
- (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
- (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
- (6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
- (7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

Australia ratified the ICCPR on 13 August 1980 and the ICCPR came into force in Australia on 13 November 1980. There is also a significant body of case law relating to the analysis of the rights contained in *ibid* art 14 and analogous provisions in regional human rights systems. See also (US) American Convention on Human Rights 1969 art 8; (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 6. As to the ICCPR see further FOREIGN RELATIONS [\[215-635\]](#), [\[215-645\]](#). As to the relationship between public international law and Australian law see FOREIGN RELATIONS [\[215-50\]](#)-[\[215-65\]](#). For interpretation of ICCPR art 14 see United Nations Human Rights Committee, General Comment No 13: *Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org>.

- 2 *Dietrich v R* (1992) 177 CLR 292  at 304, 305; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) per Mason CJ and McHugh J (referred to art 14 of the ICCPR). The High Court of Australia also referred to the (CTH) Human Rights and Equal Opportunity Commission *Act* 1986 (now the (CTH) [Australian Human Rights Commission Act 1986](#)) which incorporates the ICCPR as a Schedule of the *Act*; *Dietrich v R* (1992) 177 CLR 292  at 321 per Brennan J, at 337 per Deane J, at 347 per Dawson J, at 359-61 per Toohey J, at 372, 373 per Gaudron J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). See also *McInnis v R* (1979) 143 CLR 575  at 588; [27 ALR 449](#); 54 ALJR 122 per Murphy J (Australia had not ratified the ICCPR at that time). On the significance of treaties that have been ratified but not domestically implemented see [\[80-15\]](#) (Bill of Rights).
- 3 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; Aust TS 1975 No 40; 660 UNTS 195) art 5(a). See FOREIGN RELATIONS [\[215-655\]](#).

(A) Introduction — Right to a Fair Trial

- 4 (INT) Convention against **Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; Aust TS 1989 No 21; 23 ILM 1027 (1984), 24 ILM 535 (1985)) art 15.
- 5 (INT) Convention on the Rights of the Child (New York, 20 November 1989; Aust TS 1991 No 4) arts 3, 37, 40. Entry into force for Australia on 16 January 1991.
- 6 United Nations Human Rights Committee, General Comment No 13: *Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I , 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [2] emphasises that art 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.

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(B) Common Elements of Fair Judicial Process

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(11\) RIGHT TO A FAIR TRIAL](#)

(B) COMMON ELEMENTS OF FAIR JUDICIAL PROCESS

[80-1585] Elements of fair judicial process

The paragraph below is current to **07 March 2018**

Article 14(1) of the (INT) International Covenant on Civil and Political Rights 1966¹ (the 'ICCPR') identifies a number of elements that are common to a fair judicial process as a whole, both criminal trials and the determination of civil rights and liabilities, being:

(1) equality of all before the courts and tribunals;²

(2) hearing by a fair and impartial tribunal;³ and

(3) judgments to be made public.⁴

The ICCPR also identifies the specific incidents of a fair trial.⁵

Notes

¹ See [\[80-1580\]](#).

² See [\[80-1590\]](#).

³ See [\[80-1595\]](#).

⁴ See [\[80-1600\]](#).

⁵ (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(2)-(7). See [\[80-1605\]](#)-[\[80-1695\]](#).

[80-1590] Equality before courts and tribunals

The paragraph below is current to **07 March 2018**

All adult persons in Australia are generally entitled to be parties before Australian courts.¹ Exceptions exist preventing direct access to the law in certain circumstances. These may relate to the subject matter

(B) Common Elements of Fair Judicial Process

of the law and available remedies² to particular laws that affect standing in the court³ and fitness to plead.⁴ Rules of standing have been adopted that require a person to have an interest in a controversy and that the controversy be one the courts can determine according to law as between the parties.⁵ If a person's private right is not involved, standing will only be recognised if he or she has a special interest in the subject matter of the action beyond that of any other member of the public. If no private right is interfered with, a special interest is necessary.⁶ However, there is increasing judicial and legislative recognition that the rules of standing developed in private interest cases are not necessarily appropriate to public interest cases (such as in the area of environmental law). As a result, a 'flexible' approach to the identification of a special interest has been adopted by the judiciary,⁷ and broad standing provisions have been developed by legislatures.⁸

It is also a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given reasonable opportunity to appear and present his or her case.⁹ They must have adequate notice of the case at trial and proper opportunity to meet that case or to advance a contrary case. This entails sufficient delineation of the issues claimed against another so they may be effectively addressed by that other.¹⁰ The philosophy in establishing the relevant court or tribunal is relevant¹¹ and may require a commonsense approach to be taken unconstrained by technical or procedural considerations.¹² The claim should clearly and concisely set out allegations with sufficient particularity to permit a defence.¹³ The action must be within the jurisdiction of the court and be capable of determination by the court,¹⁴ although superior courts are presumed to have jurisdiction unless it can be expressly shown otherwise.¹⁵ Subject to these limitations, if access to the services of the courts were to be denied on grounds that have been made unlawful as discrimination, such as race, sex, marital status and disability, then discrimination law would provide a remedy.¹⁶ In some circumstances, however, access to the Court can be denied on security grounds.¹⁷ In the context of a Refugee Status Assessment, procedural fairness requires the substance of matters known and considered to bear upon claims relevant to assessment to be put to the person whose claim was being reviewed.¹⁸

Notes

- 1 The essential principle is contained in Magna Carta, Ch 40 ('To no-one will we sell, to no-one deny or delay right or justice'). While there is no specific guarantee of this in Australian law, the effect is achieved by referring to 'a person', as in (CTH) [Judiciary Act 1903](#) s 56, or to 'a claim', that is, the limitation is not related to the person but to the availability of a cause recognised in law. See also *Baume v Commonwealth* (1906) 4 CLR 97 ; 13 ALR 22 (a person has the same rights of action against the Commonwealth as the person would have against a subject in matters of tort or contract).
- 2 'Privative clauses' may attempt to oust the jurisdiction of a Court to judicially review certain types of matters by stating that certain remedies are not available. See for instance (CTH) [Migration Act 1958](#) s 474. However, such clauses are strictly construed by the Court at the federal level as not protecting against all types of jurisdictional error: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476  at 534; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#); *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 ; [234 ALR 114](#); [\[2007\] HCA 14](#); [BC200702595](#) at [\[15\]-\[19\]](#) per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ (reviewing privative clauses and *Plaintiff S157/2002*, above in the light of changes to (CTH) [Migration Act 1958](#) s 486A since *Plaintiff S157/2002*, above was decided). This approach is increasingly being taken at the State level: *Vanmeld Pty Ltd v Fairfield City Council* [1999] [46 NSWLR 78](#)  at [103](#), [104](#); [\[1999\] NSWCA 6](#); [BC9900156](#) per Spigelman CJ; *Woolworths Ltd v Wyong Shire Council* [\[2005\] NSWLEC 400](#) ; [BC200507301](#); *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) [61 NSWLR 707](#) ; [\[2004\] NSWCA 422](#); [BC200408193](#); *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) [26 VR 112](#) ; [\[2009\] VSC 156](#); [BC200903118](#). See ADMINISTRATIVE LAW [\[10-4115\]](#).
- 3 The main classes not having direct access are:

(B) Common Elements of Fair Judicial Process

- (1) a minor does not have the same standing as an adult (see FAMILY LAW [\[205-1880\]](#));
 - (2) unlawful non-citizens may in some circumstances be prevented from access to the courts (see [\[80-1165\]](#), [\[80-1170\]](#), CITIZENSHIP AND MIGRATION [\[77-665\]](#));
 - (3) persons with severe mental disabilities may not be able to plead their cases or be subject to usual penalties (see MENTAL HEALTH AND INTELLECTUAL DISABILITY [\[285-65\]](#)-[\[285-80\]](#), **CRIMINAL** LAW [\[130-13650\]](#), PRACTICE AND PROCEDURE [\[325-2535\]](#));
 - (4) persons imprisoned and guilty of serious crimes may have some of their normal rights of access to courts suspended: see PRISONS [\[335-320\]](#).
- 4 *R v Pritchard* [\(1836\) 173 ER 135](#) ; *R v Presser* [\[1958\] VR 45](#) ; [1958] ALR 248; *Kesavarajah v R* (1994) 181 CLR 230 ; [123 ALR 463](#); 68 ALJR 670; [BC9404646](#); *Eastman v R* (2000) 203 CLR 1 ; [172 ALR 39](#); [\[2000\] HCA 29](#); [BC200002716](#). For a recent review of fitness to plead requirements see *R v Bailiff* (2010) 5 ACTLR 1 ; 244 FLR 362; [\[2010\] ACTSC 54](#); [BC201004144](#) at [\[34\]](#)-[\[46\]](#), [\[99\]](#) per Penfold J (assessing whether (ACT) *Human Rights Act 2004* resulted in a less stringent test, 'human rights are not necessarily furthered by expanding the capacity of the authorities to identify individuals as incapable of participating fully in the legal system'). Compare *R v Monaghan* [\[2009\] ACTSC 61](#) ; [BC200904441](#) at [\[2\]](#) per Refshauge J (cardinal principle that persons cannot be tried for a crime unless they are in a position to defend themselves and that this includes being in a mental condition).
 - 5 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27  at 35; [36 ALR 425](#); 55 ALJR 631 per Gibbs CJ (an Aboriginal group member wishing to contest on behalf of the group the legality of action by Alcoa). See also ADMINISTRATIVE LAW [\[10-12030\]](#), EQUITY [\[185-1535\]](#).
 - 6 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27  at 36; [36 ALR 425](#); 55 ALJR 631 per Gibbs CJ (Aboriginal cultural interest was sufficient to give standing to challenge alumina refinery on sacred land). See also ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-20\]](#), ADMINISTRATIVE LAW [\[10-1\]](#).
 - 7 See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247  at 266; [54 ALD 609](#); 98 LGERA 410; [BC9803589](#) per Gaudron, Gummow and Kirby JJ, referring to Dawson, Toohey, Gaudron and McHugh JJ in *Shop Distributive and Allied Employees Assn v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552  at 558; [129 ALR 191](#); [BC9506425](#), and noting 'the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject matter of the action, where the consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law.' For application of this flexibility, see discussion of tests and case law in *Save The Ridge Inc v Australian Capital Territory* (2004) 133 LGERA 188 ; 182 FLR 155; [\[2004\] ACTSC 13](#); [BC200401474](#).
 - 8 See, for example, (CTH) *Environment Protection and Biodiversity Conservation Act 1999* ss [475](#) (injunctions and meaning of 'interested person'), [487](#) (extended standing for judicial review); (NSW) *Environmental Planning and Assessment Act 1979* s 123 (any person may bring proceedings whether or not any right of that person has been or may be infringed).
 - 9 *Cameron v Cole* (1944) 68 CLR 571  at 589; [1944] ALR 130; (1944) 17 ALJ 397; [BC4400034](#) per Rich J. See also *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [\[2009\] VSC 425](#) ; [BC200908759](#) at [\[53\]](#) per Vickery J ('The right to be heard before a court pronounces an order or judgment adverse to the party concerned is fundamental. It is a principle which yields only to legislation which clearly manifests a contrary intention. If the principle is not observed, and the court has been led to purport to determine the matter, the determination will be a nullity').
 - 10 *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490  at 517; [BC1690128](#); *Employment Services Australia Pty Ltd v Poniatowska* [\[2010\] FCAFC 92](#) ; [BC201005221](#). See also *Leghaei v Director-General of Security* [\(2007\) 97 ALD 516](#) ; [241 ALR 141](#); [\[2007\] FCAFC 37](#); [BC200705367](#) (claim to breach of procedural fairness in failure to put to particular grounds or issues addressing the question of why he was believed to be a risk to Australia's national security; balance in favour of the protection of the public interest in national security).
 - 11 *Rana v University of South Australia* (2004) 136 FCR 344 ; [\[2004\] FCA 559](#); [BC200402473](#) at [\[37\]](#) per Lander J; *Sterling Commerce (Aust) Pty Ltd v Iliff* (2008) EOC ¶93-496 ; (2008) 173 IR 378; [\[2008\] FCA 702](#); [BC200803650](#).
 - 12 *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC ¶93-457 ; [\[2007\] QSC 075](#); [BC200702388](#) at [\[80\]](#) per Moynihan J.

(B) Common Elements of Fair Judicial Process

- 13** *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279  at 286; [92 ALR 53](#); 64 ALJR 244; [BC9002932](#). See also *Reading v Partnership of Western Diagnostic Pathology* [\[2008\] FCA 1381](#) ; [BC200807953](#).
- 14** *Coe v Commonwealth* [\(1979\) 24 ALR 118](#) ; 53 ALJR 403 (action by an Aboriginal person refused because of defective statement of claim and insufficient identification of respondents).
- 15** *Cameron v Cole* (1944) 68 CLR 571  at 585 per Latham CJ, 590, 591 per Rich J; [1944] ALR 130; (1944) 17 ALJ 397; [BC4400034](#).
- 16** See [\[80-520\]-\[80-530\]](#) (provision of goods and services), [\[80-265\]-\[80-285\]](#) (indirect discrimination), [\[80-645\]-\[80-690\]](#) (harassment).
- For an example of a fair trial disability discrimination claim see *Tompkins v Honeyman* [\[2009\] QCA 217](#) ; [BC200906767](#).
- 17** For circumstances in which access to Courts and to classified or security sensitive information can be denied see [\[80-1615\]](#).
- 18** *Plaintiff M61/2010E v Commonwealth* [\(2010\) 272 ALR 14](#) ; 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#) at [\[91\]](#) per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ (procedural fairness required the reviewer to put before the plaintiff the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims).

[80-1595] Fair and impartial tribunal

The paragraph below is current to **07 March 2018**

There is no statutory right as such to a fair and impartial tribunal other than in the Australian Capital Territory and Victoria charters which make provision for decisions by a 'competent, independent and impartial court or tribunal'.¹ The Victorian charter expressly applies to courts.² In these and other jurisdictions, rules of court or legislation such as evidence statutes and those governing **criminal** proceedings attempt to ensure that judges will discharge their duties in a fair and impartial way.³ A miscarriage of justice resulted where a trial judge had been asleep during certain parts of the trial⁴ and issues commonly arise as to the completeness of directions given to the jury.⁵ Similarly, juries must be independent and impartial⁶ and free of external influences, secured through anonymity, confidentiality of deliberation process, and isolation when deliberating.⁷

All holders of judicial office are given security of tenure, subject only to either proven misbehaviour or incapacity⁸ or to 'good behaviour' and an address⁹ by the House or Houses of the relevant parliament.¹⁰ There are also rules, primarily derived from the common law, that provide grounds for disqualifying judges from hearing cases in which they have an interest.¹¹

Pre-trial publicity has the potential to impact on the fairness of a trial, for example, where jurors are overwhelmed by a perceived community expectation that the accused must be convicted whatever the weaknesses in the Crown case.¹² Proceedings might then be stayed but a permanent stay will only be ordered in an extreme case and there must be a fundamental defect of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences.¹³

The doctrine of the separation of powers embodied in Chapter III of the Commonwealth Constitution has provided a means by which the judiciary has protected its independence from encroachment on the judicial power.¹⁴ Enforced primarily in Commonwealth jurisdiction,¹⁵ it has been applied to prevent vesting of judicial power in administrative bodies¹⁶ and vesting of administrative functions in judges, notwithstanding the persona designata doctrine.¹⁷ The doctrine limits the extent to which Parliament can amend the law which is applicable in pending legal proceedings at least to the extent that it interferes with judicial functions.¹⁸ At the State level, it affects the extent to which State Parliaments can vest

(B) Common Elements of Fair Judicial Process

administrative functions in State Courts exercising federal jurisdiction.¹⁹ Most trials in Australia are conducted in courts established under State or Territory legislation.

Rules, primarily derived from the common law, give the courts wide powers to allow or exclude evidence that the court considers unfair to the accused²⁰ and evidence improperly obtained through oppression is inadmissible.²¹

A wide range of offences under the head of contempt of court ensure a fair trial and prevent interference with, or perversion of, the course of justice.²² Contempt law can become operative in connection with committal proceedings,²³ with publication of material prior to commencement of proceedings²⁴ and with the conduct of a trial.²⁵ Attempting or conspiring to pervert the course of justice is also a separate **criminal** offence.²⁶

International human rights law reflects the principle that a trial should be by an independent and impartial tribunal established by law.²⁷ The United Nations Human Rights Committee has raised particular concern that the use of military courts to try civilians should only occur in exceptional circumstances and must adhere to the fair trial provisions of the covenant.²⁸

Notes

1 (ACT) [Human Rights Act 2004](#) s 21

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 24.

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

2 Ibid s 6(2)(b) (the Charter applies to courts and tribunals 'to the extent that they have functions under ibid Pt 2, which includes ibid s 24). See *Kracke v Mental Health Review Board* (2009) 29 VAR 1 ; [2009] VCAT 646.

(ACT) [Human Rights Act 2004](#) applies to public authorities (ibid s 40B) but under ibid s 42(b) a public authority does not include a court, except when acting in an administrative capacity. See also *R v Griffin* [\[2007\] ACTCA 6](#) ; [BC200702339](#).

3 *Antoun v R* [\(2006\) 224 ALR 51](#) ; 80 ALJR 497; [\[2006\] HCA 2](#); [BC200600326](#) at [\[34\]-\[41\]](#) per Kirby J (review of the position at international law). For an unsuccessful claim of bias on the basis that relevant judges participated in the making of Court Rules and could not pass on their validity see *Priestley v Godwin (Parliamentary Service Merit Protection Commissioner)* [\(2008\) 251 ALR 612](#) ; 83 ALJR 237; [\[2008\] HCA 59](#); [BC200811702](#).

4 *Cesan v R (Matter No S233/2008)* (2008) 236 CLR 358 ; [250 ALR 192](#); [\[2008\] HCA 52](#); [BC200809727](#).

5 *Gassy v R* (2008) 236 CLR 293 ; [245 ALR 613](#); [\[2008\] HCA 18](#); [BC200803348](#). See also *HML v R* (2008) 235 CLR 334 ; [245 ALR 204](#); [\[2008\] HCA 16](#); [BC200802787](#).

6 *R v Woods* (2010) 246 FLR 4 ; [\[2010\] NTSC 69](#); [BC201009534](#) at [\[58\]](#) per Mildren ACJ, Blokland and Reeves JJ (no entitlement to trial by a racially balanced jury comprised of the same proportion of people of a particular race as in the broader community, but by an independent and impartial jury randomly selected in accordance with (NT) [Juries Act 1963](#) from a jury array randomly selected from the local community).

A jury is 'a competent, independent and impartial body' for the purposes of () Human Rights Act 2004 s 21: *R v Fearnside* (2009) 228 FLR 77 ; 193 A Crim R 128; [\[2009\] ACTCA 3](#); [BC200900871](#) at [\[99\]](#), [\[101\]](#) per Penfold J.

7 *Kingswell v R* (1985) 159 CLR 264  at 301-302; [62 ALR 161](#); 60 ALJR 17; [BC8501077](#).

8 (CC) Commonwealth Constitution s 72 (applies to all federal judges). See *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 ; 24 ALR 341 (importance of tenure).

(B) Common Elements of Fair Judicial Process

For the Australian Capital Territory, see (CTH) [Australian Capital Territory \(Self-Government\) Act 1988](#) s 48D (removal by executive after judicial commission and on determination and motion by the Assembly).

(NT) [Supreme Court Act 1979](#) s 40 (removal by Administrator on address by Assembly).

- 9 (NSW) [Constitution Act 1902](#) s 53 (removal by Crown by resolution of both Houses in same session on ground of 'proved misbehaviour or incapacity')

(QLD) [Constitution of Queensland 2001](#) s 61 (address of Legislative Assembly after report of a tribunal)

(SA) [Constitution Act 1934](#) ss 74 (tenure during good behaviour), 75 (address of both Houses of Parliament)

(TAS) Supreme Court (Judges' Independence) Act 1857 s 1 (but the only requirement is for an address by both Houses); (TAS) [Supreme Court Act 1887](#) s 6A (retirement at age 72)

(VIC) [Constitution Act 1975](#) s 77 (includes retirement at age 70)

(WA) [Constitution Act 1889](#) ss 54, 55.

- 10 See COURTS AND JUDICIAL SYSTEM [125-895], [125-900] (all federal judges), [125-1635], [125-1640] (Supreme Court of the Australian Capital Territory), [125-1850], [125-1855] (Supreme Court of the Northern Territory), [125-1960] (Court of Summary Jurisdiction of the Northern Territory), [125-2125], [125-2130] (Supreme Court of New South Wales), [125-2255] (Land and Environment Court of New South Wales), [125-2375] (District Court of New South Wales), [125-2450] (Compensation Court of New South Wales), [125-2760], [125-2765] (Supreme Court of Queensland), [125-2880] (District Court of Queensland), [125-2932] (Land Court of Queensland), [125-3190] (Supreme Court of South Australia), [125-3305] (District Court of South Australia), [125-3645] (Supreme Court of Tasmania), [125-3980], [125-3990] (Supreme Court of Victoria), [125-4070] (County Court of Victoria), [125-4335], [125-4340] (Supreme Court of Western Australia), [125-4440] (Family Court of Western Australia), [125-4535] (District Court of Western Australia).

- 11 See COURTS AND JUDICIAL SYSTEM [125-290]-[125-315].

- 12 *R v Ferguson; Ex parte A-G (Qld)* (2008) 186 A Crim R 483 ; [2008] QCA 227; [BC200807057](#) at [57] per McMurdo P, Keane and Muir JJA. See also *Hinch v A-G (Vic)* (1987) 164 CLR 15 ; [74 ALR 353](#); 61 ALJR 556; [BC8701810](#); *R v Glennon* (1992) 173 CLR 592 ; [106 ALR 177](#); 66 ALJR 344; 60 A Crim R 18; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 ; [50 ACSR 380](#); [2004] NSWCA 324; [BC200406122](#); *R v Dudko* (2002) 132 A Crim R 371 ; [2002] NSWCA 336; [BC200204739](#).

- 13 *R v Glennon* (1992) 173 CLR 592  at 605-6; [106 ALR 177](#); 66 ALJR 344; 60 A Crim R 18 (citing *Barton v R* (1980) 147 CLR 75  at 111; [32 ALR 449](#); 55 ALJR 31; [BC8000111](#) per Wilson J).

- 14 *Attorney-General (Cth) v R (Boilermakers' Case)* (1957) 95 CLR 529  at 540, 541; [1957] AC 288 ; [1957] ALR 489; [BC5700080](#), PC. *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) (no legislature can vest functions in a state court that are incompatible with the exercise of federal judicial power). See also *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [2010] HCA 39; [BC201008388](#); *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#); [2011] HCA 24; [BC201104388](#); *Lane v Morrison* (2009) 239 CLR 230 ; [258 ALR 404](#); [2009] HCA 29; [BC200907723](#); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 ; [248 ALR 456](#); [2008] FCAFC 128; [BC200805498](#); *Thomas v Mowbray* (2007) 233 CLR 307 ; [237 ALR 194](#); [2007] HCA 33; [BC200706044](#). See also CONSTITUTIONAL LAW [90-5025].

- 15 *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254 ; [1956] ALR 163; (1956) 29 ALJ 658; [BC5600120](#); *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#). However see *Fardon v A-G (Qld)* (2004) 223 CLR 575 ; [210 ALR 50](#); [2004] HCA 46; [BC200406384](#) at [37], [38] per McHugh J (Commonwealth Parliament may invest a court with Federal jurisdiction (in certain matters) and not contravene Ch III of the Commonwealth Constitution). See also *O'Donoghue v Ireland* (2008) 234 CLR 599 ; [244 ALR 404](#); [2008] HCA 14; [BC200802740](#). For the Court's refusal to extend *Kable* to the Territories see *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 ; [206 ALR 315](#); [2004] HCA 31; [BC200403588](#).

As to constitutional implications see further [80-45]. See also CONSTITUTIONAL LAW [90-5005]-[90-5060]. As to separation of powers in the States see CONSTITUTIONAL LAW [90-5030].

(B) Common Elements of Fair Judicial Process

- 16 See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ; [127 ALR 1](#); [BC9506412](#); *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 ; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#). See further CONSTITUTIONAL LAW [\[90-5015\]](#).
- 17 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ; [138 ALR 220](#); 70 ALJR 743. See further CONSTITUTIONAL LAW [\[90-5020\]](#).
- 18 *Nicholas v R* (1998) 193 CLR 173 ; [151 ALR 312](#); 72 ALJR 456; [BC9800075](#). Although note Mason J's statement in *R v Humby*; *Ex parte Rooney* (1973) 129 CLR 231  at 250; [2 ALR 297](#); 47 ALJR 738; [BC7300056](#), 'Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action.'
- 19 *Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#). As to constitutional implications see [\[80-45\]](#).
- 20 *Bunning v Cross* (1978) 141 CLR 54 ; [19 ALR 641](#); 52 ALJR 561; [BC7800046](#); *Foster v R* (1993) [113 ALR 1](#) ; 67 ALJR 550; 65 ALB 14; [BC9303566](#), HC of A (admission of confessional evidence unfair and conviction quashed). See also (CTH) [Evidence Act 1995](#) ss [84](#) (exclusion of admissions influenced by violence and certain other conduct), [90](#) (discretion to exclude admissions where unfair to defendant). Similar provisions exist in all jurisdictions. See *Em v R* (2007) 232 CLR 67 ; [239 ALR 204](#); [\[2007\] HCA 46](#); [BC200708428](#) at [\[108\]-\[113\]](#) per Gummow and Hayne JJ, at [\[183\]-\[197\]](#) per Kirby J (dissenting) (unfairness discretion under (CTH) [Evidence Act 1995](#) reviewed; not unfair to admit the evidence of admissions made during covertly recorded conversation)); *Tofilau v R* (2007) 231 CLR 396 ; [238 ALR 650](#); [\[2007\] HCA 39](#); [BC200707276](#) (exclusion of confessional evidence reviewed in context of undercover operation).
- As to the validity of evidentiary certificates under (CTH) [Telecommunications \(Interception and Access\) Act 1979](#) s [18\(2\)](#) see *R (Commonwealth) v Baladjam (No 17)* (2008) [270 ALR 163](#) ; [\[2008\] NSWSC 1439](#); [BC200813553](#) ((CTH) [Telecommunications \(Interception and Access\) Act 1979](#) s [18\(2\)](#) does not violate the separation of powers or the accused's right to a jury trial guaranteed by s 80 of the Commonwealth Constitution); *Cheikho v R* (2008) 234 FLR 124 ; [261 ALR 57](#); [\[2008\] NSWCCA 191](#); [BC200812995](#).
- 21 *R v Priestly* (1965) 51 Cr App R 1 (NSW). See also *Police v Dunstall* (2015) [322 ALR 440](#) ; 89 ALJR 677; [\[2015\] HCA 26](#); [BC201507279](#), HC of A. See further EVIDENCE [\[195-165\]-\[196-225\]](#) (discretion to admit or exclude evidence). On the inducement rule see *Tofilau v R* (2007) 231 CLR 396 ; [238 ALR 650](#); [\[2007\] HCA 39](#); [BC200707276](#) at [\[227\]](#) per Wood J. See also EVIDENCE [\[195-720\]-\[196-1680\]](#) (proof of facts).
- 22 See, for example, (CTH) [Crimes Act 1914](#) s [43](#). See also *R v Day* [\[1985\] VR 261](#) ; *Registrar of Court of Appeal v Willesee* (1985) [3 NSWLR 650](#) ; 17 A Crim R 238, CA(NSW); *Hinch v A-G (Vic)* (1987) 164 CLR 15 ; [74 ALR 353](#); 61 ALJR 556; [BC8701810](#). See further CONTEMPT [\[105-10\]](#) (criminal contempt), [\[105-250\]](#) (civil contempt).
- 23 *R v Murphy* (1985) 158 CLR 596 ; [61 ALR 139](#); [BC8501073](#).
- 24 See CONTEMPT [\[105-35\]-\[105-120\]](#).
- 25 *James v Robinson* (1963) 109 CLR 593  at 607; [1964] ALR 7; 37 ALJR 151; [BC6300460](#) per Kitto, Taylor, Menzies and Owen JJ (no contempt if no proceedings commenced in any court); *R v Edelsten* (1990) [21 NSWLR 542](#) ; 51 A Crim R 397.
- 26 See, for example, *R v Freeman* (1985) [3 NSWLR 303](#) ; 17 A Crim R 272, CCA(NSW); *R v Baba* [\[1977\] 2 NSWLR 502](#) ; CCA(NSW). See further CRIMINAL LAW [\[130-7070\]](#).
- 27 *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (1985), endorsed by UNGA Res 40/32 of 29 November 1985 and Res 40/156 of 13 December 1985.
- 28 United Nations Human Rights Committee, *CCPR General Comment 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8 at [4].

[80-1600] Judgments to be published

The paragraph below is current to **07 March 2018**

The right to a public judgment requires that any judgment be in writing. A trial judge is under an obligation to give reasons for his or her decision.¹ Reasons for a decision also support the right to review of a decision.²

The general practice in Australia is for judgments (relevant findings as to facts and law, decisions and any orders, sentence or other matters) to be published,³ but there is no common law (or statutory) requirement that reasons must in all cases be published. The practice of publication has been explained as being partly to inform the parties⁴ and partly to ensure that, if there is an appeal from the judicial officer (magistrate, district or county court or supreme court judge), the appellate court is in a position to deal effectively with the appeal.⁵ Failure to have regard to relevant material⁶ and taking into account irrelevant considerations⁷ constitute jurisdictional error though in a lower court it is not necessary to show also an error in relation to the finding itself.⁸ However, it is not required that in every case the reasons for the decision be given,⁹ as for example if the case turns on a single simple finding of fact, the reasons are patent or the claim or defence so muddled as to make reasons unnecessary.¹⁰ On the other hand, even if some of the proceedings are in camera, the reasons and orders should still be published.¹¹ The United Nations Human Rights Committee has indicated that this rule continues to apply even during declared states of emergency.¹²

Notes

- 1 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 ; *AK v Western Australia* (2008) 232 CLR 438 ; 243 ALR 409; [2008] HCA 8; BC200801833 (as question of identification was raised the judge was obliged to say why, and how, it was resolved); *Carlisle Homes Pty Ltd v Barrett Property Group Pty Ltd* [2009] FCAFC 31 ; BC200901729 at [40], [41] per Tamberlin, Sundberg and Besanko JJ; *Wainohu v New South Wales* (2011) 243 CLR 181 ; 278 ALR 1; [2011] HCA 24; BC201104388 at [54]-[59] per French and Kiefel (reasons for decision linked to essential characteristics of a court), at [104]-[109] per Gummow, Hayne, Crennan and Bell JJ (power to make control order uses confidence in judges to support inscrutable decision-making).

See also

(ACT) *Human Rights Act 2004* s 21(3)

(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 24(3).

- 2 *Pettitt v Dunkley* [1971] 1 NSWLR 376  at 388 per Moffitt JA.
- 3 *Brittingham v Williams* [1932] VLR 237 ; [1932] ALR 176, SC(VIC), Full Court.
- 4 *Pettitt v Dunkley* [1971] 1 NSWLR 376 . Compare *Pettitt v Dunkley* [1971] 1 NSWLR 376  at 388 per Moffitt JA (doubts there is any judicial duty to give reasons except so far as they relate to a right of appeal).
- 5 *Donovan v Edwards* [1922] VLR 87 .
- 6 *Craig v South Australia* (1995) 184 CLR 163  at 179; 39 ALD 193; 131 ALR 595; BC9506437 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ; 180 ALR 1; [2001] HCA 30; BC200102757; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 ; 256 ALR 32; [2009] FCA 528; BC200904335; *Malaxetxebarria v Queensland* [2007] QCA 132 ; (2007) 95 ALD 89; BC200702754.
- 7 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ; 66 ALR 299; 60 ALJR 560; BC8601448 per Mason J (fundamental principles concerning the ground of taking into account irrelevant considerations reviewed); *Graovac v Motor Accidents Authority* (2010) 56 MVR 212 ; [2010] NSWSC 938; BC201006201.
- 8 *Pettitt v Dunkley* [1971] 1 NSWLR 376  (also contains a useful discussion of several earlier cases).

(B) Common Elements of Fair Judicial Process

- 9 *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd* [\(1980\) 29 ALR 322](#) ; 42 FLR 369.
- 10 *Brittingham v Williams* [1932] VLR 237  at 239; [1932] ALR 176.
- 11 *David Syme & Co Ltd v General Motors-Holden's Ltd* [\[1984\] 2 NSWLR 294](#) .
- 12 United Nations Human Rights Committee, *CCPR General Comment 29: Article 4: Derogations during a State of Emergency*, UN Doc CCPR/C/21/Rev 1/Add 11 (2001) at [6]. The Committee notes that there are certain strictly defined exceptions, yet fails to elaborate on this point.

End of Document

(C) Right to a Fair Trial

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [II CIVIL RIGHTS](#) > [\(11\) RIGHT TO A FAIR TRIAL](#)

(C) RIGHT TO A FAIR TRIAL

[80-1605] Elements of a fair trial

The paragraph below is current to **07 March 2018**

The main thrust of article 14 of the International Covenant on Civil and Political Rights¹ (the 'ICCPR') is towards guaranteeing a fair trial in **criminal** proceedings. In addition to those elements common to a fair judicial process as a whole,² article 14 of the ICCPR identifies the following elements of a fair trial, being the right of the accused:

- (1) to public hearings, though with some exceptions;³
- (2) to be presumed innocent until proved guilty;⁴
- (3) to be informed, in a language that is understood, of the charge;⁵
- (4) to have adequate time and facilities for preparing a defence;⁶
- (5) to have access to counsel of his or her own choosing;⁷
- (6) to be tried without undue delay;⁸
- (7) to be present at his or her trial and to be able to defend him or herself;⁹
- (8) to have legal assistance, without payment where necessary;¹⁰
- (9) to examine, or have examined, the witnesses against him or her, and to have supporting witnesses available;¹¹
- (10) to have free interpreter assistance;¹²
- (11) not to be compelled to testify against himself or herself, or to confess guilt;¹³
- (12) if convicted, to have the right of appeal;¹⁴
- (13) to receive compensation if there has been miscarriage of justice;¹⁵ and

(C) Right to a Fair Trial

(14) not to be tried again for an offence once finally convicted or acquitted.¹⁶

The right to receive a fair trial covers the whole course of the **criminal** process, including investigation.¹⁷ There are additional requirements in relation to the trial of juveniles.¹⁸ Also, article 15 of the ICCPR provides that an accused must not be held guilty of an offence that was not an offence at the time of commission.¹⁹ In Australia what constitutes procedural fairness will vary from case to case.²⁰ The constitutional right to trial by jury is confined to trial on indictment.²¹

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(3). As to art 14 of the ICCPR see [\[80-1580\]](#).
- 2 As to the elements common to a fair judicial process as a whole see [\[80-1585\]-\[80-1600\]](#).
- 3 Ibid art 14(1). See further [80-1615].
- 4 Ibid art 14(2). See further [80-1620].
- 5 Ibid art 14(3)(a). See further [80-1625].
- 6 Ibid art 14(3)(b). See further [80-1630].
- 7 Ibid art 14(3)(b). See further [80-1635].
- 8 Ibid art 14(3)(c). See further [80-1640].
- 9 Ibid art 14(3)(d). See further [80-1645].
- 10 Ibid art 14(3)(d). See further [80-1650].
- 11 Ibid art 14(3)(e). See further [80-1655].
- 12 Ibid art 14(3)(f). See further [80-1660].
- 13 Ibid art 14(3)(g). See further [80-1665].
- 14 Ibid art 14(5). See further [80-1670].
- 15 Ibid art 14(6). See further [80-1675].
- 16 Ibid art 14(7). See further [80-1680].
- 17 *Jago v District Court of New South Wales* (1989) 168 CLR 23 ⚠ at 29, 33; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#) per Mason CJ; *R v Penney* (1998) [155 ALR 605](#) ⚡; 72 ALJR 1316; [1998] 14 Leg Rep C11; [BC9803708](#) at [\[16\]-\[18\]](#), [\[20\]](#), [\[22\]](#) per Callinan J (McHugh, Gummow, Kirby and Hayne JJ agreeing).
- 18 See [80-1610].
- 19 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 15. See further [80-1685].
- 20 *Kioa v West* (1985) 159 CLR 550 ⚠ at 609; [62 ALR 321](#); 60 ALJR 113; [BC8501054](#) per Brennan J; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ⚡; [267 ALR 204](#); [\[2010\] HCA 23](#); [BC201004220](#). As to procedural fairness see ADMINISTRATIVE LAW [\[10-12630\]-\[10-12990\]](#).
- 21 (CC) Commonwealth Constitution s 80. See *Kingswell v R* (1985) 159 CLR 264 ⚠ at 276-7; [62 ALR 161](#); 60 ALJR 17; [BC8501077](#); *Cheng v R* (2000) 203 CLR 248 ⚡; [175 ALR 338](#); [\[2000\] HCA 53](#); [BC200005825](#); *Harding v DCT* (2008) 172 FCR 206 ⚡; [\[2008\] FCA 1403](#); [BC200808039](#).

[80-1610] Trials of juveniles

The paragraph below is current to **07 March 2018**

(C) Right to a Fair Trial

The International Covenant on Civil and Political Rights (the 'ICCPR') also provides that juvenile persons are entitled to special procedures that take account of their age and will promote their rehabilitation.¹ This is reflected in both the Australian Capital Territory and Victorian human rights charters.² These objectives are achieved in various ways, including in civil law by permitting children and young persons to obtain separate legal representation in custody, access and other proceedings³ and by obtaining assistance from welfare authorities or by guardianship arrangements.⁴ In **criminal** matters, the special arrangements include:

- (1) varying ages for **criminal** responsibility;⁵
- (2) provisions relating to the establishment of children's courts;⁶
- (3) provisions requiring that children's evidence be taken in the presence, or with the consent of, an adult other than the police officer taking the evidence;⁷
- (4) special provisions for punishment;⁸ and
- (5) suppression of the identities of juveniles.⁹

Notes

1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(4). As to art 14 of the ICCPR see [\[80-1580\]](#). Other relevant international documents relating to the situation of juveniles before the **criminal** justice system include the (INT) Convention on the Rights of the Child (New York, 20 November 1989; Aust TS 1991 No 4 arts 3, 37, 40, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the Vienna Guidelines for Action on Children in the **Criminal** Justice System and the recommendations of the Committee on the Rights of the Child made at its day of general discussion on juvenile justice (CRC/C/46, at [203]-[238]) all available at <http://www.ohchr.org>.

The Australian Capital Territory and Victoria have both codified this provision: (ACT) [Human Rights Act 2004](#) s 22(3) (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 25(3).

2 (ACT) [Human Rights Act 2004](#) s 22(3) (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss 23(3), 25(3).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

3 (CTH) [Family Law Act 1975](#) s 68L. See FAMILY LAW [\[205-1916\]](#).

4 See FAMILY LAW [\[205-1405\]](#), [\[205-1880\]](#).

5 See **CRIMINAL** LAW [\[130-30\]](#).

6 See COURTS AND JUDICIAL SYSTEM [\[125-1765\]](#) (Australian Capital Territory), [\[125-1995\]](#) (Northern Territory), [\[125-2650\]](#) (New South Wales), [\[125-3050\]](#) (Queensland), [\[125-3475\]](#) (South Australia), [\[125-3870\]](#) (Tasmania), [\[125-4240\]](#) (Victoria), [\[125-4765\]](#) (Western Australia).

7 See EVIDENCE [\[195-1270\]](#). See also *R v DA* (2017) 316 FLR 228 ; [\[2017\] NTSC 2](#); [BC201700076](#).

8 See **CRIMINAL** LAW [\[130-17285\]](#).

9 See, for example, (NSW) [Children \(Criminal Proceedings\) Act 1987](#) s 15A (publication and broadcasting of names). See CONTEMPT [\[105-100\]](#).

[80-1615] Right to a public hearing

The paragraph below is current to **07 March 2018**

It is a common law principle that trials should take place in open court, that is, that the public, including the press, may attend all stages of a trial provided they are respectful and orderly.¹ Open justice requires all evidence on which a court is asked to **act** be open to public scrutiny, both to inform the public of how judicial power is exercised and for accountability in the use of judicial power; exceptions must be demonstrated to be necessary in the interests of justice.² This is also reflected in the United Nations Human Rights Committee's general comment on article 14 of the International Covenant on Civil and Political Rights.³ A court may not be closed, even if the presiding judge considers that in the interests of decency the evidence should be given in private, the only exception being where justice cannot be secured otherwise than by ordering the court to be cleared.⁴ Nor may a judge communicate with a jury without proper recall of the prisoner or his defence, although if the communication is an administrative direction⁵ and does not relate to the material issues, it need not render the trial void.⁶ The right to a public hearing extends to all courts, including proceedings before a magistrate.⁷ However, there is an exception where the interests of justice require,⁸ and the relevant factors may include the need for security checks or the prominence of the people charged and the public interest in the proceedings.⁹ The exception does not extend to cover publication of the reasons for judgment or the orders, which should be published even if care is needed in framing the reasons. Nor should the fair and accurate reports of proceedings be discouraged.¹⁰ Until 1983, proceedings in the Family Court were normally held in private, but are now normally held in open court, subject to discretionary exceptions, with the court being able to make orders about who may be present in court during a case.¹¹ There are also restrictions on publication of proceedings in that court.¹²

In matters dealing with classified and security sensitive information, a court may make suppression orders restricting the reporting or publication of proceedings and restricting access to documents on the court file,¹³ or order the holding of hearings in camera¹⁴ in addition to the inherent jurisdiction of the court to make necessary orders to ensure a fair **criminal** trial.¹⁵ However, it will only close the court where lesser procedures (such as the placing of a matter before a court in writing so that it is not read out) are clearly inadequate to give the confidentiality which is seen to be necessary.¹⁶ Queensland legislation provides for the appointment of an independently appointed Public Interest Monitor (the 'Monitor') to be present at applications for surveillance warrants and search warrants and to make submissions on the appropriateness of the application, examine or cross examine any witness, gather statistics for its annual report and monitor police compliance.¹⁷ The person subject to the warrant or anyone who may alert that person cannot attend the application but the Monitor, or a lawyer representing the Monitor, may be present.¹⁸ Federal and Queensland anti-terrorism legislation retains a role for the Monitor in relation to control orders and preventative detention orders operating in Queensland.¹⁹ It is questionable whether a point may be reached whereby federal legislation sanctioning the reliance on 'secret' evidence and effectively denying a party the capacity to challenge such evidence might be found unconstitutional.²⁰

The Australian Capital Territory and Victoria provide for public hearings. However, in the Australian Capital Territory the press and public may be excluded from all or part of a trial 'to protect morals, public order or national security in a democratic society,' if the interest of the private lives of the parties require the exclusion, or if strictly necessary because publicity would otherwise prejudice the interests of justice.²¹ Victoria's Charter has a more general exception to the public hearing where 'permitted to do so by a law other than this Charter'.²²

(C) Right to a Fair Trial

Notes

- 1 *R v Hamilton* (1930) 30 SR (NSW) 277 ; 47 WN (NSW) 84; *Russell v Russell* (1976) 134 CLR 495  at 520; [9 ALR 103](#); 50 ALJR 594; [BC7600041](#) per Gibbs J. Compare *Coulter v R* (1988) 164 CLR 350  at 357; [76 ALR 365](#); 62 ALJR 74; 30 A Crim R 471 per Mason CJ, Wilson and Brennan JJ (application for leave to appeal may be by a written submission without a hearing). See further CRIMINAL LAW [\[130-13160\]](#). As to the possibility that conditions of incarceration and travel arrangements to and from court could affect the fairness of a trial see *R v Benbrika* (*Ruling No 20*) ([2008](#)) [18 VR 410](#) ; 182 A Crim R 205; [\[2008\] VSC 80](#); [BC200801727](#).
- 2 *Dye v Commonwealth Securities Ltd (No 2)* [\[2010\] FCAFC 118](#) ; [BC201006733](#) at [\[121\]](#) per Marshall, Rares and Flick JJ (when invited to make a suppression order under (CTH) Federal Court of Australia Act 1976 s 50 (repealed)) (considering *Scott v Scott* [\[1913\] AC 417](#) ; [\[1911-13\] All ER Rep 1](#); *Dickason v Dickason* (1913) 17 CLR 50 ; *R v Hamilton* (1930) 30 SR (NSW) 277 ; 47 WN (NSW) 84; *McPherson v McPherson* [\[1936\] AC 177](#) ; [\[1935\] All ER Rep 105](#). On the threshold for making such an order see *Hogan v Australian Crime Commission* (2010) 240 CLR 651 ; [267 ALR 12](#); [\[2010\] HCA 21](#); [BC201004004](#) at [\[31\]](#) per French CJ, Gummow, Hayne, Heydon and Kiefel JJ (on (CTH) Federal Court of Australia Act 1976 s 50 (repealed)). See also *Hogan v Hinch* [\(2011\) 275 ALR 408](#) ; 85 ALJR 398; [\[2011\] HCA 4](#); [BC201101056](#) at [\[27\]](#), [\[29\]](#), [\[30\]](#), [\[39\]](#), [\[41\]-\[44\]](#) per French CJ ((VIC) Serious Sex Offenders Monitoring Act 2005 (repealed) s 42 (power to make a suppression order) does not infringe the principle of open justice; a federal law to the effect of *ibid* s 42 would not deny an essential characteristic of a court exercising federal jurisdiction (open justice), so does not attack the institutional integrity of State courts as independent and impartial tribunal in the *Totani* sense) (citing *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[91\]](#) per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). Compare *Russell v Russell* (1976) 134 CLR 495  at 520; [9 ALR 103](#) at [122-3](#); 50 ALJR 594; [BC7600041](#) per Gibbs J (to require a court invariably to sit in closed court was to alter an essential aspect of its character). See also *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#); [\[2011\] HCA 24](#); [BC201104388](#).
- For a review of the use of pseudonym orders and what must be established in an application to restrict publication by the use of pseudonym orders see *ABC v D1* [\[2007\] VSC 480](#) ; [BC200710447](#). See also *Ives v Western Australia (No 2)* [\[2010\] WASC 221](#) ; [BC201007115](#); *Anon 2 v XYZ* [\[2008\] VSC 466](#) ; [BC200809887](#); *ESB v Victoria* [\[2010\] VSC 479](#) ; [BC201007914](#).
- 3 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14. See United Nations Human Rights Committee, General Comment No 13: *Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [6] (apart from exceptional circumstances, a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons... even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public).
- 4 *R v Hamilton* (1930) 30 SR (NSW) 277 ; 47 WN (NSW) 84. *Scott v Scott* [\[1913\] AC 417](#)  at [436](#), [437](#); [\[1911-13\] All ER Rep 1](#) per Haldane LC. See further CRIMINAL LAW [\[130-13160\]](#).
- 5 *R v Fitzgerald* (1889) 15 VLR 40 ; SC(VIC), Full Court; *R v Kerr (No 2)* [1951] VLR 239 ; [1951] ALR 608; *Rabey v R* [1980] WAR 84 .
- 6 *R v Barnowski* [1969] SASR 386 ; *Smith v R* (2015) 255 CLR 161 ; [322 ALR 464](#); [\[2015\] HCA 27](#); [BC201507280](#) at [\[60\]](#) per Gordon J, HC of A.
- 7 See CRIMINAL LAW [\[130-13415\]](#).
- 8 *R v Governor of Lewes Prison; Ex parte Doyle* [\[1917\] 2 KB 254](#) ; *Scott v Scott* [\[1913\] AC 417](#)  at [436](#), [437](#); [\[1911-13\] All ER Rep 1](#) per Viscount Haldane, LC. See also *R v WR* [\[2009\] ACTSC 93](#) ; [BC200907212](#) (a pre-trial hearing with CCTV transmission of evidence from a remote witness room does not prevent a fair trial).
- 9 *Glennan v Hornibrook* (unreported, CA, 19 September 1985, [BC8500532](#)) (distinguishing *R v Governor of Lewes Prison; Ex parte Doyle* [\[1917\] 2 KB 254](#) ). For the effects on fair trial of publication by journalists in contempt see *R v Herald & Weekly Times Ltd* [\(2007\) 19 VR 248](#) ; [\[2007\] VSC 482](#); [BC200710081](#).
- 10 *David Syme & Co Ltd v General Motors-Holden's Ltd* [\[1984\] 2 NSWLR 294](#)  at [299-301](#) per Street CJ. See also *Scott v Scott* [\[1913\] AC 417](#)  at [439](#) per Viscount Haldane, LC, at 448 per Earl Loveburn; [\[1911-13\] All ER Rep 1](#).

(C) Right to a Fair Trial

- 11 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440   at 450 ; [1979] 1 All ER 745. As to reporting of court proceedings and **criminal** contempt see CONTEMPT [105-90]-[105-100].
- 12 (CTH) *Family Law Act 1975* s 97(1), 97(1A), 97(2). Proceedings may be held in chambers ((CTH) *Family Law Act 1975* s 97(1A)); (CTH) *Family Law Rules 2004* rr 11.16, 23.05 (parenting plan applications)). See also *Russell v Russell* (1976) 134 CLR 495 ; 9 ALR 103; 50 ALJR 594; BC7600041, HC of A (former (CTH) *Family Law Act 1975* s 97, to the extent that it required proceedings in state courts exercising federal jurisdiction to be in camera, was held to be invalid).
- 13 Ibid s 121. See also Dickey A, 'The Scope of s 121 of the Family Law Act' (1992) 66 ALJ 289. As to the power of a magistrate to make non-publication orders or to hold proceedings in camera for cases other than family law cases see *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342  at 347, 348 per Mahoney JA, at 357, 358 per McHugh JA; 36 A Crim R 345; *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153 . See further COURTS AND JUDICIAL SYSTEM [125-1505].

On the use of such suppression orders see Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98, AGPS, Canberra, 2004 at Ch 9, fn 1.

- 14 (CTH) **Criminal** Code s 93.2 allows a judge or magistrate at any time before or during a hearing of an application or proceedings before a federal court if satisfied that it is in the interest of the security or defence of the Commonwealth, to:

- (1) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or
- (2) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or
- (3) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.

See similar provisions in (CTH) *Crimes Act 1914* s 85B. Also, (CTH) *Federal Court of Australia Act 1976* s 17(4) (Court may order the exclusion of the public where satisfied that the presence of the public or of those persons would be contrary to the interests of justice). See also (CTH) *Migration Act 1958* ss 503B, 503C which authorises the court, on application by the Minister, to make non-disclosure orders to protect confidential information. See *R v Bersinic* [2007] ACTSC 46 ; BC200705206 at [4]-[12] per Connolly J (review of rationale) (citing *Sankey v Whitlam* (1978) 142 CLR 1  at 44-46; 21 ALR 505; 53 ALJR 11; BC7800068; *Director of Public Prosecutions (DPP) v Smith* (1996) 86 A Crim R 308  at 311; BC9601667)). See also *Alister v R* (1983) 154 CLR 404  at 435; 51 ALR 480; 58 ALJR 97; BC8400543 per Wilson and Dawson JJ ('Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister'); *Lodhi v R* (2006) 65 NSWLR 573 ; 199 FLR 288; [2006] NSWCCA 101; BC200601923. (NSW) *Witness Protection Act 1995* s 16 (closing Court to protect witnesses from identification)

(VIC) *Supreme Court Act 1986* ss 18, 19; (VIC) Open Court Act 2013 s 30; (VIC) Magistrates' Court Act 1989 s 126 which allows the court to order partial or full closure, and prohibition of publication where necessary to do so in order not to endanger the national or international security of Australia or not to prejudice the administration of justice).

- 15 'X' v *General Television Corp Pty Ltd* (2008) 187 A Crim R 533 ; [2008] VSC 344; BC200808361.
- 16 *R v Tait and Bartley* (1979) 24 ALR 473  at 490; 46 FLR 386. See also *R v Ealing Justices; Ex parte Weafer* (1981) 74 Cr App Rep 204  at 206; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47  at 54, 55; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440   at 471 ; [1979] 1 All ER 745.
- 17 (QLD) *Police Powers and Responsibilities Act 2000* ss 740 (a monitor must not be a person who is, or who is a member of, or who is employed in or by or to help any of the following: the director of public prosecutions; the office of the director of public prosecutions; CMC; the police service; the Commissioner for Children and Young People and Child Guardian), 742. It is notable that the Public Interest Monitor is not subject to a statutory requirement to **act** in the interests of the person whose rights are in issue, unlike the representative be appointed under UK anti-terrorism

(C) Right to a Fair Trial

legislation. See (UK) Prevention of Terrorism Act 2005 (repealed) Sch para 7(1) (relevant law officer may appoint a person to represent the interests of a relevant party), and the special rules contained in (UK) Civil Procedure Rules 1998 Pt 76. The original functions of a special advocate in connection with 'closed material' under the (UK) Prevention of Terrorism Act 2005 (repealed) were rendered inadequate for a fair trial in the decision of European Court of Human Rights in *A v UK* (2009) 26 BHRC 1 .

- 18 (QLD) Police Powers and Responsibilities Act 2000 ss 213, 329, 337, 345, 742(2)(c).
- 19 (CTH) Criminal Code s 104.12(5) (where a person in relation to whom an interim control order is made is a resident of Queensland, the Australian Federal Police must give notice to the Queensland Public Interest Monitor of the fact that an interim control order has been made), 104.14(1)(e) (Monitor may adduce evidence or make submissions to the court in relation to the confirmation of the control order), 104.18(4)(e) (representations in relation to an application for a revocation or variation of a control order).
- 20 See discussion in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98, AGPS, Canberra, 2004 at Ch 10. See also [80-1645].
- 21 (ACT) Human Rights Act 2004 s 21(2).
- 22 (VIC) Charter of Human Rights and Responsibilities Act 2006 s 24(2). See, for example, (VIC) Supreme Court Act 1986 s 19 (Supreme Court may close all or part of a proceeding to the public); (VIC) Open Court Act 2013 s 30; (VIC) Magistrates' Court Act 1989 s 126.

[80-1620] Right to be presumed innocent

The paragraph below is current to **07 March 2018**

The right of a person to be presumed innocent of any particular offence until a court has determined, beyond reasonable doubt, that the person is guilty of that offence, is a basic principle of the common law.¹ It extends to prevent any contrary impression during trial.² The presumption is particularly strong if the accused is unrepresented and the charge is preferred by the police.³

There is a common law exception to the presumption in the case of insanity.⁴ The authorities in Australia are to the effect that the burden of proving insanity⁵ lies with the accused if pleading insanity, although the requirement is the civil burden of proof (on the balance of probabilities) and the burden is on the prosecution to prove sanity if the jury is empanelled to determine insanity.⁶ The effect of a successful defence plea of insanity is to lead to an acquittal, or a finding of not guilty, on grounds of insanity.⁷ A person acquitted or found not guilty on grounds of insanity may be detained at the discretion of the Governor of a State,⁸ or under order of the court either alone⁹ or pursuant to mental health legislation.¹⁰ Under the Commonwealth's jurisdiction, a person may, where an offence has been committed, be ordered to be detained for hospital treatment without sentence, if mental illness contributed to commission of the offence.¹¹ The defence of insanity is to be distinguished from defences such as provocation, which have the effect of reducing the gravity of the crime but do not affect the finding of guilt. Once a prima facie case of provocation has been established, the prosecution bears the criminal burden of proof to show that provocation did not occur,¹² thus again affirming the presumption of innocence.

There are also statutory provisions that 'reverse the onus of proof'. In effect, such provisions negate the presumption of innocence.¹³ Their effect is to deem a person guilty of an offence if certain facts are proved there by placing the burden of proof on the accused to the standard of the balance of probabilities.¹⁴ The legislation may alternatively provide that the defendant may have to prove that a given act was done with lawful authority.¹⁵ Where there is the possibility that the evidence could lead to a conviction then a person must stand trial and the beyond reasonable doubt test comes later as a matter of proving the offence.¹⁶ Legislation regulating environmental offences, for which establishing that environmental harm was caused by a defendant can be particularly difficult, frequently employ such mechanisms.¹⁷

(C) Right to a Fair Trial

Notes

- 1 *Woolmington v DPP* [1935] AC 462  at 481; [1935] All ER Rep 1; (1935) 25 Cr App R 72 per Viscount Sankey LC ('Throughout the web of English **Criminal** Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'). See further **CRIMINAL LAW** [130-25], EVIDENCE [195-2105]. See also United Nations Human Rights Committee, General Comment No 13: *Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [7].

See also:

(ACT) *Human Rights Act 2004* s 22(1)

(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(1).

As to whether the presumption of innocence applies in a disciplinary proceeding, such as a hearing by Medical Practitioners Board of Victoria see *Sabet v Medical Practitioners Board (Vic)* (2008) 20 VR 414 ; [2008] VSC 346; BC200809039 at [176] per Hollingworth J.

- 2 *R v Benbrika (Ruling No 12)* [2007] VSC 524 ; BC200712144 (the presence of prison officers created the perception that the accused warrant being guarded to prevent their escape or other undesirable activity).
- 3 *Hallahan v Campbell; Ex parte Campbell* [1964] QWN 17 ; *Heffernan v Ward* [1959] Qd R 12 ; (1958) 53 QJPR 62.
- 4 *M'Naghten's Case* (1843) 10 Cl & Fin 200 ; [1843-60] All ER Rep 229; (1843) 8 ER 718; *Sodeman v R* (1936) 55 CLR 192 ; [1936] ALR 156; (1936) 10 ALJ 161; *Thomas v R* (1960) 102 CLR 584 ; [1960] ALR 233; (1960) 33 ALJR 413; *Mizzi v R* (1960) 105 CLR 659 ; [1961] ALR 137; (1960) 34 ALJR 307; *Taylor v R* (1978) 22 ALR 599 ; 45 FLR 343. As to onus of proof see *Woolmington v DPP* [1935] AC 462 ; [1935] All ER Rep 1; (1935) 25 Cr App R 72; *R v Podola* [1960] 1 QB 325 ; [1959] 3 All ER 418; [1959] 3 WLR 718 ; *R v Robertson* [1968] 3 All ER 557 ; [1968] 1 WLR 1767 ; (1968) 52 Cr App R 690; *R v Ayoub* [1984] 2 NSWLR 511 ; (1984) 10 A Crim R 312 at 316 per Enderby J, CCA(NSW). *Davis v United States* 160 US 469 (1985). However, the prosecution bears the legal burden of disproving automatism: *R v Joyce* [1970] SASR 184 ; *R v Quick* [1973] QB 910  ; [1973] 3 All ER 347; [1973] 3 WLR 26 . See further EVIDENCE [195-320]. As to mental impairment and **criminal** responsibility see also **CRIMINAL LAW** [130-9860]-[130-9895].

As to fitness to plead and equality before courts and tribunals see [80-1590].

- 5 *R v Vernell* [1953] VLR 590 ; [1953] ALR 1139; *R v Roche* (1889) 3 QJLJ 139 .
- 6 *R v McGrath* The Argus, 18 June 1890; *R v Lyfield* (1897) 3 ALR 39. See further **CRIMINAL LAW** [130-9745].
- 7 (CTH) *Crimes Act 1914* s 20BJ (acquitted by reason of mental illness); (CTH) **Criminal** Code s 7.3 (mental impairment) (ACT) *Crimes Act 1900* s 321 (special verdict of not guilty because of mental impairment) (NT) **Criminal** Code s 43C (acquittal on ground of mental impairment); see ibid Pt IIA for procedures to be followed where defence of mental impairment is raised (NSW) *Mental Health (Forensic Provisions) Act 1990* ss 22, 38 (not guilty on grounds of mental illness) (QLD) **Criminal** Code s 647 (acquitted on ground of insanity: not of sound mind) (SA) *Criminal Law Consolidation Act 1935* Pt 8A (not guilty on grounds of mental incompetence) (TAS) **Criminal** Code s 381 (acquitted on the ground of insanity) (VIC) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 20 (acquitted on account of mental impairment) (WA) **Criminal** Code s 27 (insanity).

See also **CRIMINAL LAW** [130-13795].

(C) Right to a Fair Trial

- 8 (QLD) **Criminal** Code s 647(2) (power is also given to the Court (ibid s 647(1) until the person is dealt with pursuant to (QLD) [Mental Health Act 2016](#))
- (WA) **Criminal** Code s 27 (insanity).
- 9 (CTH) **Crimes Act 1914** s [20BJ](#) (court alone). The Attorney-General also has powers in relation to these matters: ibid ss 20BJ(2), 20BK (review for release), 20BL (order release)
- (ACT) **Crimes Act 1900** ss [323](#) (Supreme Court), [328](#) (Magistrates Court) — includes detention in custody, or order submitting to the jurisdiction of the ACAT to enable the ACAT to make a mental health order)
- (NT) **Criminal** Code Pt IIA Div 5 (Supervision Orders)
- (QLD) **Criminal** Code s 647(1) (until person is dealt with under the (QLD) [Mental Health Act 2016](#))
- (SA) **Criminal Law Consolidation Act 1935** s [269O](#) (detained under supervision order)
- (TAS) **Criminal Justice (Mental Impairment) Act 1999** Pts 3, 4 (powers of the Court regarding persons liable to supervision), ss 21-37
- (VIC) **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** ss [24](#) (Court may make orders pending making of supervision order), [26](#) (supervision orders)
- (WA) **Criminal Law (Mentally Impaired Accused) Act 1996** s [22\(2\)](#), [Pt 5](#) (mentally impaired defendants). Note (WA) **Acts** Amendment (Safety and Human Rights of Persons in Custody) Bill 2009 adds section 26A to (WA) **Criminal Law (Mentally Impaired Accused) Act 1996** to make provision for the humane treatment of detainees.
- 10 (ACT) **Crimes Act 1900** ss [323](#) (Supreme Court), [328](#) (Magistrates Court) — includes detention in custody, or order submitting to the jurisdiction of the ACAT to enable the ACAT to make a mental health order); (ACT) **Mental Health Act 2015** s [80](#)
- (NSW) **Mental Health (Forensic Provisions) Act 1990** Pts 2, 5 (the Attorney-General, the Supreme Court of New South Wales and the District Court, and the Mental Health Review Tribunal (constituted under the (NSW) **Mental Health Act 2007**) all have roles)
- (QLD) **Mental Health Act 2016** ss [21](#), [131](#), [155](#) (under ibid Ch 4 Pt 5, the Mental Health Court decides issues of unsoundness of mind, diminished responsibility and fitness for trial).
- 11 (CTH) **Crimes Act 1914** s [20BS](#).
- 12 *Moffa v R* (1977) 138 CLR 601 ; [13 ALR 225](#); 51 ALJR 403; (NSW) **Crimes Act 1900** s 23(4). See also **CRIMINAL LAW** [\[130-1095\]](#).
- 13 Examples include (VIC) **Firearms Act 1996** s [145](#); (VIC) **Drugs, Poisons and Controlled Substances Act 1981** s [5](#), the subject of *Momcilovic v R* ([2011](#)) [280 ALR 221](#) ; [\[2011\] HCA 34](#); [BC201106881](#) in which French CJ, Gummow, Hayne, Crennan and Kiefel JJ held that (VIC) **Drugs, Poisons and Controlled Substances Act 1981** s [5](#) did not apply to the offence of trafficking contrary to ibid s 71AC. The Queensland Parliament has stated a policy against reverse onus provisions: (QLD) **Legislative Standards Act 1992** s 4(3)(d). See also *Re Application for Bail by Breen* ([2009](#)) [172 ACTR 21](#) ; [\[2009\] ACTSC 172](#); [BC200912020](#) (presumption of innocence and interests of the accused balanced against attendance at trial and 'future risk' to the community). For discussion on when the presumption is engaged: see *Sabet v Medical Practitioners Board (Vic)* ([2008](#)) [20 VR 414](#) ; [\[2008\] VSC 346](#); [BC200809039](#).
- 14 (CTH) **Criminal** Code s 13.5.
- 15 See, for example, under (CTH) **Fisheries Management Act 1991** s s 95(1)(c), [95\(5\)](#) (a person found to be in possession of fish in the proclaimed fishing areas without authorisation by a fishing concession or a scientific permit is guilty of an offence against the **Act**), [95\(6\)](#) (in defence to a charge under ibid s 95(1)(c), a person must show the court that the fish was not taken in the proclaimed fishing areas); (CTH) **Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990** ss [6\(1\)\(a\)](#) (cultivation of specific plants is deemed to be dealing in drugs), [8A](#) (intent may be inferred from objective factual circumstances), [15\(2\)](#) (penalties where offence involves cultivation).
- 16 *May v O'Sullivan* (1955) 92 CLR 654 ; [1955] ALR 671; (1955) 29 ALJ 375 (followed in *Torrance v Cornish* (1985) 79 FLR 87 ; *Myers v Claudianos* ([1990](#)) [95 ACTR 1](#)  at [8](#); 100 FLR 362; [2 ACSR 73](#) per Miles CJ; applied *Barrett v Keygan* 1986 Tas R (NC 17) 243 ; [\(1986\) 4 MVR 353](#); *Wilson v Kuhl* [\[1979\] VR 315](#) ). Where the facts do not allow a charge, no question of law arises: *O'Mara v Liftin*; *Ex parte O'Mara* [\[1972\] QWN 32](#) .

(C) Right to a Fair Trial

- 17** For presumptions about the correctness of averments, see, for example, (QLD) [Environmental Protection Act 1994](#) s 490(6); (SA) [Environment Protection Act 1993](#) s 139(3). For an extensive set of provisions which strengthen presumptions about substantive matters, see (NSW) [Protection of the Environment Operations Act 1997](#) ss 255-262, notably *ibid* ss 257, 258 which deem occupiers of premises to have caused pollution, reversing the onus of causation.

[80-1625] Right to be informed of charge

The paragraph below is current to **07 March 2018**

The right to be informed of the charge 'promptly' as stated in the International Covenant on Civil and Political Rights (the 'ICCPR') applies to all **criminal** charges (not just in cases of detention) and requires that information be given as soon as the charge is first made (such as in the course of an investigation when an authority decides to take a procedural step against a suspect or publicly names them).¹ This must be done in an understood language.² The language requirement is a narrowly stated right, since being informed of the charge, in whatever language, may not ensure that the accused understands in any real sense what precisely are the charge and its implications.³ Nevertheless, a case has been dismissed where it was apparent that, even with the aid of an interpreter, it would not be possible to communicate adequately with an Aboriginal person charged with murder, or to convey the significance of such terms as 'unlawful' and 'guilty'.⁴ The basis for deciding whether an interpreter should be involved is whether without that assistance a fair trial can be held.⁵ Any party who is present and unable to understand what is happening must by the use of an interpreter be placed in a position to understand.⁶

While both the Australian Capital Territory and Victoria have included the right to free interpreting assistance in court in their human rights charters,⁷ the Victorian provision goes further than the ICCPR, recognising that some people will need and are entitled to specialised communication tools and technology in order to understand the nature and the reason for the **criminal** charge and to participate in the judicial process.⁸

Notes

- 1** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') art 14. See United Nations Human Rights Committee, General Comment No 13: *Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [8] (article 14(3)(a) of the ICCPR applies to all cases of **criminal** charges, including those of persons not in detention; the right to be informed of the charge 'promptly' requires that information be given as soon as the charge is first made by a competent authority (eg when in the course of an investigation a court or an authority decides to take procedural steps against a person suspected of a crime or publicly names them)).
- 2** As to interpreter assistance in the trial process see [80-1660]. See, for example, the case discussed in (1978) 3 Legal Service Bulletin 94, 95.
- 3** *R v Willie* (1885) 7 QJLJ (NC) 108. For an example of failure to appreciate the nature of a charge (and mistaken admission of guilt) see *Spatolisano v Hyde* [2009] ACTSC 161 ; [BC200911045](#) (uncertain move on direction under (ACT) Crime Prevention Powers Act 1998 s 4). See also *R v Goreng-Goreng* (2008) 220 FLR 21 ; [2008] ACTSC 74; [BC200807357](#) (claim upheld that non-disclosure duty under (CTH) [Public Service Regulations 1999](#) reg 2.1 was invalid for uncertainty).
- 4** *R v Grant* [1975] WAR 163 .
- 5** *Johnson v R* (1987) 25 A Crim R 433 , CCA(QLD).

(C) Right to a Fair Trial

- 6 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414  at 425 per Samuels JA, CA(NSW) (the party in this case was deaf mute). See, however, *Condren v R* (1987) 28 A Crim R 261  at 297 per Ambrose J (evidence of speech habits of Aboriginal people was not admitted in relation to a particular Aboriginal prisoner).
- 7 (ACT) [Human Rights Act 2004](#) s 22(2)(h)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [25\(2\)\(i\)](#).
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 8 *Ibid* s 25(2)(j).

[80-1630] Right to adequate time and facilities to prepare a defence

The paragraph below is current to **07 March 2018**

The main object of a court is to ensure that in the administration of justice a fair trial according to law is secured.¹ Provided a bona fide application has been made and an adequate reason is stated, an adjournment should be granted and if it is not and the trial proceeds, a new trial may be ordered.² It is essential that an accused have an opportunity properly to prepare his or her defence.³ The facilities must include access to documents and other evidence needed to prepare their case, as well as the opportunity to engage and communicate with counsel.⁴

Under the Commonwealth's anti-terrorism provisions, an explanation of the effect of an interim control order must be served upon a person 'at least 48 hours before the confirmation hearing.'⁵ This potentially compromises a person's capacity to find legal representation and to adequately prepare their case.

Notes

- 1 *R v Van Beelen* (1973) 4 SASR 353  at 367-9, 374, 375, 380, 385, 403, 410, 411 per the court.
- 2 *R v Jones* [\[1971\] VR 72](#) . As to adjournments see [CRIMINAL LAW \[130-13165\]](#).
- 3 *R v Van Beelen* (1973) 4 SASR 353  at 366, SC(SA), Full Court; *R v Jones* [\[1971\] VR 72](#)  at [76](#), SC(VIC), Full Court; *R v McGill* [\[1967\] VR 683](#) . See also [CRIMINAL LAW \[130-13620\]-\[130-13635\]](#) (hearing on indictment), [\[130-13420\]-\[130-13450\]](#) (committal for trial). This right has been included in the Australian Capital Territory and Victoria see (ACT) [Human Rights Act 2004](#) s 22(2)(b); (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [25\(2\)\(b\)](#).
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 4 See (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14. See further United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [9]. For a review of international authorities on the development of the equality of arms principle see *Ragg v Magistrates' Court* [\(2008\) 18 VR 300](#) ; 179 A Crim R 568; [\[2008\] VSC 1](#); [BC200800133](#) at [\[55\]-\[66\]](#) per Bell J. See also *R v Rich (Ruling No 20)* [\[2009\] VSC 24](#) ; [BC200905158](#) (application for a 6 month stay of trial and internet access from prison denied even though claimed to support alibi defence).
- 5 (CTH) [Criminal Code](#) s 104.12. However, the provision also requires that the summary be served 'as soon as practicable after an interim control order is made'.

[80-1635] Right to have access to counsel of accused's own choosing

The paragraph below is current to **07 March 2018**

There is a right to be represented by counsel, in the sense that an accused person cannot be forced by a judge to go to a trial unrepresented.¹ A right to representation of the accused's own choosing for the purpose of preparing a defence is provided by legislation in all jurisdictions,² although the cost of counsel may be an effective bar.³ The common law of Australia, while recognising a right not to be tried unfairly,⁴ does not recognise the right of an accused to be provided with counsel at public expense⁵ or, where such counsel is provided, that it be counsel chosen by the accused.⁶ However, the refusal to adjourn or stay a trial for an indigent accused charged with a serious offence who is unable, through no fault of their own, to obtain legal representation may result in an unfair trial and a conviction which the Courts will quash.⁷ Access to counsel of persons in custody without bail and of prisoners, is subject to regulation in some jurisdictions.⁸

National security and terrorism-related legislation strictly controls both access to lawyers,⁹ severely limits the freedom of communication with counsel (including the use of an interpreter)¹⁰ and limits the ability of a detainee to select counsel of their own choosing.¹¹

The United Nations Human Rights Committee, determining communications complaining about non-compliance with articles 14(1), 14(3)(b) and 14(3)(d) of the International Covenant on Civil and Political Rights has explained that they imply a guarantee of adequate, proper or effective legal representation.¹² In Australia, an appellate court may conclude that inadequate representation has resulted in an unfair trial that might amount to a miscarriage of justice.¹³ A complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard. Nonetheless, there may be rare cases in which counsel's misbehaviour or ineptitude is so extreme as to constitute a denial of due process to the client, notably where, for no valid reason, counsel fails to cross examine material witnesses, or does not address the jury.¹⁴

Notes

- 1 *Dietrich v R* (1992) 177 CLR 292  at 304 per Mason CJ and McHugh J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#). See also *McInnis v R* (1979) 143 CLR 575  at 579 per Barwick CJ, at 581 per Mason J; [27 ALR 449](#); 54 ALJR 122. See also *R v Hanias* (1976) 14 SASR 137  at 143 per Bray CJ; *R v Bicanin* (1976) 15 SASR 20  at 25 per Hogarth, Wells and Sangster JJ.
- 2 (CTH) [Judiciary Act 1903](#) s 78 (appearance of parties by solicitors or barristers in every court exercising federal jurisdiction)

(ACT) [Crimes Act 1900](#) s 285 (accused may be defended by lawyer); (ACT) [Human Rights Act 2004](#) s 22(2)(b), 22(2)(f)

(NT) [Criminal Code](#) s 360 (entitlement to representation by counsel)

(NSW) [Criminal Procedure Act 1986](#) s 36 (representation and appearance)

(QLD) [Criminal Code](#) s 616 (defence by counsel)

(SA) [Criminal Law Consolidation Act 1935](#) s 288 (right to counsel)

(TAS) [Criminal Code](#) s 368 (defence either personally or by counsel)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 25(2)(d)

(WA) [Criminal Procedure Act 2004](#) s 172.

(C) Right to a Fair Trial

See *Dietrich v R* (1992) 177 CLR 292  at 304; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) per Mason CJ and McHugh J (the statutory right was interpreted in negative terms — the accused could not be forced by the exercise of the judge's discretion to go to trial unrepresented). On the significance of the availability of legal aid see *R v East* (2008) 190 A Crim R 225 ; [\[2008\] QCA 144](#); [BC200812493](#) (the prospect of legal aid strengthens the need for adjournment to seek representation). For the duties on the judge to assist see *MacPherson v R* (1981) 147 CLR 512 ; [37 ALR 81](#); 55 ALJR 594; [BC8100115](#). As to the resulting dilemma see *Tomasevic v Travaglini* [\(2007\) 17 VR 100](#) ; [\[2007\] VSC 337](#); [BC200707864](#) at [\[97\]-\[132\]](#) per Bell J; *Caladine v Cmr, New South Wales Health Care Complaints Commission* [\[2007\] NSWCA 362](#) ; [BC200710975](#); *Jae Kyung Lee v Bob Chae-Sang Cha* [\[2008\] NSWCA 13](#) ; [BC200800876](#) at [\[46\]-\[50\]](#) per Basten J; *Jones v Ekermawi* [\[2009\] NSWCA 388](#) ; [BC200910972](#) (denial of opportunity to put arguments); *Jeray v Blue Mountains City Council (No 2)* (2010) 180 LGERA 1 ; [\[2010\] NSWCA 367](#); [BC201009842](#) at [\[6\]-\[12\]](#) per Allsop P (Macfarlan JA agreeing), [\[54\]-\[65\]](#) per Young JA.

- 3 See [\[80-1650\]](#).
- 4 *Dietrich v R* (1992) 177 CLR 292  at 299; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) per Mason CJ and McHugh J.
- 5 *Dietrich v R* (1992) 177 CLR 292  at 303 per Mason CJ and McHugh J, at 330 per Deane J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#).
- 6 *R v Connell* (1993) 78 A Crim R 480 ; [BC9301034](#). See *Dietrich v R* (1992) 177 CLR 292  at 336; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) per Deane J.
- 7 *Dietrich v R* (1992) 177 CLR 292  at 299; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) per Mason CJ and McHugh J. See *Craig v South Australia* (1995) 184 CLR 163  at 183-184; [39 ALD 193](#); [131 ALR 595](#); [BC9506437](#) (for the meaning of 'no fault on his or her part' focussing on the reasonableness of the conduct of an accused in all of the circumstances). For a review of cases where the accused has been at fault see *Philopos v R* [\[2008\] NSWCCA 66](#) ; [BC200802124](#) at [\[62\]-\[71\]](#) per McClellan CJ at CL.
- 8 See PRISONS [\[335-945\]](#).
- 9 For instance, under the (CTH) **Criminal** Code s 104.5(5) a person subject to an interim control order may be denied the right to contact, communicate or associate with their lawyer if the lawyer is a 'specified individual'. See parallel provisions for a person subject to a prohibited contact order: *ibid* s 105.40. Under *ibid* s 105.37, a detained person is entitled to contact a lawyer for specified purposes.
- 10 (CTH) **Criminal** Code s 105.38 provides that the contact 'may take place only if it is conducted in such a way that the contact, and the content and meaning of the communication that takes place during the contact, can be effectively monitored by a police officer exercising authority under the preventative detention order'. Furthermore, 'the contact may take place in a language other than English only if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter'. *Ibid* s 105.38(5) provides that any communication between a person and their lawyer is not admissible in evidence against the person in any proceedings in court.
- 11 See, for example, (CTH) **Criminal** Code s 105.37(4), 105.37(5). More limiting, however, are provisions in the (CTH) [Australian Security Intelligence Organisation Act 1979](#), notably *ibid* ss 34D(5), 34F(5) which requires the Minister to ensure a warrant permits contact with a single lawyer of the person's choice, but allows for the prescribed authority to direct under *ibid* s 34ZO that the person be prevented from contacting the lawyer in certain conditions, notably where satisfied that there are circumstances relating to the nominated lawyer such that, if there is contact, a person involved in a terrorist offence may be alerted or a record altered, damaged or destroyed.
- 12 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14. See *Vasilskis v Uruguay* UNHCR Communication No 80/1980, UN Doc CCPR/C/OP/2 at [105]; *Kelly v Jamaica* UNHCR Communication No 253/1987, UN Doc CCPR/C/41/D/253/1987 at [60]; *Campbell v Jamaica* UNHCR Communication No 618/1995, UN Doc CCPR/C/64/D/618/1995. The more serious the case and grave the potential punishment upon conviction, the greater is the obligation of the State party to ensure against incompetence in representation: *Campbell v Jamaica* UNHCR Communication No 618/1995, UN Doc CCPR/C/64/D/618/1995; *Hussain v Mauritius* UNHCR Communication No 980/2001, UN Doc CCPR/C/77/D/980/2001; *HC v Jamaica* UNHCR Communication No 383/1989, UN Doc CCPR/C/45/D/383/1989; *Taylor v Jamaica* UNHCR Communication No 705/1996, UN Doc CCPR/C/62/D/705/1996.
- 13 *TKWJ v R* (2002) 212 CLR 124 ; [193 ALR 7](#); [\[2002\] HCA 46](#); [BC200205984](#). A miscarriage is measured by reference to both unfair process and outcome. When based on a counsel's performance, the Court will consider whether there was a material irregularity in the trial (at 149, 150 per McHugh J), and whether there was a significant possibility that the **acts** or omissions of which complaint is made affected the outcome of the trial: at 135 per Gaudron

(C) Right to a Fair Trial

J, at 149 per McHugh J, at 157 per Gummow and Hayne JJ. See also *Nudd v R* (2006) 225 ALR 161 ; 80 ALJR 614; [2006] HCA 9; [BC200601022](#); *Seymour v R* (2006) 162 A Crim R 576 ; [2006] NSWCCA 206; [BC200605474](#); *Ali v R* (2005) 214 ALR 1 ; 79 ALJR 662; [2005] HCA 8; [BC200500839](#).

- 14 See *Nudd v R* (2006) 225 ALR 161 ; 80 ALJR 614; [2006] HCA 9; [BC200601022](#) at [19] per Gleeson CJ, noting that McHugh J gave two such examples in *TKWJ v R* (2002) 212 CLR 124 ; [193 ALR 7](#); [2002] HCA 46; [BC200205984](#) at [76] per McHugh J. Gleeson CJ takes his Honour to have been referring to cases where there is no rational explanation for counsel's decisions.

[80-1640] Right to be tried without undue delay

The paragraph below is current to **07 March 2018**

The earliest expression of the right to be tried without undue delay is in the Magna Carta,¹ and it was many times subsequently repeated.² The question of trial without undue delay has come to notice recently as a result of the crowded business of the courts and the number of persons in prison on remand. There is no common law right to a speedy trial of a **criminal** charge that exists separately from the question whether the trial was fair.³ However, discharge or stay of proceedings may be granted where excessive delay in instituting or continuing them would be harsh and oppressive and an abuse of process, but as an aspect of the conduct of a fair trial rather than as a right to a speedy trial.⁴ In determining whether a request for a stay should be granted, the extent to which the accused has sought or consented to delays may be relevant and may lead to refusal and the overriding principle is that a fair trial must be achieved.⁵ The guarantee relates also to the time by which judgment must be given. Excessive delay in delivering judgment in a **criminal** matter may violate the right to be tried without undue delay.⁶ The Australian Capital Territory and Victorian rights charters both include a general right to be tried without unreasonable delay.⁷ In the Australian Capital Territory, the Supreme Court has held that mere delay is of itself not necessarily sufficient grounds under the (**ACT**) [Human Rights Act 2004](#) for staying a trial, but that a stay is one possible remedy for delay. The test applied is that of proportionality.⁸

Notes

- 1 (UK) Magna Carta 1215 Ch 29 ('We will sell to no-one, we will not deny or defer to anyone either justice or right'). See, however, *Jago v District Court of New South Wales* (1989) 168 CLR 23  at 62-9; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#) per Toohey J (expressed doubts as to the historical accuracy of the emphasis on Magna Carta and of Coke's references to the common law origin).
- 2 See *Halsbury's Statutes of England* 4th ed (1995 reissue), Vol 10, Butterworths, London, p 14 (reproduces parts of the most commonly used version, Edward I (1297), and refers to the Henry III (1225-7) version); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558  at 572 and 573 per Samuels JA (reference to John I (1215) and Henry III (1225-7) versions); 37 A Crim R 314; *Jago v District Court of New South Wales* (1989) 168 CLR 23  at 66; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#) per Toohey J (reference to John I (1215) version). See also McKechnie 105, *Magna Carta*, 2nd ed, Glasgow, 1914 (authoritative source for references to endorsements of the charter).
- 3 *Jago v District Court of New South Wales* (1989) 168 CLR 23 ; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#) (followed *Waterhouse v R* (1992) 62 A Crim R 59 , CCA(NSW); *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 ; 48 A Crim R 420). In order to succeed on a 'speedy trial' argument, an accused must show actual or likely harm. See also *Director of Public Prosecutions v Tokai* [1996] AC 856  at 864 ; [1996] 3 WLR 149 ; PC; *Gill v Walton* (1991) 25 NSWLR 190 . On the application of fair trial principles on a strike out see *West v New South Wales* [2007] ACTSC 43 ; [BC200705205](#) at [19]-[23] per Connolly J; *Oorloff & Anor v Lee & Anor* [2004] FMCA 893

(C) Right to a Fair Trial

- ; [BC200409110](#) at [\[48\]-\[49\]](#) per Walters FM. As to case management see *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 ; [141 ALR 353](#); 71 ALJR 294; [BC9700005](#) at [\[154\]](#) per Dawson, Gaudron and McHugh JJ ('Case management is ... an important and useful aid for ensuring the prompt and efficient disposal of litigation. But ... the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim').
- 4 *R v McConnell* [\(1985\) 2 NSWLR 269](#) ; *Herron v McGregor* [\(1986\) 6 NSWLR 246](#)  at [252](#), [253](#); 28 A Crim R 79 per McHugh JA. The argument that there is a common law right to a speedy trial was not accepted by the High Court of Australia in *Jago v District Court of New South Wales* (1989) 168 CLR 23  at 33 per Mason CJ, at 70 per Toohey J, at 78 per Gaudron J, at 44 by Brennan J; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#). See also *R v Clarkson* [\[1987\] VR 962](#) ; (1987) 25 A Crim R 277 (10 year old evidence allowed), SC(Vic), Full Court; *Freeman v McKenzie* [\(1988\) 16 ALD 83](#) ; [82 ALR 461](#), Fed C of A (8 year delay and further 5 years for proceedings led to permanent stay of proceedings); *R v Mills* (2011) 252 FLR 295 ; 210 A Crim R 434; [\[2011\] ACTSC 109](#); [BC201104695](#) (no right not to be tried following undue delay) at [32] per Higgins CJ. See further CRIMINAL LAW [\[130-13565\]](#).
- 5 *Jago v District Court of New South Wales* (1989) 168 CLR 23 ; [87 ALR 577](#); 63 ALJR 640; [BC8902707](#). See also *Aboud v A-G (NSW)* [\(1987\) 10 NSWLR 671](#) ; 31 A Crim R 127 per McHugh JA; *Jago v District Court of New South Wales* [\(1988\) 12 NSWLR 558](#) ; 37 A Crim R 314 per Kirby P (to link the right to a fair trial could reduce the mandatory nature of the right to trial without delay) per Samuels JA (different approach based on the common law rather than on Magna Carta); *Frugtniet v Victoria* [\(1997\) 148 ALR 320](#) . See further CRIMINAL LAW [\[130-13630\] note 4](#).
- 6 United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [10]. Violation of the International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(3)(a) found by the United Nations Human Rights Committee in *Rogerson v Australia*; Communication No 802/1998 (3 April 2002).
- 7 (ACT) *Human Rights Act 2004* s 22(2)(c). For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#). See *Re Application for Bail by Massey (No 2)* [\[2009\] ACTSC 70](#) ; [BC200905514](#) at [\[36\]](#) per Penfold J (in answer to a bail application submission that 'a person is entitled to be tried without unreasonable delay and ... to be released if that cannot be achieved,' the suggestion that pre-(ACT) *Human Rights Act 2004* interpretations must be abandoned in favour of new ones would need to be made out, case by case, by substantive arguments).
- (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(c). See *Re Application for Bail by Creamer* [\[2009\] VSC 460](#) ; [BC200909270](#) at [\[31\]](#) per Whelan J (adoption of the approach by Lasry J in *Application for Bail by Dickinson, Re* [\[2008\] VSC 516](#) ; [BC200810371](#) at [\[19\]](#) per Lasry J (the (VIC) *Charter of Human Rights and Responsibilities Act 2006* has a significant role to play in emphasising the importance of particular rights, but when it comes to the right to be brought to trial without unreasonable delay, that right remains to be considered within the appropriate or relevant provisions of the (VIC) *Bail Act 1977*). See also *Director of Public Prosecutions (DPP) v Gray* [\[2008\] VSC 4](#) ; [BC200800067](#); *Director of Public Prosecutions (DPP) (Cth) v Barbaro* [\(2009\) 20 VR 717](#) ; 193 A Crim R 369; [\[2009\] VSCA 26](#); [BC200901132](#).
- 8 See *R v Upton* [\[2005\] ACTSC 52](#) ; [BC200504507](#) at [\[19\]](#) per Connolly J, who referred to *Re Attorney-Generals Reference (No 2 of 2001)* [\[2004\] 1 All ER 1049](#)  and *Martin v Tauranga District Court* [\[1995\] 2 NZLR 419](#) .

[80-1645] Rights to be present at one's trial and to defend oneself

The paragraph below is current to **07 March 2018**

The common law rule is that it is fundamental to the fair administration of justice that no trial can proceed in the absence of the accused,¹ unless the accused is excluded after creating a disturbance that prevents continuance of the trial.² The purpose is to ensure that the accused knows of the case against him or her and has an opportunity of answering it.³ The accused must be given a full opportunity to present a defence,⁴ or, as the United Nations Human Rights Committee puts it, the accused or his lawyer

(C) Right to a Fair Trial

must have the right to **act** diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case, and when exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.⁵ Although the rights to be present, to test the evidence against and to conduct a defence can properly be described as rights, they may, at the discretion of the judge, be waived so as not to prevent a trial proceeding if the accused absents himself or herself by escaping from lawful custody.⁶ But the accused has a clear right, even if unruly, to be present at the pronouncing of sentence.⁷ There is no longer a distinction on these matters between trial for a felony and a misdemeanour.⁸ The law in this area does not appear to have been developed as far as it has in relation to administrative tribunals to which the doctrines of natural justice and procedural fairness, which include a right to be heard, have been regularly applied.⁹ However, evidence obtained illegally may lead to quashing a conviction on grounds of public policy.¹⁰ While an accused has a right to give evidence at his or her trial, it is at the discretion of the trial judge whether the accused's native tongue may be used to give evidence.¹¹

National security and anti-terrorism legislation provides for ex parte hearings, for instance in the making of initial control orders and preventative detention orders, and the application by the Australian Federal Police Commissioner for a revocation or variation of a control order.¹² Furthermore, a person challenging an interim control order (which imposes significant restraints on personal liberty for periods of up to 12 months)¹³ may be denied access to the evidence upon which the order is being made.¹⁴

The human rights charters in the Australian Capital Territory and Victoria include the right to be tried in person, and to defend oneself personally, or through legal assistance.¹⁵

Notes

- 1 *O'Donnell v Dawe* [1905] VLR 538 ; (1905) 11 ALR 273. See also *Tongahai v The Queen* (2014) 241 A Crim R 217 ; [2014] NSWCCA 81; BC201403550 at [24] per Basten JA (the right to be present at the trial includes the right to attend a view). See further *CRIMINAL LAW* [130-13170]. For violation of (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(1) found by the United Nations Human Rights Committee see *Dudko v Australia*; Communication No 1347/2005 (23 July 2007) (State counsel took part in hearing in the absence of the unrepresented defendant; unrepresented defendant in detention treated more unfavourably than unrepresented defendant not in detention, at [7.4]).
- 2 *R v Lee Kun* [1916] 1 KB 337  at 341 per the court (applying *R v Berry* (1897) 104 LT Jo 110 ). See *R v Vernell* [1953] VLR 590 ; [1953] ALR 1139.
- 3 *R v Lee Kun* [1916] 1 KB 337  at 341 per the court; *R v McHardie* [1983] 2 NSWLR 733  at 740; (1983) 10 A Crim R 51.
- 4 *R v Van Beelen* (1973) 4 SASR 353 . See also [80-1630].
- 5 As to (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14 see United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [11].
- 6 *R v Cornwell* [1972] 2 NSWLR 1 ; *R v McHardie* [1983] 2 NSWLR 733 ; (1983) 10 A Crim R 51; *R v Jones* (1998) 72 SASR 281 ; 104 A Crim R 399; BC9806980; *R v Jones* [2003] 1 AC 1 ; [2002] 2 All ER 113; [2002] 2 WLR 524 ; [2002] UKHL 5 (the House of Lords devised a checklist of relevant matters in exercising discretion); *Flavel v Van Reesema* [2005] SASC 418 ; BC200509446; *R v Mokbel* [2006] VSC 119 ; BC200602091 (accused absconded); *R v Serrano* (No 5) [2007] 16 VR 360 ; [2007] VSC 209; BC200704563; *Devine v Victorian Civil and Administrative Tribunal* (VCAT) [2008] VSC 410 ; BC200808830; *R v Gee* (2012) 113 SASR 372 ; 267 FLR 159;

(C) Right to a Fair Trial

[2012] SASCFC 86; [BC201205534](#) (the discretion to commence the trial in the absence of the defendant should be exercised with caution; discusses the relevant factors to be applied to the decision); *R v Ferguson* [2015] NTSC 35 ; [BC201504955](#).

- 7 *R v Cornwell* [1972] 2 NSWLR 1 ; *Flavel v Van Reesema* [2005] SASC 418 ; [BC200509446](#). See further *CRIMINAL LAW* [130-17160].
- 8 *R v McHardie* [1983] 2 NSWLR 733  at 742; (1983) 10 A Crim R 51.
- 9 The writs available under (CC) Commonwealth Constitution s 75(v) are increasingly referred to in the procedural fairness context as providing constitutional protections. See *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ; 81 ALJR 1190; [2007] HCA 26; [BC200704430](#) at [49]-[86] per Kirby J (discretionary character of constitutional writs); *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82 ; [176 ALR 219](#); [2000] HCA 57; [BC200006927](#); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 ; [179 ALR 238](#); [2001] HCA 22; [BC200102010](#). See also *ADMINISTRATIVE LAW* [10-4105].
- 10 *Ridgeway v R* (1995) 184 CLR 19 ; [129 ALR 41](#); 69 ALJR 484; 78 A Crim R 307 (discretion to exclude evidence on the grounds of public policy extends to the exclusion of evidence of an offence procured by unlawful conduct by law enforcement officers). Note (NSW) *Law Enforcement (Controlled Operations) Act 1997* was enacted in response to the decision in *Ridgeway v R*, above and was challenged in *Gedeon v Cmr of the New South Wales Crime Commission* (2008) 236 CLR 120 ; [249 ALR 398](#); [2008] HCA 43; [BC200807739](#) to establish the invalidity of certain Commissioner issued 'authorities' for 'controlled operations' issued under that *Act* (special leave granted). See also *Nicholas v R* (1998) 193 CLR 173 ; [151 ALR 312](#); 72 ALJR 456; [BC9800075](#) (discretion to exclude evidence where unlawful conduct by officers).
- 11 *R v Burke* (1858) 8 Cox CC 44  (followed *Filios v Morland* [1963] NSW 545 ; [1963] SR (NSW) 331; (1963) 80 WN (NSW) 501 (civil case)). As to the right to free interpreter assistance see [80-1660]. See also *EVIDENCE* [195-7030].
- 12 Initial orders are made ex parte, see (CTH) *Criminal* Code s 104.4. The confirmation regime requires an inter partes hearing. However, extension, revocation and variation applications need not be heard in the presence of the detained person (or their lawyer): *ibid* s 104.24. While detainees are able to make representations to the nominated Australian Federal Police ('AFP') Officer, that person is under no obligation to draw those matters to the attention of the issuing authority. The nominated AFP officer must merely 'consider' any such representations. See (CTH) *Criminal* Code s 105.19(7)(c).
- 13 *Ibid* s 104.5. See [80-1123].
- 14 (CTH) *Criminal* Code s 104.12, 104.12A requires that a person be given an explanation of the effect and period of the order and *ibid* s 104.12A(3)(a) provides that disclosure of evidence 'likely to prejudice national security' need not be provided in this summary. National security is broadly defined by reference to the definition in (CTH) *National Security Information (Criminal and Civil Proceedings) Act 2004* s 8 ('national security means Australia's defence, security, international relations or law enforcement interests').
- 15 (ACT) *Human Rights Act 2004* s 22(2)(d)
(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(d).
For the significance of charter-listed rights see [80-27], [80-28].

[80-1650] Right to have legal assistance without payment

The paragraph below is current to **07 March 2018**

There is no right at common law in Australia for an accused person to have legal assistance,¹ although it is recognised that the presence of counsel is important to the obtaining of a fair trial.² It is also an accused's right to have the proper procedures followed relating to the administration of legal aid legislation.³ If, on appeal, the court decides that through the absence of counsel the accused may have lost an opportunity for acquittal, it may direct that a new trial be held.⁴ Natural persons are entitled to appear without representation but this imposes particular burdens on the court.⁵ Persons committed to trial for offences against Commonwealth law may apply to a Justice in Chambers or to a State or Territory Supreme Court judge for the appointment of counsel to assist in their defence. If the judge finds

(C) Right to a Fair Trial

that it is desirable in the interests of justice that an appointment be made, the matter is to be brought to the attention of the Commonwealth Attorney-General, who may have arrangements made for the appointment of counsel or refer the matter to the appropriate legal aid authority.⁶ Legal aid will, within guidelines and available funding, be available on a means tested basis for the provision of counsel, and there are special arrangements for the provision of legal aid to Aboriginal litigants.⁷

The human rights charters statutes in the Australian Capital Territory and Victoria include the right to legal assistance provided without payment if the accused cannot afford to pay for the assistance.⁸

Notes

- 1 *McInnis v R* (1979) 143 CLR 575 ; [27 ALR 449](#); 54 ALJR 122 (a new trial was refused although the accused complained of the absence of his (legal aid) counsel on the morning of his trial).
- 2 *Dietrich v R* (1992) 177 CLR 292  at 298 per Mason CJ and McHugh J, at 316 per Brennan J, at 336 per Deane J, at 344 per Dawson J, at 353, 354 per Toohey J, at 368 per Gaudron J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#); *Gassy v R* (2008) 236 CLR 293 ; [245 ALR 613](#); [\[2008\] HCA 18](#); [BC200803348](#) (trial judge erred in refusing representation by counsel at a voir dire when otherwise self-represented); *R v Chaouk* (2013) 40 VR 356 ; 231 A Crim R 337; [\[2013\] VSCA 99](#); [BC201302153](#) (the lack of an instructing solicitor for counsel would cause a real risk of unfairness to the accused). See also *CRIMINAL LAW* [\[130-13170\]](#), *ABORIGINALS AND TORRES STRAIT ISLANDERS* [\[5-3620\]](#), [\[5-4645\]](#).
- 3 *McInnis v R* (1979) 143 CLR 575  at 579 per Barwick CJ, at 581 per Mason J; [27 ALR 449](#); 54 ALJR 122. See also *Hakimi v Legal Aid Commission (ACT)* (2009) 227 FLR 462 ; 195 A Crim R 275; [\[2009\] ACTSC 48](#); [BC200903798](#) ((*ACT Human Rights Act 2004* s 22 does not require funding the lawyer of choice — relying on construction of *ibid* s 22(2) and overseas authorities such as the European Commission or European Court (*X v United Kingdom* (1980) 21 DR 126 (no European Convention (European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) breach when accused admitted incriminating statements were true and sought representation on the basis they were untrue)).
- 4 *Dietrich v R* (1992) 177 CLR 292  at 304, 305 per Mason CJ and McHugh J, at 321 per Brennan J, at 337 per Deane J, at 347 per Dawson J, at 359-61 per Toohey J, at 372, 373 per Gaudron J; [109 ALR 385](#); 67 ALJR 176; [BC9202663](#) (referred to (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14). See also *McInnis v R* (1979) 143 CLR 575 ; [27 ALR 449](#); 54 ALJR 122.
- 5 For the duties of the court to unrepresented litigants see *MacPherson v R* (1981) 147 CLR 512 ; [37 ALR 81](#); 55 ALJR 594; [BC8100115](#); *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 ; [57 ALD 23](#); [\[1999\] FCA 85](#); [BC9900296](#); *Tomasevic v Travaglini* (2007) 17 VR 100 ; [\[2007\] VSC 337](#); [BC200707864](#); *Russell v Yarra Ranges Shire Council* [\[2009\] VSC 486](#) ; [BC200909738](#). See also *Re F (Litigants in Person Guidelines)* (2001) 161 FLR 189 ; [27 Fam LR 517](#); (2001) FLC ¶93-072; [2001] FamCA 348:

- (1) A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
- (2) A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses.
- (3) A judge should explain to the litigant in person any procedures relevant to the litigation.
- (4) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
- (5) If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a

(C) Right to a Fair Trial

litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.

- (6) A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
- (7) If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 121 ALR 148  at 150; 68 ALJR 509; [BC9404628](#).

Where the interests of justice and the circumstances of the case require it, a judge may:

- (1) draw attention to the law applied by the court in determining issues before it;
- (2) question witnesses;
- (3) identify applications or submissions which ought to be put to the court;
- (4) suggest procedural steps that may be taken by a party; and
- (5) clarify the particulars of the orders sought by a litigant in person or the bases of such orders.

On the effect of the introduction of (CTH) [Family Law Act 1975](#) Pt VII Div 12A on the guidelines for child related proceedings see *Sheen v Paulo* [2007] FamCA 1175 ; [BC200750248](#); *Farmer v Rogers* [2010] FamCAFC 253 ; [BC201051269](#).

6 (CTH) [Judiciary Act 1903](#) s 69(3).

7 As to aboriginal legal service see ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-4645\]](#).

8 For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#). (ACT) [Human Rights Act 2004](#) s 22(2)(f). *Commonwealth v Davis Samuel Pty Ltd (No 3)* (2008) 164 ACTR 14 ; [2008] ACTSC 76; [BC200807496](#) at [\[36\]](#), [\[39\]](#) (in civil cases, it seems quite clear that the common law does not recognise that, as part of procedural fairness, legal representation is required (referring to *New South Wales v Canellis* (1994) 181 CLR 309  at 328-9; [124 ALR 513](#) at [521-3](#); 68 ALJR 883; [BC9407136](#), citing *Airey v Ireland* (1979) 2 EHRR 305  (not an absolute requirement in civil cases that counsel represent the litigants), the question to be asked is whether the absence of legal representation will effectively abrogate the applicants' access to a court, protected under (ACT) [Human Rights Act 2004](#) s 21). Compare *Golder v United Kingdom* (1975) 57 ILR 200 ; [1 EHRR 524](#).

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 25(2)(d)-(f). However, these provisions are linked expressly to provision of aid under the (VIC) [Legal Aid Act 1978](#).

[80-1655] Right to examine and call witnesses

The paragraph below is current to **07 March 2018**

The general rule is that any person is a competent and compellable witness, although there are exceptions in the case of children, persons of impaired intellect, the accused and the spouse of the accused.¹ The United Nations Human Rights Committee has explained that the right of the accused to examine prosecution witnesses and compel attendance is designed to assure the same powers as are available to the prosecution.² All jurisdictions provide to some extent for the payment of expenses for witnesses called in **criminal** trials.³ It is, however, at the discretion of the Court whether an interpreter should be called to interpret the evidence given by a witness.⁴ Some documents may be privileged (not subject to compulsory disclosure), but this does not prevent a relevant witness from being compelled to attend the proceedings.⁵

(C) Right to a Fair Trial

The human rights charters in the Australian Capital Territory and Victoria include the right to examine and call witnesses, although the Victorian Charter qualifies this right by including the words 'unless otherwise provided for by law'.⁶ This qualification is intended to make it clear that current rules in relation to the cross-examination of certain witnesses, such as children and victims of sexual assault, continue to apply. In addition, that right may be subject by law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁷ Where the results of examination are challenged, some cross-examination should generally be allowed.⁸

Notes

- 1 *Stoddart v Boulton (Examiner, Australian Crime Commission) and Another* (2010) 185 FCR 409 ; [271 ALR 53](#); [\[2010\] FCAFC 89](#); [BC201004902](#) ((CTH) *Australian Crime Commission Act 2002* s 30 does not abrogate spousal privilege by necessary implication). See EVIDENCE [\[195-7100\]-\[195-7200\]](#).
- 2 As to (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14 see United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [12].
- 3 As to payment of conduct money to witnesses see PRACTICE AND PROCEDURE [\[325-7505\]](#), [\[325-7510\]](#) and *CRIMINAL LAW* [\[130-13800\]](#).
- 4 *Dairy Farmers Co-op Milk Co Ltd v Acquilina* (1963) 109 CLR 458  at 465; [1964] ALR 333; (1963) 37 ALJR 308; [BC6300360](#) (affirming *Filios v Morland* [1963] NSW 545 ; [1963] SR (NSW) 331; (1963) 80 WN (NSW) 501). As to a witness and parties giving evidence in his or her native tongue see [80-1660].
- 5 See EVIDENCE [\[195-7255\]](#).
- 6 (ACT) *Human Rights Act 2004* s 22(2)(g). See, for example: *Application under section 73 of the (ACT) Civil Law (Wrongs) Act 2002* (2009) 3 ACTLR 239 ; [\[2009\] ACTSC 53](#); [BC200903900](#) (order protecting the names of the witnesses more easily made because of the privacy right in (ACT) *Human Rights Act 2004* s 12).
(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(g).
For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).
- 7 *Ibid* s 7(2) (outlining factors justifying limitations to human rights). See also *R v Zuber* [\(2010\) 175 ACTR 1](#) ; 242 FLR 416; [\[2010\] ACTSC 107](#); [BC201006809](#) (evidence of audiovisual recording of interview between child complainant and police officers admissible under (ACT) *Evidence (Miscellaneous Provisions) Act 1991* s 40F which came into effect after audiovisual recording made — not an infringement of the accused's right of confrontation, which is a right to confrontation with one's accusers as a right to examine witnesses in court).
- 8 *Egan v JG* [\[2010\] ACTSC 53](#) ; [BC201004124](#) at [46] per Refshauge J (a fair trial would ordinarily require that where the results of the examination were to be challenged, then some cross-examination would be allowed and, if not, the proceedings could properly be said to be unfair). This principle applies to tribunals and courts: *McClymont v Owners Strata Plan (No 12139)* [\(2009\) 74 NSWLR 404](#) ; [\[2009\] NSWSC 276](#); [BC200902727](#).

[80-1660] Right to have free interpreter assistance

The paragraph below is current to **07 March 2018**

The United Nations Human Rights Committee regards difficulty in understanding the language used by the court as a potentially major obstacle to the right of defence, applicable equally to nationals and aliens.¹ The court has a discretion whether the accused is allowed to have the assistance of an

(C) Right to a Fair Trial

interpreter, based on the right of the accused to understand the nature of the charge.² Accordingly, when the accused is unable to understand the English language and is undefended, the evidence given at the trial must be translated to the accused.³ The common law does not confer a right as such to an interpreter, in that the decision of the court will not be set aside if, on appeal, the court is satisfied that no substantial miscarriage of justice has occurred.⁴

However, a person under arrest for a Commonwealth offence, who is unable to communicate effectively because English is not that person's first language or because of a physical disability, has a right to an interpreter before questioning by the investigating officer.⁵ Where Aboriginal or Torres Strait Islander persons are likely to be under investigation for Commonwealth offences, the Commonwealth Attorney-General is required to establish lists of persons available for interpreting.⁶

In the Commonwealth, New South Wales, Queensland, South Australia and Tasmania, a witness may give evidence through an interpreter; there is no right to free interpreter assistance other than under the human rights charters in the Australian Capital Territory and Victoria.⁷ In Victoria, a court must not, when hearing a ***criminal*** charge punishable by imprisonment or against a child, proceed without a competent interpreter if the court is satisfied that the defendant (or the defendant's parent or another party to proceedings against a child) does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceeding.⁸

While a witness does not have a right to give evidence in his or her native tongue,⁹ it is the responsibility of the court to ensure that 'the necessary means are adopted to convey the evidence to [the accused's] intelligence, notwithstanding that he makes no application to the court'.¹⁰ The basis of deciding whether a witness should have an interpreter is whether it is necessary for a fair trial,¹¹ but the presence of defence counsel appears in practice to have dispensed with the requirement that the accused understand the evidence, although not with the requirement that, if the accused or counsel wishes translation, it should be provided.¹² The appellate court may be reluctant to interfere with the exercise of this discretion except for extremely cogent reasons.¹³ The information provided by the interpreter in the course of interpretation has been held not to be hearsay evidence,¹⁴ on the ground that interpretation is an integral part of one transaction consisting of communication through the interpreter.¹⁵

Civil and administrative proceedings may also require the use of an interpreter to ensure fairness.¹⁶ This has also been given statutory recognition in some contexts, such as for migrants before the Migration Review Tribunal.¹⁷ The technical skills required of an interpreter have been measured against a set of criteria aimed at helping to ensure that persons with language difficulties have the same opportunity to understand and be understood as if they were conversant in the language being employed in the proceedings. These criteria include continuity, precision, impartiality, competency and contemporaneity.¹⁸

Notes

- 1 As to (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14 see United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 1 at 14, 13 April 1984, available at <http://www.ohchr.org> at [13].
- 2 *R v Lee Kun* [1916] 1 KB 337  at 341 per the court. See also [80-1045].
- 3 *R v Lee Kun* [1916] 1 KB 337  at 340 per the court; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414  at 425 per Samuels JA, CA(NSW). See also *R v Scobie* (2003) 85 SASR 77 ; [2003] SASC 85; [BC200301268](#) (obligation to ensure interpreter available); *Frank v Police* (2007) 98 SASR 547 ; 250 LSJS 210; [2007] SASC 288; [BC200706104](#)

(C) Right to a Fair Trial

(error of law in sentencing in the absence of an interpreter where full reasons not given due to accused's lack of comprehension of English).

- 4 *R v Lee Kun* [1916] 1 KB 337  at 340 per the court. See also EVIDENCE [195-7030].
- 5 (CTH) *Crimes Act 1914* s 23N.
- 6 Ibid s 23J. See further ABORIGINALS AND TORRES STRAIT ISLANDERS [5-3525].
- 7 (CTH) *Evidence Act 1995* s 30
(ACT) *Evidence Act 2011* s 30; (ACT) *Human Rights Act 2004* s 22(2)(h)
(NSW) *Evidence Act 1995* s 30
(QLD) *Evidence Act 1977* s 131A
(SA) *Evidence Act 1929* s 14; (SA) *Summary Offences Act 1953* s 83A (non-native speaker)
(TAS) *Evidence Act 2001* s 30
(VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(i).
There are no equivalent provisions in the Northern Territory or Western Australia although (WA) *Criminal Procedure Act 2004* s 75(3) provides for adjournment to allow the services of an interpreter to be obtained. As to interpreted evidence generally see EVIDENCE [195-7030].
- 8 (VIC) *Children, Youth and Families Act 2005* s 526 (the 'interpreter' must be competent or accredited with the National Accreditation Agency for Translators and Interpreters Ltd: ibid s 3(1)).
- 9 *Dairy Farmers Co-op Milk Co Ltd v Acquilina* (1963) 109 CLR 458  at 464; [1964] ALR 333; (1963) 37 ALJR 308; *BC6300360* per the court; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75  at 80; 95 ALR 525 per Mahoney JA, CA(NSW). Compare *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75  at 77, 78; 95 ALR 525 per Kirby P, CA(NSW).
- 10 *R v Lee Kun* [1916] 1 KB 337  at 341 per the court.
- 11 *Johnson v R* (1987) 25 A Crim R 433 , CCA(QLD).
- 12 *R v Lee Kun* [1916] 1 KB 337  at 342, 343 per the court (the safest course is for the trial judge to ensure that the evidence is interpreted to the non-English-speaking accused except when the accused or counsel on the accused's behalf expresses a wish to dispense with the translation and the judge thinks fit to permit the omission).
- 13 *Dairy Farmers Co-op Milk Co Ltd v Acquilina* (1963) 109 CLR 458  at 464; [1964] ALR 333; (1963) 37 ALJR 308; *BC6300360* per the Court (a workers' compensation case and not a *criminal* trial).
- 14 *Gaio v R* (1960) 104 CLR 419 ; [1961] ALR 67; (1960) 34 ALJR 404; *BC6000680*.
- 15 *Gaio v R* (1960) 104 CLR 419  at 421; [1961] ALR 67; (1960) 34 ALJR 404; *BC6000680* per Dixon CJ. See also *Gaio v R* (1960) 104 CLR 419  at 430 per Kitto J ('a bilingual transmitter'), at 433 per Menzies J ('merely a translator'); [1961] ALR 67; (1960) 34 ALJR 404; *BC6000680*.
- 16 For civil proceedings see *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414  at 423, 424 per Kirby P, 425 per Samuels JA and 427 per Clarke JA; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75  at 81; 95 ALR 525 per Mahoney JA. For administrative proceedings, where a right to a hearing has been provided, it has been held that a Tribunal is unable to give an applicant an effective opportunity to appear before it to give evidence unless it provides an interpreter to assist and thus the Tribunal lacks the jurisdiction to continue the hearing before it unless it provides an interpreter: *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6 ; 56 ALD 231; [1999] FCA 507; *BC9902052* at [21] per Kenny J.
- 17 (CTH) *Migration Act 1958* s 366C. See *DZAAA & ORS v Minister for Immigration & Anor* (2011) 250 FLR 423 ; [2011] FMCA 434; *BC201104081*.
- 18 *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6 ; 56 ALD 231; [1999] FCA 507; *BC9902052* at [28] per Kenny J. For an example of application see *VWFY v Minister for Immigration and Multicultural and*

Indigenous Affairs [\[2005\] FCA 1723](#) ; [BC200510354](#) per Finkelstein J; *SZHEW v Minister for Immigration and Citizenship* [\[2009\] FCA 783](#) ; [BC200906487](#) at [\[45\]-\[52\]](#) per Jagot J.

[80-1665] Right not to be compelled to testify against oneself or confess guilt

The paragraph below is current to **07 March 2018**

The right to silence is a fundamental common law right.¹ In relation to compellability of an accused, most jurisdictions provide by legislation that an accused is either not a competent (and therefore not a compellable) witness at his or her trial, or (more commonly) competent but not compellable except in specific circumstances.² In relation to competence, the common law rule was that an accused person was not a competent witness for the prosecution at his or her trial.³ The rule as to competence extended to all stages of proceedings⁴ and to co-accused persons.⁵ However, the various jurisdictions have differing rules as to the competence (as distinct from compellability) of accused persons to give unsworn evidence and evidence on oath.⁶

There is unclear authority on the extent to which the common law right to silence can be limited and/or abrogated by statute.⁷

A confession of guilt may be sufficient to convict a person,⁸ but is not necessarily conclusive, with voluntariness being determined in all the circumstances of the case and in the interests of a fair trial,⁹ it will not be admissible in evidence if it is not voluntarily made.¹⁰ It will also not be admissible if proper warnings as required by statute are not given before questioning commences.¹¹ The failure of an accused person to give evidence does not remove the onus of proof on the prosecution to prove guilt beyond reasonable doubt.¹²

The 'right to silence' does not apply to corporations¹³ but originated in the protection of the individual suspect from the state.¹⁴ It is not a fundamental irregularity if breached, provided no miscarriage of justice results¹⁵ and the failure of the accused to give evidence may, in relation to the inference of guilt from the prosecution evidence, allow a court to have regard to the fact that the accused has not given evidence, even though the onus of proof remains on the prosecution.¹⁶ Although there is discretion to stay civil proceedings if **criminal** proceedings could be commenced on substantially the same conduct, the right of silence does not necessarily give a defendant a right to a stay of civil proceedings merely because they might disclose the likely defence in the **criminal** proceedings.¹⁷

The basic common law rule is that no one is bound to answer a question if the answer would, in the opinion of the judge, have a tendency to expose that person to a **criminal** charge,¹⁸ and the principle applies also to answers to interrogatories and to discovery and production of documents.¹⁹ However, there are various statutory modifications of this rule, among which are that a certificate may be issued by the courts which can have effects including to:

- (1) prevent use in any civil or **criminal** proceedings of statements made before a board or commission;
- (2) preclude evidence being used in other proceedings where the court requires the evidence to be given;²⁰

(C) Right to a Fair Trial

- (3) be available in other proceedings, to the effect that the evidence was given, under compulsion, to the court's satisfaction.²¹

Notes

- 1 For the common law right to silence see *R v Sang* [1980] AC 402  at 436 ; [1979] 2 All ER 1222 at 1230 per Lord Diplock, (cited in *Tofilau v R* (2007) 231 CLR 396 ; 238 ALR 650; [2007] HCA 39; BC200707276 at [21] per Gleeson CJ, (at [204] Kirby J dissenting) (the right to silence is not a single principle but a collection of substantive and procedural rules and principles; the confessional statements obtained undercover undermined fundamental right to remain silent in the presence of police investigators). On the use of deception by the police in this context see *Em v R* (2007) 232 CLR 67 ; 239 ALR 204; [2007] HCA 46; BC200708428 at [78] per Gleeson CJ (compare Kirby J at [215]-[224]) (right to silence not impugned by use of trickery and surveillance devices); *R v Dunning*; *Ex parte A-G (Qld)* [2007] QCA 176 ; BC200704668 (pretext telephone conversation).

On the privilege against self-incrimination see *Hammond v Commonwealth* (1982) 152 CLR 188 ; 42 ALR 327; 56 ALJR 767; BC8200099; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ; 82 LGRA 51; 118 ALR 392; BC9303552; *Reid v Howard* (1995) 184 CLR 1 ; 131 ALR 609; 69 ALJR 863; BC9506438 (direct and indirect or 'derivative' evidence); *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 ; 192 ALR 561; [2002] HCA 49; BC200206568.

- 2 (CTH) *Evidence Act 1995* ss 12, 17 (not competent as a prosecution witness; and associated defendant is not compellable to give evidence for or against defendant except if tried separately)

(ACT) *Human Rights Act 2004* s 22(2)(i)

(NT) *Evidence (National Uniform Legislation) Act 2011* s 17 (not competent as a prosecution witness)

(NSW) *Evidence Act 1995* ss 12, 17 (not competent as a prosecution witness; and associated defendant is not compellable to give evidence for or against defendant)

(QLD) *Evidence Act 1977* ss 8, 10, 15 (competent, but not compellable except as provided)

(SA) *Evidence Act 1929* s 18 (competent, but not compellable except as provided)

(TAS) *Evidence Act 2001* ss 12, 17 (not competent as a prosecution witness; and associated defendant is not compellable to give evidence for or against defendant)

(VIC) *Evidence Act 2008* s 12; (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(k); see also *DAS v Victorian Human Rights and Equal Opportunity Commission* (2009) 24 VR 415 ; 198 A Crim R 305; [2009] VSC 381; BC200908160 (VIC) *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(k) breached by coercive powers order under (VIC) *Major Crime (Investigative Powers) Act 2004* s 5 because both direct and derivative immunity abrogated by ibid s 39, allowing prosecuting authorities to make derivative of compelled incriminating testimony)

(WA) *Evidence Act 1906* s 8, 11 (competent, but not compellable except as provided).

As to competence and compellability of witnesses generally see EVIDENCE [195-7100]-[195-7200].

- 3 *Sinclair v R* (1946) 73 CLR 316  at 337 per Dixon J, discussing the presumption of involuntariness of confessions; [1947] ALR 37; (1946) 20 ALJ 395. For confessions by those with mental disability see *R v Scotty* [2007] NTSC 43 ; BC200707195; *R v Arnott* [2009] VSCA 299 ; BC200911396.

- 4 *R v Wheeler* [1917] 1 KB 283 .

- 5 See EVIDENCE [195-7200].

- 6 See EVIDENCE [195-7190] (accused's unsworn evidence), [195-7195] (accused's sworn evidence).

(C) Right to a Fair Trial

- 7 *X7 v Australian Crime Commission* (2013) 248 CLR 92 ; [298 ALR 570](#); [\[2013\] HCA 29](#); [BC201303126](#) (a majority of the High Court held that (CTH) *Australian Crime Commission Act 2002* did not authorise examination of an accused person on the subject of their pending charges). But see *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 ; [302 ALR 363](#); [\[2013\] HCA 39](#); [BC201313530](#) (a majority of the High Court held that (NSW) *Criminal Assets Recovery Act 1990* did authorize the compulsory examination of an accused on the subject of their charges).
- 8 *McKay v R* (1935) 54 CLR 1 ; [1935] ALR 484. On discretion to exclude confessional statements see *R v Swaffield* (1998) 192 CLR 159 ; [151 ALR 98](#); [BC9800011](#).
- 9 *R v Lee* (1950) 82 CLR 133  at 149-153; [1950] ALR 517; (1950) 24 ALJ 223; [BC5000550](#) per the court. See also *Tofilau v R* (2007) 231 CLR 396 ; [238 ALR 650](#); [\[2007\] HCA 39](#); [BC200707276](#) at [66] per Gummow and Hayne JJ (the circumstances of a voluntary confession may be excluded in the exercise of the discretion) at [325]-[340] (basal involuntariness); *Cox v Western Australia* [\[2008\] WASC 101](#) ; [BC200804113](#) (discussion of key authorities).
- In considering freedom from compulsory self-incrimination, the United Nations Human Rights Committee has stated that the right not to be subjected to *torture* under (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') art 7 and the right of deprived persons to be treated with dignity under *ibid* art 10(1) should be borne in mind. In United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, at [14], available at <http://www.ohchr.org>, the Committee noted that '[i]n order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used': United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org>. For observations on article 14(3)(g) of the ICCPR see *Cornwell v R* [\(2007\) 234 ALR 51](#) ; 81 ALJR 840; [\[2007\] HCA 12](#); [BC200701731](#) at [176] per Kirby J.
- 10 *R v Lee* (1950) 82 CLR 133 ; [1950] ALR 517; (1950) 24 ALJ 223; [BC5000550](#); *Basto v R* (1954) 91 CLR 628  at 639; 28 ALJ 519 per the court. A statement required under the (CTH) *Bankruptcy Act 1966* may be admitted: *R v Zion* [\[1986\] VR 609](#) . As to admissibility and unsatisfactoriness in evidence see *R v Thomas* [\[1970\] VR 674](#) , SC(VIC), Full Court. See also discussion in *R v Thomas* (2006) 163 A Crim R 567 ; [\[2006\] VSCA 165](#); [BC200606396](#) (applicant repeatedly told by Pakistani interrogators, to whose control he was subject at all times, that his fate would to a very substantial extent be determined by the extent of his co-operation. Statements not voluntarily made to persons in authority, or if voluntary should have been excluded in the exercise of discretion). See also *Landsman v R* [\(2014\) 88 NSWLR 534](#) ; [\[2014\] NSWCCA 328](#); [BC201411092](#) (not in the interests of justice to allow the prosecution to adduce post-conviction admission on an appeal against conviction when the admissions were made to a person in authority). As to confessions as evidence see EVIDENCE [\[195-1195\]-\[195-1285\]](#).
- 11 *Pollard v R* (1992) 176 CLR 177 ; [110 ALR 385](#); 67 ALJR 193; 64 A Crim R 393.
- 12 *May v O'Sullivan* (1955) 92 CLR 654  at 658; [1955] ALR 671; (1955) 29 ALJ 375 per the court. As to the right to silence see EVIDENCE [\[195-7170\]-\[195-7185\]](#).
- 13 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ; 82 LGERA 51; [118 ALR 392](#); [BC9303552](#); *Construction, Forestry, Mining and Energy Union of Australia v Alfred* (2004) 135 FCR 459 ; 130 IR 343; [\[2004\] FCAFC 36](#); [BC200400598](#); *Project 28 Pty Ltd v Barr* [\(2007\) 64 ACSR 620](#) ; [\[2007\] NSWSC 715](#); [BC200705216](#).
- 14 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477  at 498; 82 LGERA 51; [118 ALR 392](#); [BC9303552](#) per Mason CJ and Toohey J.
- 15 *Glennon v R* (1994) 179 CLR 1 ; [119 ALR 706](#); 68 ALJR 209; [BC9404611](#).
- 16 *May v O'Sullivan* (1955) 92 CLR 654  at 658; [1955] ALR 671; (1955) 29 ALJ 375 per the court.
- 17 *McMahon v Gould* [\(1982\) 7 ACLR 202](#) ; 1 ACLC 98; *Re AWB Ltd* (ACN 081 890 459); *Australian Securities and Investments Commission v Flugge* [\(2008\) 21 VR 252](#) ; [252 ALR 566](#); [\[2008\] VSC 473](#); [BC200809901](#). On discretion to stay proceedings see also *De Simone v Bevnol Constructions & Developments Pty Ltd* [\(2010\) 30 VR 200](#) ; [\[2010\] VSCA 231](#); [BC201006633](#); *Lee v DPP (Cth)* (2009) 235 FLR 122 ; [261 ALR 123](#); [\[2009\] NSWCA 347](#); [BC200909560](#) (*McMahon v Gould* distinguished).

(C) Right to a Fair Trial

- 18** *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253   at 257 ; [1942] 2 All ER 187 per Goddard LJ. See also *Reid v Howard* (1995) 184 CLR 1 ; 131 ALR 609; 69 ALJR 863; BC9506438 (no scope for an exception to the privilege except by waiver or statute). See also

(CTH) *Evidence Act 1995* s 128. *Cornwell v R* (2007) 234 ALR 51 ; 81 ALJR 840; [2007] HCA 12; BC200701731 (significance of certificate granted under (CTH) *Evidence Act 1995* s 128).

(NSW) *Evidence Act 1995* s 128

(QLD) *Evidence Act 1977* ss 10, 15

(TAS) *Evidence Act 2001* s 128

(VIC) *Evidence Act 2008* s 128.

The (CTH) *Evidence Act 1995* applies to proceedings in the Australian Capital Territory that relate to bail, are interlocutory proceedings, are heard in chambers, or relate to sentencing: *ibid* s 4. See further EVIDENCE [195-20], [195-25]. The common law rule applies without statutory provision in South Australia.

As to the privilege against self-incrimination see EVIDENCE [195-7405]-[195-7435].

- 19** See *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 11 FCR 478 ; 67 ALR 253 at 262-7; 6 IPR 578; (1986) ATPR ¶40-714 per Wilcox J. See further EVIDENCE [195-7410].

- 20** (CTH) *Evidence Act 1995* s 128(6), 128(7)
(NSW) *Evidence Act 1995* s 128(6), 128(7).

(TAS) *Evidence Act 2001* s 128(6), 128(7).

(VIC) *Evidence Act 2008* s 128(6), 128(7).

- 21** (WA) *Evidence Act 1906* ss 11-13, 24.

See also EVIDENCE [195-7435].

[80-1670] Right to appeal if convicted

The paragraph below is current to **07 March 2018**

There is, in Australian law, no common law right of a convicted person to appeal to a higher court¹ although article 14(5) of the International Covenant on Civil and Political Rights provides that everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal, which is not confined only to the most serious offences.² Where there are rights of appeal, they are to be found in the Australian Capital Territory and Victorian human rights charters, other statutory provisions, and rules of court or decisions relating to the granting of leave to appeal by the various courts having appellate jurisdiction.³ The normal form of appeal is an appeal in the strict sense, involving stated issues based on the facts as found in the lower court. An appeal de novo, on the other hand, involves a rehearing and thus fresh taking of evidence and a full reconsideration of issues.⁴

Notes

- 1** *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73  at 108; 5 ALJ 241 sub nom *Meakes v Dignan* [1932] ALR 22 . As to appeals generally see PRACTICE AND PROCEDURE [325-11000]-[325-12060].
- 2** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14. See United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14*

(C) Right to a Fair Trial

(*Administration of justice*), UN Doc HRI/GEN/1/Rev 9, Vol I, 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [17].

- 3 See (ACT) [Human Rights Act 2004](#) s 22(4)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 25(4). See also *Travini v Starczewski* (2009) 169 ACTR 1 ; 235 FLR 14; [2009] ACTSC 123; BC200908695 (right to review applies under (ACT) [Human Rights Act 2004](#) s 22(4) where substitution of a non-conviction order is sought). See further [CRIMINAL LAW \[130-13910\]-\[130-13935\]](#) (appeals from summary hearings), [130-13940]-[130-14000] (appeals from proceedings on indictment). As to appeals generally see PRACTICE AND PROCEDURE [\[325-11000\]-\[325-12060\]](#).

- 4 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616  at 619 per Mason J, at 628, 629 per Jacobs J; 14 ALR 174; 51 ALJR 260; BC7600124 (considered the District Court had a discretion to determine how the rehearing would be conducted). As to the distinction between appeals and rehearings see PRACTICE AND PROCEDURE [\[325-11105\]](#).

[80-1675] Right to receive compensation if there has been miscarriage of justice

The paragraph below is current to **07 March 2018**

Neither the common law nor statute law within Australia (except in the Australian Capital Territory)¹ provides a right to compensation in the event of a miscarriage of justice. However, administrative procedures are available in all jurisdictions to provide for compensation for miscarriage of justice² and in special cases, governments have granted ex gratia compensation, often after public inquiry.³ Article 14(6) of the International Covenant on Civil and Political Rights provides for compensation in certain cases of a miscarriage of justice.⁴

Notes

- 1 (ACT) [Human Rights Act 2004](#) s 23 (compensation for wrongful conviction).

No equivalent provision was provided for in the (VIC) [Charter of Human Rights and Responsibilities Act 2006](#).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 2 See ADMINISTRATIVE LAW [\[10-1300\]](#).

- 3 For example, the cases of Lindy Chamberlain, *Royal Commission of Inquiry into Chamberlain Convictions*, Report, AGPS, Northern Territory, 1987 at 340-2 and *R v Anderson* (unreported, CCA(NSW), Gleeson CJ, Finlay J and Slattery AJ, 60587 of 1990, 6 June 1991, BC9101925) where the compensation (including, in the Chamberlain case, a pardon) followed the appointment of a Royal Commission or other special form of extrajudicial inquiry. See also [CRIMINAL LAW \[130-14055\]](#).

- 4 Australia, in the instrument of ratification, made the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14(6) may be by administrative procedures rather than pursuant to specific legal provision: *ibid* art 14(6) note 7 (reservations and declarations). See also Commonwealth Attorney-General's Department, *Australia's Second Report to the United Nations Human Rights Committee under article 40 of the International Covenant on Civil and Political Rights*, Canberra, February, 1997. There have been several unsuccessful communications to the United Nations Human Rights Committee against Australia concerning failure to receive compensation. See, for examples, *Colin Uebergang v Australia* Communication No 963/2001 UN Doc CCPR/C/71/D/963/2001 (2001); *Terry Irving v Australia* Communication No 880/1999, UN Doc CCPR/C/74/D/880/1999 (2002); *Anderson v Australia* Communication No 1367/2005, UN Doc CCPR/C/88/D/1367/2005 (2006).

[80-1680] Right not to be tried again once finally convicted or acquitted

The paragraph below is current to **07 March 2018**

The right not to be placed in double jeopardy for the same or a substantially similar offence consists of the pleas recognised at common law of *autrefois convict* and *autrefois acquit*.¹ A plea of *autrefois acquit* is tried by a jury, and the effect of its being upheld is to discharge the case.²

The Australian Capital Territory and Victoria charters include the right not to be tried or punished more than once, similar to the guarantee in article 14(7) of the International Covenant on Civil and Political Rights.³ Pleas of *autrefois acquit* or *autrefois convict* may only be raised if there has been an earlier determination of ***criminal liability*** and the matter has thereby been finally resolved, whereas issue estoppel is designed to avoid, in subsequent proceedings, relitigation of propositions of law or fact which have already been settled.⁴ The position of defence force disciplinary offences is uncertain following the High Court of Australia finding that the legislation establishing the Australian Military Court was unconstitutional.⁵ In 2010 proposals for the Military Court of Australia were announced, to be administered by the Federal Court of Australia, with the ability to hear cases affecting personnel overseas.⁶

Notes

- 1 See EVIDENCE [\[195-2530\]-\[195-2620\]](#). See *Director of Public Prosecutions (DPP) v Dickfoss* (2011) 28 NTLR 71 ; 249 FLR 374; [\[2011\] NTSC 4](#); [BC201100039](#) at [\[112\]](#) per Mildren J (no double jeopardy on property forfeiture as ***liability*** for forfeiture arises at the time of the commission of the forfeiture offence and that removal of double jeopardy as a factor to be taken into consideration on re-sentencing does not to infringe the *Kable* principle (*Kable v DPP (NSW)* (1996) 189 CLR 51 ; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#)) on institutional integrity of a court (citing *R v Carroll (2010) 267 ALR 57* ; 239 FLR 11; [\[2010\] NSWCCA 55](#); [BC201001882](#)).
- 2 *R v Gamble; Ex parte Cleary* [1947] VLR 491 ; [1948] 1 ALR 21. See further EVIDENCE [\[195-2545\]-\[195-2575\]](#). As to charges with overlapping elements constituting double jeopardy see *Benbrika v R* (2010) 247 FLR 1 ; [\[2010\] VSCA 281](#); [BC201007814](#) at [\[415\]-\[430\]](#) (reliance on same conduct to establish fault element in two counts (with proof of the same state of mind as an element of each offence) did not constitute double jeopardy for the same conduct (relying on *R v Tang* (2008) 237 CLR 1 ; [249 ALR 200](#); [2008] HCA 39; [BC200807527](#); *Pearce v R* (1998) 194 CLR 610 ; [156 ALR 684](#); 72 ALJR 1416; [BC9804554](#) (each of the offences required proof of a fact which the other did not, so plea in bar could not be upheld)). See also *BBA v R* [\[2010\] VSCA 174](#) ; [BC201004670](#).
- 3 (ACT) [Human Rights Act 2004](#) s 24
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 26. For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

See further *Re Nolan; Ex parte Young* (1991) 172 CLR 460  at 499; [100 ALR 645](#); 65 ALJR 486; [BC9102615](#) per Gaudron J.
- 4 *R v Wilkes* (1948) 77 CLR 511  at 519; [1950] ALR 168; (1948) 22 ALJ 546 per Dixon J. See also *R v Hogan* [\[1974\] QB 398](#) ; [\[1974\] 2 All ER 142](#); [\[1974\] 2 WLR 357](#)  per Lawson J (differences are fully reviewed). See also ESTOPPEL [\[190-170\]](#), EVIDENCE [\[195-2530\]](#) (application of issue estoppel in ***criminal*** cases). Note *Washer v Western Australia* (2007) 234 CLR 492 ; [239 ALR 610](#); [\[2007\] HCA 48](#); [BC200709511](#) at [\[41\]](#), [\[111\]](#) per Gleeson CJ, Heydon, Hayne and Crennan JJ (Kirby J dissenting) (evidence of drug dealing tendered at an earlier trial, which resulted in acquittal, admissible on different charges in subsequent trial; neither the fact that there had been the earlier trial, nor the fact that the appellant had been acquitted of the earlier charge, was relevant to any fact in issue in the later trial). See also *Garrett v R* (1977) 139 CLR 437 ; [18 ALR 237](#); 52 ALJR 206; [BC7700109](#); *Rogers v R* (1994) 181 CLR

(C) Right to a Fair Trial

251 ; [123 ALR 417](#); 68 ALJR 688; [BC9404645](#); *R v Carroll* (2002) 213 CLR 635 ; [194 ALR 1](#); [\[2002\] HCA 55](#); [BC200207276](#).

- 5 *Lane v Morrison* (2009) 239 CLR 230 ; [258 ALR 404](#); [\[2009\] HCA 29](#); [BC200907723](#).

See further DEFENCE [\[150-670\]](#). As to the Australian Military Court see also [80-1695].

- 6 Attorney-General Hon Robert McClelland MP, Media Release 24 May 2010 (Establishment of the Military Court of Australia, Commonwealth Attorney-General's Department website). The (CTH) Military Court of Australia Bill 2010 lapsed without being enacted.

[80-1685] Right not to be held guilty of a retrospective offence

The paragraph below is current to **07 March 2018**

Australian common law is that a court will not construe a penalty or crime in legislation as having retrospective effect unless the legislation is clear.¹ **Acts** interpretation legislation and like measures in some jurisdictions have embodied the common law rule in legislation.² The human rights charters in the Australian Capital Territory and Victoria both include protection against retrospective offences.³

Notes

- 1 See STATUTES [\[385-495\]-\[385-505\]](#).

- 2 See STATUTES [\[385-500\]](#).

- 3 For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#). (ACT) [Human Rights Act 2004](#) s 25. See *R v PM* [\[2009\] ACTSC 24](#) ; [BC200901546](#) ((ACT) [Human Rights Act 2004](#) s 25(2) has no role when the sentencing regime at the time of the offence allowed for remission, in circumstances where the sentence is to be the shortest appropriate and to allow for rehabilitation).

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 27. See *WBM v Chief Cmr of Police* [\(2010\) 27 VR 469](#) ; 203 A Crim R 167; [\[2010\] VSC 219](#); [BC201003468](#) (retrospective application of reporting obligations under (VIC) [Sex Offenders Registration Act 2004](#) does not offend right not to be retrospectively punished under (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) ss 13, 27 since they do not constitute a 'penalty' but are to reduce the likelihood re-offending and to facilitate investigation).

See also *R v AMP* [\[2010\] VSCA 48](#) ; [BC201001285](#) (changes to sentencing practice between offence and sentencing). On whether an extradition treaty requirement (that an offence for which extradition is sought be an offence in the requesting state at time of relevant **act**) is satisfied if the **act** constituted an offence (even if not that in relation to which extradition sought) see *O'Connor v Zentai* [\[2011\] FCAFC 102](#) ; [BC201106143](#). For the presumption against retrospective operation see *Chang v Laidley Shire Council* (2007) 234 CLR 1 ; [237 ALR 482](#); [\[2007\] HCA 37](#); [BC200707215](#). For a restrictive interpretation of retrospective legislation in the context of migration: see *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 ; [256 ALR 32](#); [\[2009\] FCA 528](#); [BC200904335](#).

[80-1690] Fair trial and the Australian military justice system

The paragraph below is current to **07 March 2018**

In many respects, the Australian military justice system has lacked the elements common to a fair judicial process largely guaranteed in Australian non-military jurisdictions, and military justice systems

(C) Right to a Fair Trial

overseas.¹ A discipline system provides a framework within which disciplinary and **criminal** offences are investigated and prosecuted, regardless of whether offences are committed during peacetime or operational activities, within Australia or overseas. The (CTH) [Defence Force Discipline Act 1982](#) underpins the discipline system, providing for the investigation of disciplinary offences, types of offences, available punishments, the creation of Service tribunals, trial procedures before those Service tribunals, and rights of review and appeal.²

An Inspector-General of the Australian Defence Force (the 'IGADF') was appointed by the Chief of the Defence Force in January of 2003. The Office of the IGADF was opened in September 2003. Broadly, the Office of the IGADF was intended to provide a mechanism whereby the military justice system would be reviewed and audited, independently of the chain of command.³

Problems identified with disciplinary investigations included:⁴

- (1) lack of experience and inappropriate training of those undertaking the investigation;
- (2) inadequate questioning techniques, recording of interviews and statement taking;
- (3) lack of guidance about evidence gathering and analysis; and
- (4) absence of a structured process for supervising or monitoring the progress of investigations.

A joint standing committee reported in 1999 widespread failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations.⁵ Evidence presented to a 2005 parliamentary inquiry revealed that many of the problems outlined in previous reports continued, including problems with protracted investigations, inadequate legal assistance, failure to inform persons that they were under investigation, the verballing of witnesses and failure to adequately weigh or pursue exculpatory evidence.⁶

Criticisms have also been raised by various High Court of Australia justices concerning court martial jurisdiction over civilian **criminal** charges and disciplinary charges involving civilian **criminal** elements.⁷

Notes

1 See, for example, the following inquiries:

- (1) Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, 21 June 1999 available at <http://www.aph.gov.au>;
- (2) 2001 Report of an Inquiry into Military Justice in the Australian Defence Force, conducted by Mr JCS Burchett QC, 16th August 2001 available at <http://www.defence.gov.au>; and
- (3) Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, 16 June 2005, which noted, inter alia, its 'concerns regarding the means through which operational effectiveness and the individual rights of Service personnel are balanced within the current disciplinary tribunal structure' (at 5.2) and that 'the disciplinary process' capacity to provide basic standards of fairness and justice is problematic' (at 5.4).

(C) Right to a Fair Trial

See also comments made by Kirby J in *Re Colonel Aird* (2004) 220 CLR 308 ; [209 ALR 311](#); [2004] HCA 44; [BC200405815](#) at [137], [138].

- 2 See, for examples, (CTH) [Defence Force Discipline Act 1982](#) Pt III (Offences), Pt IV (Punishments and Orders), Pt VII (Service Tribunals), Pt VIII (Procedure of Service Tribunals), Pt VIIIA (Review of Proceedings of Service Tribunals).
- 3 As to the Inspector-General of the Australian Defence Force see <http://www.defence.gov.au>.
- 4 Commonwealth Ombudsman, *Own Motion Investigation into how the Australian Defence Force Responds to Allegations of Serious Incidents and Offences*, January 1998.
- 5 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the ADF*, June 1999, at [3.128]-[3.134].
- 6 Senate Foreign Affairs, Defence and Trade Committee Report on *The effectiveness of Australia's military justice system*, 16 June 2005 chapter 3, which outlines specific investigations.
- 7 See various opinions in *Re Colonel Aird* (2004) 220 CLR 308 ; [209 ALR 311](#); [2004] HCA 44; [BC200405815](#).

[80-1695] Australian Military Court

The paragraph below is current to **07 March 2018**

In response to the recommendations of the 2005 Senate inquiry, the (CTH) [Defence Force Discipline Act 1982](#) (the 'DFDA') was significantly amended 'to provide for the maintenance of effective discipline and the protection of individuals and their rights'.¹ These amendments, which came into effect on 1 October 2007, aimed to achieve this primarily through the creation of a permanent 'Australian Military Court' (the 'AMC') to replace² and to have almost the same jurisdiction as the Courts Martial (the 'CM') and Defence Force Magistrate (the 'DFM'),³ and to satisfy the principles of impartiality and judicial independence, and independence from the chain of command, through:

- (1) statutory appointment of legally-trained military judges by the Governor General following an independent merit selection process;⁴
- (2) security of tenure;⁵
- (3) remuneration set by the Remuneration Tribunal;⁶ and
- (4) no eligibility for promotion during tenure as a judge (other than an automatic mid-term promotion).⁷

Further reforms in 2008 to give effect to recommendations in the 2005 Senate report simplified discipline procedures, including rules of evidence, with a right of appeal to the Australian Military Court, a right to elect trial by the Australian Military Court instead of a summary authority (with certain exceptions) and review of summary proceedings.⁸ In 2009 the establishment of Australian Military Court was found by the High Court of Australia to be unconstitutional⁹ and in 2010 the Military Court of Australia was announced, to be administered by the Federal Court of Australia, with the ability to hear cases affecting personnel overseas.¹⁰

The United Nations Human Rights Committee has observed that many military or special courts which try civilians do not comply with normal standards of justice and could present serious problems as far as the equitable, impartial and independent administration of justice is concerned.¹¹

(C) Right to a Fair Trial

Notes

- 1 See Explanatory Memorandum to the (CTH) [Defence Force Discipline Act 1982](#) available at <http://www.comlaw.gov.au>, which notes the many submissions expressing concerns about the location of judge advocates and DFMs within the military chain of command and the implications for their (actual and perceived) independence.
- 2 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 11](#) repeals (CTH) Defence Force Discipline [Act 1982](#) Divs 3-5 Pt VII (the 'DFDA') dealing with trials by Court martial, Defence Force magistrates and the nomination procedures for members of a Court martial and Defence Force magistrates, respectively.
- 3 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 11](#) inserted into the (CTH) [Defence Force Discipline Act 1982](#) new ibid ss 114, 115. The notes to (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 11](#) asserted that the court will not be not a court for the purposes of Ch III of the Constitution.
- 4 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 17](#) inserted into the (CTH) [Defence Force Discipline Act 1982](#) new ibid ss 188AC, 188AE for Chief Military Judges (the 'CMJ') and ibid s 188AP for Military Judges. See also the new ibid s 188BB for **Acting** Military Judges.
- 5 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 17](#) inserted into the (CTH) [Defence Force Discipline Act 1982](#) a new ibid s 188AC which provided that the CMJ holds office for 10 years. Military judges would hold office for 10 years (ibid s 188AP(4)), and have similar qualifications and be subject to similar termination provisions as a Chief Military Judge (ibid ss 188AR, 188AZ), the position was to be terminal (ibid s 188AP(4A)) and a military judge would not be eligible for promotion other than automatic mid-term promotion (ibid s 188AX). A military judge may be a justice, judge or magistrate of a federal court.
- 6 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 17](#) inserted into the (CTH) [Defence Force Discipline Act 1982](#) a new ibid s 188AG concerning the remuneration of the CMJ, and ibid s 188AU for military judges.
- 7 (CTH) [Defence Legislation Amendment Act 2006 Sch 1 Pt 1 item 17](#) inserted into the (CTH) [Defence Force Discipline Act 1982](#) new ibid ss 188AJ (for CMJ), 188AX (for Military Judges).
- 8 Defence Legislation Amendment [Act 2008](#), by inserting into the (CTH) [Defence Force Discipline Act 1982](#) Pts IX, VIIIA, ss 111B, 111C, 146A.
- 9 The validity of the system of military justice established by (CTH) [Defence Force Discipline Act 1982](#), as it stood before the introduction of (CTH) [Defence Legislation Amendment Act 2006](#), was upheld in *White v Director of Military Prosecutions* (2007) 231 CLR 570 ; [235 ALR 455](#); [2007] HCA 29; [BC200704600](#). The Australian Military Court ('AMC') was established under that (CTH) [Defence Legislation Amendment Act 2006](#) outside the previous command structure to overcome the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221(the 'European Convention') decision in *Findlay v United Kingdom* [1997] ECHR 8 ; [\(1997\) 24 EHRR 221](#) at [243-246](#) where the equivalent British command chain (in which the sentences of courts-martial required confirmation by a superior officer which might be quashed by higher levels of command) raised article 6(1) of the European Convention issues by denying an entitlement to trial by 'an independent and impartial tribunal established by law'. The validity of the provisions creating the AMC was successfully challenged in *Lane v Morrison* (2009) 239 CLR 230 ; [258 ALR 404](#); [2009] HCA 29; [BC200907723](#) at [\[32\]](#), [\[51\]](#) per French CJ and Gummow J, [98], [106]-[113] per Hayne, Heydon, Crennan, Kiefel and Bell JJ (the jurisdiction conferred upon the AMC involved the exercise of the judicial power of the Commonwealth not in accordance with (CC) Commonwealth Constitution Ch III and not supported by ibid s 51(vi)).
- 10 Attorney-General Hon Robert McClelland MP, Media Release 24 May 2010 (Establishment of the Military Court of Australia, Commonwealth Attorney-General's Department website). The (CTH) Military Court of Australia Bill 2010 lapsed without being enacted.
- 11 For commentary on (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 14 see United Nations Human Rights Committee, *CCPR General Comment No 13: Article 14 (Administration of justice)*, UN Doc HRI/GEN/1/Rev 9, Vol I , 27 May 2008, p 184-8, available at <http://www.ohchr.org> at [4].

(A) Introduction — Right to Participate in Public Life

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > III POLITICAL RIGHTS > (1) PARTICIPATION IN PUBLIC LIFE

III POLITICAL RIGHTS

(1) PARTICIPATION IN PUBLIC LIFE

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(A) INTRODUCTION — RIGHT TO PARTICIPATE IN PUBLIC LIFE

[80-1740] Objectives

The paragraph below is current to **07 March 2018**

The right to participate in public life requires a particular combination of legal provisions if it is to be effective.¹ Thus a free vote without freedom to organise parties and candidates would not effectively lead to full participation in the election of representatives of the people. Nor would an arrangement of electorates that was designed to place certain religious or ethnic groups in a minority situation so that they were effectively disenfranchised conform with the non-discriminatory provisions contained in article 2 and referred to in article 25 of the International Covenant on Civil and Political Rights.² Furthermore, a 'genuine' free vote would not be obtained by a system that, although providing for initial secret ballot, allowed subsequent scrutiny by public authorities with punitive objectives.

It is not possible to state unequivocally what particular combination of provisions constitutes a genuinely participatory system, and it is not the purpose of this section to describe such a system. What is described below are the provisions the Australian legal system contains that cumulatively establish the framework for participation in public life. The High Court of Australia has in effect endorsed the system as reasonably expressive of a parliamentary representative democracy³ which confers universal, non-discriminatory citizenship-based franchise.⁴ The various elements of voting rights,⁵ electoral systems,⁶ distribution of electorates,⁷ qualification for election⁸ and access to the public service⁹ making up the Australian system at Commonwealth, State and Territory and local government levels¹⁰ are outlined below. The full enjoyment of the right to participate in public affairs also depends on ancillary rights such as freedom of assembly, freedom of thought and conscience, and freedom of expression.¹¹

Notes

- 1** These criteria are stated in the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 25:

'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (1) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (2) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and
- (3) to have access, on general terms of equality, to public service in his country.'

As to the International Covenant on Civil and Political Rights see FOREIGN RELATIONS [\[215-635\]](#).

The same rights are enacted in (ACT) [Human Rights Act 2004](#) s [17](#) and (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [18](#).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 2** As to ibid art 2 see [\[80-235\]](#).

- 3** *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ; [7 ALR 593](#); [BC7500067](#).

- 4** *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 ; [45 ALR 1](#); [BC8300055](#) found that the (CC) Commonwealth Constitution s 41 does not in terms confer a right to vote. *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ; [7 ALR 593](#); [BC7500067](#) suggested grossly discriminatory franchise may be held to be inconsistent with representative democracy and hence invalid (Stephen, Mason, McTiernan, Jacobs JJ), notably 35, 36 per McTiernan and Jacobs JJ ('the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.'). See also *McGinty v Western Australia* (1996) 186 CLR 140 ; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#) per Gaudron J at 221, 222, 166, 167 per Brennan CJ, 201 per Toohey J, 286, 287 per Gummow J.

- 5** See [\[80-1745\]-\[80-1775\]](#).

- 6** See [\[80-1780\]-\[80-1800\]](#).

- 7** See [\[80-1805\]-\[80-1820\]](#).

- 8** See [\[80-1825\]-\[80-1835\]](#).

- 9** See [\[80-1840\]](#).

- 10** See [\[80-1845\]-\[80-1890\]](#). The section on local government covers the issues dealt with in the earlier sections in relation to the Commonwealth and State governments.

- 11** See United Nations Human Rights Committee, *CCPR General comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [25].

End of Document

(B) Voting Rights

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(B) VOTING RIGHTS

[80-1745] General

The paragraph below is current to **07 March 2018**

Neither the Commonwealth nor the State constitutions entrench¹ an enforceable right to vote. Only the constitutions of Tasmania and Victoria include voting provisions but these are not entrenched.² However, there is a pecuniary remedy at common law for malicious prevention of a person voting.³ There are also Courts of Disputed Returns under the jurisdiction of the High Court of Australia and the Supreme Courts of each State and Territory that can provide a remedy where there is electoral irregularity.⁴ Following evidence that the handling of votes, or other circumstances, are such as to affect the genuineness of the result, a court of disputed returns may declare the election void.⁵ A right to vote has been included in the human rights statutes in the Australian Capital Territory and Victoria.⁶

The International Covenant on Civil and Political Rights states that every citizen is to have the right to vote at genuine periodic elections involving universal and equal suffrage and secret ballot, and guaranteeing the free expression of the will of the electors.⁷

Notes

- ¹ As to constitutional alteration see CONSTITUTIONAL LAW [\[90-270\]-\[90-300\]](#).
- ² (TAS) [Constitution Act 1934](#) s [28](#) (subject to (TAS) [Electoral Act 2004](#))
(VIC) [Constitution Act 1975](#) ss [48](#), [49](#).
- ³ *Ashby v White* (1703) 14 State TR 695 ; [1 ER 417](#), HL. For proceedings in the Court of King's Bench and commentary see *Ashby v White* (1703) 2 Ld Raym 938 ; 1 Sm LC 216; 92 ER 126. As to statutory offences in relation to voting see PUBLIC ADMINISTRATION [\[345-1825\]-\[345-1835\]](#).
- ⁴ (CTH) [Commonwealth Electoral Act 1918](#) ss [353\(1\)](#), [354\(1\)](#) (the High Court of Australia is constituted as the Court of Disputed Returns with jurisdiction to try a petition or to refer it to trial to the Supreme Court of a State or Territory). As to petition requirements see *Scott-Irving v Oakeshott* [\(2009\) 256 ALR 442](#) ; [\[2009\] FCA 487](#); [BC200903914](#) (unsuccessful attempt to declare 2008 by-election in Lyne void); *Ludlam v Johnston* [\(2014\) 305 ALR 319](#) ; 88 ALJR 405; [\[2014\] HCA 1](#); [BC201400510](#), HC of A (the petition must set out the facts relied upon to invalidate the election or return).

(B) Voting Rights

(ACT) [Electoral Act 1992](#) s 252(1)(a), 252(2) (in the Australian Capital Territory, it is known as the Court of Disputed Elections)

(NT) [Electoral Act 2004](#) Pt 12, ss 232, 234, 236

(NSW) Parliamentary Electorates and Elections Act 1912 ss 155, 156

(QLD) [Electoral Act 1992](#) s 137

(SA) [Electoral Act 1985](#) s 103

(TAS) [Electoral Act 2004](#) ss 202, 205

(VIC) [Electoral Act 2002](#) s 124

(WA) [Electoral Act 1907](#) s 157. As to Courts of Disputed Returns see PUBLIC ADMINISTRATION [\[345-2095\]-\[345-2120\]](#).

- 5 As to the powers of the Courts of Disputed Returns see PUBLIC ADMINISTRATION [\[345-2110\]](#). For an illustration of its operation for the Commonwealth see *Kean v Kerby* (1920) 27 CLR 449 ; [BC2090102](#) (Isaacs J constituted the court to consider the election for the seat of Ballarat). See also *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 ; [104 ALD 525](#); [\[2008\] FCA 692](#); [BC200805154](#) (dispute over the validity of the return of Fran Bailey to the House of Representatives in 2007 election in decisions made by Australian Electoral Officer).

- 6 (ACT) [Human Rights Act 2004](#) s 17(b) (the right to vote and be elected at periodic elections, that guarantee the free expression of the will of the electors)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 18 (the opportunity, without discrimination, to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 7 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 25. See also the United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [11], [12], available at <http://www.ohchr.org>.

[80-1750] Qualifications of electors

The paragraph below is current to **07 March 2018**

In all jurisdictions, the basic qualifications for being enrolled as an elector are that the person be an Australian citizen (or a British subject enrolled before 26 January 1984),¹ have resided in the jurisdiction for a stated period,² and be aged 18 years or more.³ Joint enrolment arrangements between a State or Territory and the Commonwealth are provided for and exist in all jurisdictions.⁴

Notes

- 1 (CTH) [Commonwealth Electoral Act 1918](#) s 93(1)(a). *Bennett v Commonwealth* (2007) 231 CLR 91 ; [235 ALR 1](#); [\[2007\] HCA 18](#); [BC200702905](#) (Commonwealth laws requiring Australian citizenship to enfranchise Norfolk Island residents valid exercise of the territories power conferred by (CC) Commonwealth Constitution s 122).

As to voting entitlement generally including equivalent provisions in the other jurisdictions see PUBLIC ADMINISTRATION [\[345-1630\]](#). As to enrolment procedures see PUBLIC ADMINISTRATION [\[345-1665\]-\[345-1710\]](#). See also *Murphy v Electoral Cmr* (2016) 334 ALR 369 ; 90 ALJR 1027; [\[2016\] HCA 36](#); [BC201607502](#).

- 2 1 month for all jurisdictions. As to the residential qualifications see PUBLIC ADMINISTRATION [\[345-1630\] note 3](#).

- 3 These qualifications are stated in the legislation:

(CTH) [Commonwealth Electoral Act 1918](#) s 93

(B) Voting Rights

(ACT) [Electoral Act 1992](#) s 72; however, see (ACT) [Human Rights Act 2004](#) s 17(b) which arguably expands electoral qualifications

(CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 14; (NT) [Electoral Act 2004](#) s 21

(NSW) [Constitution Act 1902](#) s 22; (NSW) Parliamentary Electorates and Elections Act 1912 ss 22, 25

(QLD) [Electoral Act 1992](#) s 64

(SA) [Electoral Act 1985](#) ss 29, 69

(TAS) [Constitution Act 1934](#) s 28; (TAS) [Electoral Act 2004](#) s 31

(VIC) [Constitution Act 1975](#) s 48; see also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 18 (the right 'without discrimination' to be elected and 'to have access, on general terms of equality, to the Victorian public service and public office')

(WA) [Electoral Act 1907](#).

4 (ACT) [Electoral Act 1992](#) s 70

(NT) [Electoral Act 2004](#) s 20

(NSW) Parliamentary Electorates and Elections Act 1912 s 49

(QLD) [Electoral Act 1992](#) s 62

(SA) [Electoral Act 1985](#) s 28

(TAS) [Electoral Act 2004](#) s 35

(VIC) [Electoral Act 2002](#) ss 20, 22(4)

(WA) [Electoral Act 1907](#) s 31.

[80-1755] Enforcement of enrolment

The paragraph below is current to **07 March 2018**

It is compulsory for every person who is qualified¹ to enrol or transfer enrolment as an elector.²

There are provisions in each jurisdiction for reviewing decisions made in relation to electoral rolls. For example, a citizen refused enrolment as an elector may sue for a declaration of right, apply for mandamus to enforce the right to enrolment, or seek a statutory remedy.³

It has been held that statutory provisions that precluded consideration of late enrolment applications were invalid as they denied the constitutional requirement that representatives be 'directly chosen by the people'.⁴

Notes

1 See [80-1750].

2 (CTH) [Commonwealth Electoral Act 1918](#) s 101(1)

(ACT) [Electoral Act 1992](#) s 73(1), 73(2)

(NT) [Electoral Act 2004](#) s 279

(NSW) Parliamentary Electorates and Elections Act 1912 s 27

(B) Voting Rights

(QLD) [Electoral Act 1992](#) s 65(2), 65(3)

(SA) [Electoral Act 1985](#) s 32 (compulsory enrolment and transfer of enrolment)

(TAS) [Electoral Act 2004](#) s 34

(VIC) [Electoral Act 2002](#) ss 22, 23

(WA) [Electoral Act 1907](#) ss 17, 45.

3 As to the review of electoral decisions see PUBLIC ADMINISTRATION [\[345-1705\] note 4](#), [\[345-1710\]](#) (review to Federal Administrative Appeals Tribunal).

4 *Rowe v Electoral Cmr* (2010) 243 CLR 1 ; [273 ALR 1](#); [\[2010\] HCA 46](#); [BC201009576](#), HC of A.

[80-1760] Disqualifications of electors

The paragraph below is current to **07 March 2018**

Each jurisdiction provides that some persons are disqualified from voting.¹ The disqualifications are largely the same for all jurisdictions and apply equally to eligibility to vote for both houses where relevant.² There are five general heads of disqualifications which apply in various jurisdictions:³

- (1) unsoundness of mind or mental illness;⁴
- (2) imprisonment for a serious offence,⁵ but in South Australia no special voting restrictions are imposed on prisoners;⁶
- (3) persons convicted of treason;⁷
- (4) persons who are holders of a temporary visa under the (CTH) [Migration Act 1958](#) or an unlawful non-citizen under this Act;⁸ and
- (5) persons convicted of certain other criminal offences.⁹

Notes

1 As to disqualifications from Commonwealth voting see PUBLIC ADMINISTRATION [\[345-1635\]](#). As to initial criteria qualifying a person to enrol see [80-1750]. For disqualifications of candidates see [\[80-1830\]](#), [\[80-1835\]](#).

2 The Australian Capital Territory, the Northern Territory, Queensland and Tasmania refer to the qualifications for voting under the (CTH) [Commonwealth Electoral Act 1918](#):

(CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 14

(ACT) [Electoral Act 1992](#) s 72(1)(a)

(QLD) [Electoral Act 1992](#) s 64(1)(a)

(TAS) [Electoral Act 2004](#) s 31.

3 Compare the qualifications for those who wish to stand for office: see [\[80-1825\]-\[80-1835\]](#).

4 In the Commonwealth, the Australian Capital Territory, Queensland and Victoria this is related to incapacity to understand the nature of the electoral process but can, as in New South Wales, be related to being a patient under the

(B) Voting Rights

(NSW) [Mental Health Act 2007](#) or being mentally ill. In the Northern Territory, South Australia, Tasmania and Western Australia unsoundness of mind is the disqualifying criterion. See:

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8)(a)

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8)(a) by virtue of (ACT) [Electoral Act 1992](#) s 72(1)(a)

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8)(a) by virtue of (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 14(1); (NT) [Electoral Act 2004](#) s 21

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8)(a) by virtue of (QLD) [Electoral Act 1992](#) s 64(1)(a)(i)

(NSW) Parliamentary Electorates and Elections Act 1912 s 25(a)

(SA) [Electoral Act 1985](#) s 29(1)(a)(iv)

(TAS) [Constitution Act 1934](#) s 14(2)

(VIC) [Constitution Act 1975](#) s 48(2)(d)

(WA) [Electoral Act 1907](#) s 18(a).

As to the enrolment of persons of unsound mind or with mental illness see PUBLIC ADMINISTRATION [345-1635].

- 5 (CTH) [Commonwealth Electoral Act 1918](#) s 93(8AA) (a person who is serving a sentence of imprisonment of 3 years or more for an offence against the law of the Commonwealth or of a State or Territory) rendered invalid in *Roach v Electoral Cmr* (2007) 233 CLR 162 ; [239 ALR 1](#); [2007] HCA 43; [BC200708182](#) at [95] per Gummow, Kirby and Crennan JJ (Gleeson CJ agreeing) (enlarged disqualification of prisoners from voting introduced by (CTH) [Electoral and Referendum Amendment \(Electoral Integrity and Other Measures\) Act 2006](#) was invalid: the legislative pursuit of an end which stigmatised offenders by imposing a civil disability during any term of imprisonment went beyond what was reasonably appropriate and adapted (or proportionate) to the maintenance of representative government). See also *R v Woods* (2010) 246 FLR 4 ; [\[2010\] NTSC 69](#); [BC201009534](#) at [27]-[35], [66] per Mildren ACJ, Blokland and Reeves JJ ((NT) [Juries Act 1963](#) not invalid for inconsistency with the (CTH) [Racial Discrimination Act 1975](#) in disqualifying as a juror any one who has received a custodial sentence in preceding 7 years) (distinguishing *Roach v Electoral Cmr* (2007) 233 CLR 162 ; [239 ALR 1](#); [2007] HCA 43; [BC200708182](#) which turned on Constitutional issues not (CTH) Racial Discrimination Act).

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8AA) by virtue of (ACT) [Electoral Act 1992](#) s 72(1)

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8AA) by virtue of (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 14 (qualification to vote) and (NT) [Electoral Act 2004](#) s 21 (entitled to be enrolled)

(CTH) [Commonwealth Electoral Act 1918](#) s 93(8AA) by virtue of (QLD) [Electoral Act 1992](#) s 64(1)(a)(i)

(NSW) Parliamentary Electorates and Elections Act 1912 s 25(b) (imprisonment 12 months or more)

(TAS) [Electoral Act 2004](#) s 31(2) (entitled to be enrolled if serving a sentence of imprisonment for a term of less than 3 years)

(VIC) [Constitution Act 1975](#) s 48(2)(b) (serving a sentence for 5 years or longer)

(WA) [Electoral Act 1907](#) s 18(c) (serving or about to serve a sentence of detention under the (WA) [Young Offenders Act 1994](#) or imprisonment for 1 year or longer), 18(ca) (serving or about to serve indefinite imprisonment). See also (WA) [Electoral Act 1907](#) s 18(cd) (provides for disqualification of persons who are mentally impaired accused persons under the (WA) [Criminal Law \(Mentally Impaired Accused\) Act 1996](#)).

There are no equivalent provisions in the other jurisdictions. Despite calls by the Joint Standing Committee on Electoral Matters to grant the right to vote to all prisoners (except those convicted of treason) on the basis that the prohibition was inconsistent with the rehabilitation aim of modern criminal law, the Commonwealth tightened its disqualification provisions in March 2007 by denying the vote to all persons serving a sentence of imprisonment: see Joint Standing Committee on Electoral Matters, *The 1993 Federal Election: Report of the Inquiry into the conduct of the 1993 federal election and matters related thereto*, Commonwealth of Australia, November 1994 available at <http://www.apf.gov.au>; Joint Standing Committee on Electoral Matters, *The 1998 Federal Election: Report of the Inquiry into the conduct of the 1998 federal election and matters related thereto*, Commonwealth of Australia, June 2000 available at <http://www.apf.gov.au> (although the Committee stopped short of repeating its earlier recommendation on the basis that public support was lacking); (CTH) [Electoral and Referendum Legislation Amendment Act 2007](#). Similarly, restrictive provisions have been challenged successfully in Europe as violating the right to 'free expression of the opinion of the people in the choice of the legislature'. The European Court concluded that rather than promoting civic responsibility,

(B) Voting Rights

such laws may undermine respect for law and democracy, that there is no evidence that they meet their objective of deterring crime, and that a 'blanket' removal of the vote disclosed no rational link between the punishment and the individual offender: () First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1982) art 3. See also *Hirst v United Kingdom (No 2) App No 74025/01* (Chamber Opinion); and 38 Eur HR Rep 40 (2004) (European Court of Human Rights, October 6, 2005) (Grand Chamber). Critics of similar provisions in Australia have pointed out that they disproportionately and adversely affect Indigenous people, people with mental illness and people with intellectual disability and may run foul of the freedom of political communication: Human Rights and Equal Opportunity Commission, *Submission to the Senate Finance and Public Administration Committee regarding Electoral and Referendum (Electoral Integrity and Other Measures) Bill 2005*, 9 March 2006 available at <https://www.humanrights.gov.au>, which argued that the disenfranchisement provision are disproportionate to any legitimate aim, arbitrary in their application and may be discriminatory. Other submissions made to the inquiry made similar points concerning the freedom of political communication.

See also United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [14] available at <http://www.ohchr.org>. See conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Those who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

As to enrolment of prisoners see PUBLIC ADMINISTRATION [\[345-1725\]](#).

- 6 (SA) [Electoral Act 1985](#) s [29\(4\)](#).

As to enrolment of prisoners see PUBLIC ADMINISTRATION [\[345-1725\]](#).

- 7 (CTH) [Commonwealth Electoral Act 1918](#) s [93\(8\)\(b\)](#), [93\(10\)](#)

(CTH) [Commonwealth Electoral Act 1918](#) s [93\(8\)\(c\)](#) by virtue of (ACT) [Electoral Act 1992](#) s 72(1)(a)

(CTH) [Commonwealth Electoral Act 1918](#) s [93\(8\)\(c\)](#) by virtue of (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s [14\(1\)](#); (NT) [Electoral Act 2004](#) s [21](#)

(TAS) [Electoral Act 2004](#) s [31](#) (incorporating the Commonwealth roll)

(VIC) [Constitution Act 1975](#) s [48\(2\)\(a\)](#)

(WA) [Electoral Act 1907](#) s 18(b).

There are no equivalent provisions in the other jurisdictions.

- 8 (CTH) [Commonwealth Electoral Act 1918](#) s [93\(7\)](#)

(CTH) [Commonwealth Electoral Act 1918](#) s [93\(7\)](#) by virtue of (ACT) [Electoral Act 1992](#) s 72(1)(a)

(CTH) [Commonwealth Electoral Act 1918](#) s [93\(7\)](#) by virtue of (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s [14\(1\)](#); (NT) [Electoral Act 2004](#) s [21](#)

(NSW) Parliamentary Electorates and Elections Act 1912 s 25(c)

(TAS) [Electoral Act 2004](#) s [31](#) (incorporating the Commonwealth roll)

(VIC) [Constitution Act 1975](#) s [48\(2\)\(c\)](#)

(WA) [Electoral Act 1907](#) s 18(d).

There are no equivalent provisions in the other jurisdictions.

As to migration visas see CITIZENSHIP AND MIGRATION [\[77-385\]-\[77-620\]](#). As to loss of citizenship see CITIZENSHIP AND MIGRATION [\[77-85\]-\[77-130\]](#).

- 9 (WA) [Electoral Act 1907](#) s 18(c) (serving or yet to serve detention under (WA) [Young Offenders Act 1994](#) or imprisonment totalling 1 year or more).

There are no equivalent provisions in the other jurisdictions.

[80-1765] Aboriginal voting

The paragraph below is current to **07 March 2018**

Prior to 1962, Aboriginal persons were not entitled to be enrolled for Commonwealth elections, although they were for some State elections.¹ For Commonwealth elections, enrolment of Aboriginal persons is now compulsory.² Thus, Aboriginal persons have achieved full citizenship rights in respect of voting.³

Notes

- 1** For an account of progressive developments, see *Constitutional Commission, Final Report*, AGPS, Canberra, 1988 at [4.23]-[4.30].
- 2** (CTH) [Commonwealth Electoral Act 1918](#) s [101\(1\)](#) (this provision does not discriminate in the obligation of voters to enrol). As to compulsory enrolment see [80-1755].
- 3** Generally see ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-5\]](#).

[80-1770] Compulsory voting

The paragraph below is current to **07 March 2018**

Most jurisdictions require eligible citizens to enrol for elections,¹ and all jurisdictions require enrolled citizens to vote.² The vote need not be formal but it is an offence to fail to cast one.³ In addition, New South Wales has entrenched mandatory voting into its constitution via a 'manner and form' provision.⁴ Compulsory voting is not contrary to the Constitution.⁵

Notes

- 1** See [80-1755].
- 2** There are certain exceptions for eligible overseas electors, itinerant electors and Antarctic electors: see PUBLIC ADMINISTRATION [\[345-1825\]](#) [note 3](#). As to compulsory voting and the failure to cast a vote generally see PUBLIC ADMINISTRATION [\[345-1825\]](#).
- 3** (CTH) [Commonwealth Electoral Act 1918](#) s [245\(1\)](#)
(ACT) [Electoral Act 1992](#) s [129\(1\)](#)
(NT) [Electoral Act 2004](#) s [279](#)
(NSW) Parliamentary Electorates and Elections Act 1912 s 120F(1); (NSW) [Constitution Act 1902](#) s 11B
(QLD) [Electoral Act 1992](#) s [164](#)
(SA) [Electoral Act 1985](#) s [85](#)
(TAS) [Electoral Act 2004](#) s [152](#)
(VIC) [Electoral Act 2002](#) ss [87\(3\)](#) (compulsory voting), [166](#) (offence for failure to vote at any election)
(WA) [Electoral Act 1907](#) s 156(1).
- 4** (NSW) [Constitution Act 1902](#) ss 7B (Referendum for Bills with respect to Legislative Assembly and certain other matters), 11B (compulsory voting).

- 5 *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 ; [\[2012\] SASCFC 110](#); [BC201207542](#) (there is no constitutional right to abstain from voting).

[80-1775] Secret ballot

The paragraph below is current to **07 March 2018**

In all jurisdictions voting is carried out by secret ballot.¹ Arrangements are made by law to provide for the collection of votes in publicly advertised polling booths.² Conduct by members of the public and supporters of political parties at and around polling places is strictly regulated.³

Notes

- 1 (CTH) [Commonwealth Electoral Act 1918](#) s [233\(1\)\(a\)](#)
(ACT) [Electoral Act 1992](#) s 134(a), 134(b)
(NT) [Electoral Act 2004](#) s [53](#)
(NSW) Parliamentary Electorates and Elections Act 1912 s 103(1)(a)
(QLD) [Electoral Act 1992](#) s 102(2)(a), 102(2)(b)
(SA) [Electoral Act 1985](#) s [79\(1\)](#)
(TAS) [Electoral Act 2004](#) s [112](#)
(VIC) [Electoral Act 2002](#) s [154](#) (secrecy of vote)
(WA) [Electoral Act 1907](#) s 127(a).
- As to general voting see PUBLIC ADMINISTRATION [\[345-1770\]-\[345-1820\]](#). As to special voting provisions, which include prisoners, overseas and itinerant electors, Antarctic electors and disabled voters see PUBLIC ADMINISTRATION [\[345-1715\]-\[345-1730\]](#). As to postal voting see PUBLIC ADMINISTRATION [\[345-1735\]-\[345-1770\]](#).
- 2 As to polling places see PUBLIC ADMINISTRATION [\[345-1905\]-\[345-1925\]](#).
- 3 As to proscribed behaviour and offences in relation to polling booths see PUBLIC ADMINISTRATION [\[345-1770\]-\[345-1820\]](#). As to the regulation of polling places see PUBLIC ADMINISTRATION [\[345-1960\]-\[345-1975\]](#).

[80-1777] Positive measures to facilitate the right to vote

The paragraph below is current to **07 March 2018**

International law recognises that the right to participate in public affairs and to vote requires states to take positive measures to ensure that all persons entitled to vote are able to exercise that right, including those potentially excluded by their circumstances such as the homeless.¹ This right to participate may also require the implementation of voter education programmes and registration campaigns, especially for minority groups and illiterate voters.² While implementing such positive measures is an obligation under international law, this largely occurs at the level of policy in Australia.³ All jurisdictions have legislated to promote voting rights by criminalising interference with the free exercise of the right.⁴

(B) Voting Rights

Notes

- 1 See, for example, United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [11], [12] available at <http://www.ohchr.org>.
- 2 United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [11], [12] available at <http://www.ohchr.org>.
- 3 For instance through the work of electoral commissions which exist in every jurisdiction.
- 4 (CTH) [Commonwealth Electoral Act 1918](#) s [327](#)
(ACT) [Electoral Act 1992](#) s [145](#)
(NT) [Electoral Act 2004](#) s [264](#)
(NSW) Parliamentary Electorates and Elections Act 1912 s 151
(QLD) [Electoral Act 1992](#) s [167](#)
(SA) [Electoral Act 1985](#) ss [110](#), [111](#)
(TAS) [Electoral Act 2004](#) s [168](#)
(VIC) [Electoral Act 2002](#) s [152](#)
(WA) [Electoral Act 1907](#) ss [183](#), [184](#).

End of Document

(C) Electoral System — Safeguards for Political Rights

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(C) ELECTORAL SYSTEM — SAFEGUARDS FOR POLITICAL RIGHTS

[80-1780] Commonwealth upper and lower houses

The paragraph below is current to **07 March 2018**

The Federal Parliament consists of the Queen, the Senate and the House of Representatives.¹ The system of representation of the people for the Senate (the upper house) stems from the federal structure of the Constitution. The concern is not to provide equal value for each vote, but equal representation of each original or new State in the Senate.² The legislation providing for Senate representation of the two Territories, and on a basis different from that for the States, has been held valid by the High Court of Australia.³ The Commonwealth Constitution limits the powers of the Senate in that proposed laws appropriating revenue or imposing taxation may not originate in it, nor may it amend proposed laws imposing taxation or (with certain exceptions) appropriating money and the Senate may not amend proposed laws to increase a charge or burden on people.⁴ In other respects the Senate has equal power with the House of Representatives in respect of proposed laws.⁵

Notes

- 1** (CC) Commonwealth Constitution s 1. As to the federal Parliament see CONSTITUTIONAL LAW [\[90-400\]-\[90-475\]](#).
- 2** Ibid s 7. As to the Senate see CONSTITUTIONAL LAW [\[90-410\]](#).
- 3** See CONSTITUTIONAL LAW [\[90-410\]](#).
- 4** Ibid s 53.
- 5** Ibid s 53. For further exposition of the relationship between the Senate and the House of Representatives generally see CONSTITUTIONAL LAW [\[90-400\]-\[90-425\]](#).

[80-1785] States upper and lower houses

The paragraph below is current to **07 March 2018**

All States except Queensland have two houses in their parliaments, a Legislative Council and a Legislative Assembly. The two Territories and Queensland have only one house, a Legislative Assembly.¹ The upper houses now all have the same franchise as the lower houses.² Although the differences between the constituencies of the two houses in the States are not as great as for the Commonwealth, the electoral districts are nevertheless not the same.³ Some State constitutions provide for means of resolving differences between the houses,⁴ but in other respects the legislative powers of the two houses are similar to those applying to the Commonwealth Parliament.⁵

In New South Wales, the Legislative Council has been 'entrenched', thereby protecting it from abolition without a referendum and supporting legislation.⁶ In Tasmania, the Governor is not able to dissolve the Legislative Council.⁷

Notes

- 1 (CTH) [Australian Capital Territory \(Self-Government\) Act 1988](#) Pts III, IV; (CTH) [Northern Territory \(Self-Government\) Act 1978](#) Pt III
(NSW) [Constitution Act 1902](#) s 3
(QLD) [Constitution Act 1867](#) s 2A(1); (QLD) [Constitution of Queensland 2001](#) s 6
(SA) [Constitution Act 1934](#) s 4 (upper house is called House of Assembly)
(TAS) [Constitution Act 1934](#) s 10
(VIC) [Constitution Act 1975](#) s 15
(WA) [Constitution Act 1889](#) s 2.
As to the State Parliaments see CONSTITUTIONAL LAW [\[90-610\]-\[90-625\]](#). As to the Territory Parliaments see CONSTITUTIONAL LAW [\[90-890\]-\[90-905\]](#).
- 2 As to the franchise for State and Territory Parliaments see CONSTITUTIONAL LAW [\[90-700\]-\[90-725\]](#), [\[90-910\]](#).
- 3 Electoral redistributions are the responsibility of the Federal, State and Territory electoral commissions: see PUBLIC ADMINISTRATION [\[345-1580\]-\[345-1625\]](#). As to distribution of State electorates see CONSTITUTIONAL LAW [\[90-625\]](#).
- 4 See, for example, (NSW) [Constitution Act 1902](#) Pt 2. See CONSTITUTIONAL LAW [\[90-795\]-\[90-810\]](#).
- 5 See [\[80-1780\]](#). For more detailed discussion see CONSTITUTIONAL LAW [\[90-770\]-\[90-835\]](#).
- 6 Ibid ss 7A, 7B.
- 7 (TAS) [Constitution Act 1934](#) s 12(2).

[80-1790] Periodic elections for lower houses

The paragraph below is current to **07 March 2018**

All jurisdictions contain provisions requiring elections for the lower houses to be within a fixed time from a stated date. For the federal House of Representatives, the stated date is the first meeting of the house after the general election,¹ and similar dates are stipulated in the relevant legislation for the State and Territory Legislative Assemblies. The period for all lower houses used to be 3 years, but recent amendments to the constitutions of most jurisdictions have brought the standard term to 4 years.² The exception is Queensland.³

Notes

- 1 (CC) Commonwealth Constitution s 28. As to the duration of the federal House of Representatives see CONSTITUTIONAL LAW [\[90-425\]](#).
- 2 (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 17
(ACT) [Electoral Act 1992](#) s 100
(NSW) [Constitution Act 1902](#) s 24
(SA) [Constitution Act 1934](#) s 28 (there are conditions under which the Governor may dissolve the house: ibid s 28A(1))
(TAS) [Constitution Act 1934](#) s 23(2)
(VIC) [Constitution Act 1975](#) s 38 (there are conditions under which the Governor may dissolve the house: ibid s 8(3))
(WA) [Constitution Acts Amendment Act 1899](#) s 21(1).
As to the duration of the lower houses see CONSTITUTIONAL LAW [\[90-630\]](#) (States), [\[90-900\]](#) (Territories).
- 3 (QLD) [Constitution Act Amendment Act 1934](#) s 4 (3 years).

[80-1795] Periodic elections for upper houses

The paragraph below is current to **07 March 2018**

All the upper houses (neither the two Territories nor Queensland have upper houses)¹ have arrangements for revolving membership which requires retirement of the senators² or the Legislative Councillors³ in rotation,⁴ subject to provision for dissolution.⁵

Notes

- 1 As to the constitution of the parliaments see CONSTITUTIONAL LAW [\[90-410\]](#) (Senate), [\[90-620\]](#) (States), [\[90-895\]](#) (Territories).
- 2 The standard period of rotation of the senators is 3 years: (CC) Commonwealth Constitution s 13. As to the duration of the Senate and the effect of dissolution see CONSTITUTIONAL LAW [\[90-420\]](#).
- 3 The period of rotation varies between the States. As to the duration of the Legislative Councils see CONSTITUTIONAL LAW [\[90-630\]](#).
- 4 (CC) Commonwealth Constitution ss 13-15
(NSW) [Constitution Act 1902](#) s 22B
(SA) [Constitution Act 1934](#) s 14
(TAS) [Constitution Act 1934](#) s 19
(VIC) [Constitution Act 1975](#) s 28 (the two houses have the same terms)
(WA) [Constitution Acts Amendment Act 1899](#) s 8.
- 5 (CC) Commonwealth Constitution s 57
(NSW) [Constitution Act 1902](#) s 10

(C) Electoral System — Safeguards for Political Rights

(SA) [Constitution Act 1934](#) s [41](#)

(TAS) [Constitution Act 1934](#) s [12](#) (the Governor cannot dissolve the Council)

(VIC) [Constitution Act 1975](#) s [8\(2\)](#)

(WA) [Constitution Acts Amendment Act 1899](#) s [21](#); (WA) [Constitution Act 1889](#) s [3](#) (the Governor cannot dissolve the Council).

[80-1800] Voting systems

The paragraph below is current to **07 March 2018**

The main system for the casting and recording of votes for the lower houses is by preferential vote for one candidate within a single electorate.¹ This system is varied in the Australian Capital Territory and Tasmania by a system of multi-member electorates. In the Australian Capital Territory and Tasmania, 25 members are elected from five five-member electorates by the Hare-Clark proportional representation system.² In the upper houses, where multiple candidates are elected either for a State as a whole (including for the Senate) or for electoral districts, the system is again preferential.³

Notes

1 (CTH) [Commonwealth Electoral Act 1918](#) s [274](#)

(NT) [Electoral Act 2004](#) s [50](#)

(NSW) [Constitution Act 1902](#) s 26; (NSW) [Parliamentary Electorates and Elections Act 1912](#) ss 12, 103(2), 103(3)

(QLD) [Electoral Act 1992](#) s [122](#)

(SA) [Electoral Act 1985](#) s [76](#)

(VIC) [Electoral Act 2002](#) ss [93](#), [113](#), [114](#), [121](#)

(WA) [Electoral Act 1907](#) s [128](#).

As to the determination of results in parliamentary elections see PUBLIC ADMINISTRATION [\[345-1940\]](#) (federal House of Representatives), [\[345-1945\]](#) (Senate), [\[345-1950\]](#) (States and Territories).

2 (ACT) [Electoral Act 1992](#) ss [34](#), [132](#), [185](#), Sch 4; (ACT) [Proportional Representation \(Hare-Clark\) Entrenchment Act 1994](#) ss [4](#), [5](#) (entrenchment of system) (two electorates return five Members, one returns seven Members)

(TAS) [Constitution Act 1934](#) s [22](#) (the State is to be divided into five divisions, each of which is to return five members);

(TAS) [Electoral Act 2004](#) s 100(b)(i), Sch 4.

3 (CTH) [Commonwealth Electoral Act 1918](#) ss [239](#), [240](#)

(NSW) [Parliamentary Electorates and Elections Act 1912](#) s 103(2), 103(3)

(SA) [Electoral Act 1985](#) Pt 10 Div 3

(TAS) [Constitution Act 1934](#) s [18](#); (TAS) [Electoral Act 2004](#) Sch 5

(VIC) [Electoral Act 2002](#) ss [93](#), [93A](#)

(WA) [Electoral Act 1907](#) s [128](#).

There is no upper house in the Australian Capital Territory, the Northern Territory and Queensland.

End of Document

(D) Distribution of Electorates — Safeguards for Political Rights

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(D) DISTRIBUTION OF ELECTORATES — SAFEGUARDS FOR POLITICAL RIGHTS

[80-1805] Senate

The paragraph below is current to **07 March 2018**

The Commonwealth Constitution provides that the Senate is to be elected by the people of each State, voting as one electorate until parliament otherwise provides.¹ The parliament has made no other provision, but has legislated to provide for the election of two senators from each of the Australian Capital Territory and the Northern Territory.²

Notes

- 1** (CC) Commonwealth Constitution s 7. As to the election of senators see CONSTITUTIONAL LAW [\[90-1430\]](#), [\[90-1435\]](#).
- 2** (CTH) [Commonwealth Electoral Act 1918](#) s 43. The (CTH) Senate (Representation of Territories) Act 1973 (repealed) which originally provided for two senators each for the Australian Capital Territory and the Northern Territory, and the (CC) Commonwealth Constitution s 122, was held to be valid by the High Court of Australia: *Western Australia v Commonwealth (Territory Representation Case (No 1))* (1975) 134 CLR 201 ; [7 ALR 159](#); *Queensland v Commonwealth (Territory Representation Case (No 2))* (1977) 139 CLR 585 ; [16 ALR 487](#); 52 ALJR 100.

[80-1810] Commonwealth House of Representatives

The paragraph below is current to **07 March 2018**

The number of members for the House of Representatives as a whole is to be, as nearly as practicable, twice the number of senators.¹ The Australian Electoral Commission is charged with recommending to parliament between elections any changes required in the boundaries of electorates in light of changing population or other circumstances.² The requirements for determining the boundaries of the electorates are stated but are not entrenched.³ However, there are probably limits to the extent to which the High Court of Australia will allow the parliament to provide for unequal distribution of electors between

(D) Distribution of Electorates — Safeguards for Political Rights

electoral divisions, given the requirement in section 24 of the Commonwealth Constitution that the House of Representatives is to be 'directly chosen by the people'.⁴ There are no similar constitutional constraints on the legislatures of the States arising either out of state or federal constitutions.⁵

Notes

- 1 (CC) Commonwealth Constitution s 24. There are currently 76 senators including two from each Territory. See further CONSTITUTIONAL LAW [\[90-25\]](#).
- 2 (CTH) [Commonwealth Electoral Act 1918](#) ss [6-28](#). As to the Australian Electoral Commission see PUBLIC ADMINISTRATION [\[345-1580\]](#), [\[345-1585\]](#). As to the electoral commissions of the States and Territories see PUBLIC ADMINISTRATION [\[345-1590\]](#)-[\[345-1625\]](#).
- 3 Ibid ss 66, 67.
- 4 See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ; [7 ALR 593](#); [BC7500067](#). Compare *McGinty v Western Australia* (1996) 186 CLR 140 ; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#).
- 5 *McGinty v Western Australia* (1996) 186 CLR 140  at 225, 226; [134 ALR 289](#) at [339-41](#); 70 ALJR 200; [BC9600206](#) per McHugh J held that the Constitution contains no implication affecting disparities of voting power among the holders of the franchise for the election of members of a state parliament. As to the State and Territory legislatures see PUBLIC ADMINISTRATION [\[345-1535\]](#)-[\[345-1575\]](#).

[80-1815] One vote one value

The paragraph below is current to **07 March 2018**

The number of electorates for each State is to be determined according to the population of each State and any fraction of an electorate that is greater than half results in another seat for that State.¹ The High Court of Australia (the 'High Court') held certain provisions of the (CTH) [Commonwealth Electoral Act 1918](#) (the 'Act') invalid because they allowed for any fraction over a quota of electorates for each State to permit establishment of another electorate. The High Court by majority expressed the view that the words 'directly chosen by the people'² did not require uniformity of voting values (one person one vote in equally sized electorates) and that the words allowed a wide margin, exceeding the 10 per cent allowed in the Act.³ However, a grossly disproportionate disparity may deny ultimate control by popular election.⁴

Notes

- 1 (CC) Commonwealth Constitution s 24.
- 2 Ibid s 24.
- 3 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ; [7 ALR 593](#); [BC7500067](#). On this point the only dissident was at (CLR) 66 per Murphy J who referred to the United States case of *Wesberry v Sanders* 376 US 1 (1964) at 7, 8 as a basis for insisting on strict equality in the populations of electorates.
- 4 See *McGinty v Western Australia* (1996) 186 CLR 140 ; [134 ALR 289](#) at [332](#) per Toohey J, at 338 per Gaudron J, at 389 per Gummow J; 70 ALJR 200; [BC9600206](#). See also *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 ; [202 ALR 233](#); [\[2003\] HCA 67](#); [BC200306764](#) (applied in *Glew v Governor of Western Australia* [\[2009\] WASCA 123](#) .

(D) Distribution of Electorates — Safeguards for Political Rights

[BC200906186](#) (the contention that (WA) [Constitution Act 1889](#) s 73(2)(g) required a referendum for the enactment of (WA) [Australia Acts \(Request\) Act 1985](#) and (CTH) [Australia Act 1986](#) had no legal merit). See also *Day v Australian Electoral Officer* (SA) [\(2016\) 331 ALR 386](#) ; 90 ALJR 639; [\[2016\] HCA 20](#); [BC201603455](#).

[80-1820] State electorates

The paragraph below is current to **07 March 2018**

State constitutions and electoral legislation provide for the establishment and review of electorates,¹ but there are no entrenched provisions as in the Commonwealth Constitution.² However, the New South Wales and South Australian redistribution systems provide for independent commissions and for a basic principle of one vote one value.³ In four States, there is legislation restricting variations in the size of electorates to 10 per cent either side of the mean,⁴ but in the Northern Territory, Queensland, Tasmania and Western Australia, higher variations are permitted, and in the Australian Capital Territory, the redistribution commissioner is to endeavour to ensure that the range either side of the mean is five per cent.⁵

In the upper houses in New South Wales and South Australia, the Legislative Councillors are elected at large for the State,⁶ but in Tasmania, Victoria and Western Australia, they are elected from a number of electoral divisions.⁷

Notes

- 1** As to the electoral commissions of the States and Territories see PUBLIC ADMINISTRATION [\[345-1590\]-\[345-1625\]](#). As to the distribution of State electorates see CONSTITUTIONAL LAW [\[90-625\]](#).
- 2** As to redistribution of electoral boundaries see PUBLIC ADMINISTRATION [\[345-1470\]-\[345-1480\]](#).
- 3** (NSW) Parliamentary Electorates and Elections Act 1912 ss 6, 13, 15(2), 17A(1)(a); (NSW) [Constitution Act 1902](#) ss 27, 28, 28A
(SA) [Constitution Act 1934](#) ss [77](#), [82](#).

See also *Martin v Electoral Districts Boundaries Commission* (2017) 127 SASR 362 ; [347 ALR 213](#); [\[2017\] SASCF 18](#); [BC201701427](#).
- 4** (NSW) [Constitution Act 1902](#) s 28; (NSW) Parliamentary Electorates and Elections Act 1912 s 17A(1)(a)
(SA) [Constitution Act 1934](#) s [77](#)
(VIC) [Electoral Boundaries Commission Act 1982](#) s [9\(2\)](#)
(QLD) [Electoral Act 1992](#) s [45](#).
- 5** (ACT) [Electoral Act 1992](#) ss [35](#), [36](#) (but the (CTH) [Australian Capital Territory \(Self-Government\) Act 1988](#) provides a maximum deviation of 10 per cent (ibid s 67D))
(CTH) [Northern Territory \(Self-Government\) Act 1978](#) s [13\(5\)](#) (each electoral division shall contain a number of electors not exceeding, or falling short of, the quota by more than one-fifth of the quota)
(TAS) [Constitution Act 1934](#) ss [18](#) (Legislative Council (the 15 single member electorates are defined in accordance with the processes set out in (TAS) Legislative Council Electoral Boundaries Act 1995)), [22](#) (House of Assembly, which uses the five electorates established for the Commonwealth House of Representatives, is constituted of 25 members). Under the (TAS) [Legislative Council Electoral Boundaries Act 1995](#) 13(2)(a), the Redistribution Committee has as a priority to ensure the number of electors enrolled in each Council division would not, 4 years and 6 months after the redistribution, be less than 90 per cent or more than 110 per cent of the average Council division enrolment.

(D) Distribution of Electorates — Safeguards for Political Rights

(WA) [Electoral Act 1907](#) ss [16B](#) (Electoral Distribution Commissioners), [16G](#) (basis for division of the State into districts), [16H](#) (basis for division of the State into regions), [16I](#) (matters to be considered in dividing the State into regions and districts), [16J](#) (power of Commissioners to modify boundaries of districts).

6 (NSW) [Constitution Act 1902](#) Sch 6 Pt 1 cl 1

(SA) [Constitution Act 1934](#) s [19](#).

As to the distribution of State electorates see CONSTITUTIONAL LAW [\[90-625\]](#).

7 (TAS) [Constitution Act 1934](#) s [18](#) (Legislative Council made up of 15 single member electorates as defined in accordance with the processes set out in (TAS) [Legislative Council Electoral Boundaries Act 1995](#))

(VIC) [Constitution Act 1975](#) s [27](#) (eight regions, 11 districts)

(WA) [Constitution Acts Amendment Act 1899](#) s [5](#).

End of Document

(E) Qualification for Election — Extent of Political Rights

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(E) QUALIFICATION FOR ELECTION — EXTENT OF POLITICAL RIGHTS

[80-1825] Members' qualifications

The paragraph below is current to **07 March 2018**

The qualifications for membership for both senators and federal members of the House of Representatives are to be the same.¹ To be elected, a member or senator must be 18 years or more, be an Australian citizen and an elector.²

The qualifications for members of State upper and lower houses are the same and are not materially different from those for the Commonwealth Parliament, but generally specify residential requirements.³

Notes

- ¹ (CC) Commonwealth Constitution s 16.
- ² Ibid s 34; (CTH) [Commonwealth Electoral Act 1918](#) s [163](#). See *Re Wood* (1988) 167 CLR 145 ; [78 ALR 257](#) (Wood was a British subject but not an Australian citizen, held not qualified to be elected). See also CONSTITUTIONAL LAW [\[90-430\]](#).
- ³ As to the membership qualifications of a member of the Parliament of the States and Territories see CONSTITUTIONAL LAW [\[90-640\]](#) (States), [\[90-905\]](#) (Territories).

[80-1830] Commonwealth members' disqualifications

The paragraph below is current to **07 March 2018**

The Constitution provides for five grounds of disqualification for members of, or candidates for election to, the Senate or the House of Representatives:¹

- (1) being a citizen of a foreign power;²

(E) Qualification for Election — Extent of Political Rights

- (2) being attainted of treason or under sentence for a crime involving imprisonment for 1 year or more;³
- (3) being an undischarged bankrupt;⁴
- (4) holding any office of profit under the Crown;⁵ or
- (5) having a direct or pecuniary interest in an agreement with the public service of the Commonwealth.⁶

In addition, a member of one house may not be chosen for a seat in the other.⁷ When there is a question as to the validity of an election, a member of the High Court of Australia is to constitute a Court of Disputed Returns.⁸

Notes

- 1 (CC) Commonwealth Constitution s 44.
- 2 Ibid s 44(i). See CONSTITUTIONAL LAW [\[90-445\]](#). See also *Re Wood* (1988) 167 CLR 145 ; [78 ALR 257](#); *Re Canavan* [\(2017\) 349 ALR 534](#) ; 91 ALJR 1209; [\[2017\] HCA 45](#); [BC201709006](#).
- 3 (CC) Commonwealth Constitution s 44(ii). See CONSTITUTIONAL LAW [\[90-450\]](#). See also *Re Culleton (No 2)* [\(2017\) 341 ALR 1](#) ; 91 ALJR 311; [\[2017\] HCA 4](#); [BC201700348](#).
- 4 Ibid s 44(iii). See CONSTITUTIONAL LAW [\[90-455\]](#).
- 5 Ibid s 44(iv). See CONSTITUTIONAL LAW [\[90-460\]](#).
- 6 Ibid s 44(v). See CONSTITUTIONAL LAW [\[90-465\]](#). See also *Re Webster* (1975) 132 CLR 270 ; [6 ALR 65](#); 49 ALJR 205; *Re Day (No 2)* [\(2017\) 343 ALR 181](#) ; 91 ALJR 518; [\[2017\] HCA 14](#); [BC201702531](#).
- 7 (CC) Commonwealth Constitution s 43. See CONSTITUTIONAL LAW [\[90-440\]](#).
- 8 (CTH) [Commonwealth Electoral Act 1918](#) s [354](#), Pt XXII. As to the courts of disputed returns see PUBLIC ADMINISTRATION [\[345-2095\]-\[345-2120\]](#).

[80-1835] State members' disqualifications

The paragraph below is current to **07 March 2018**

The disqualifications for State members of, or candidates for election to, either house of the Parliament are complex, but in essence are the same as for the Commonwealth.¹ There has on occasion been legislation by a State making special legislative alterations to the disqualification provisions in order to protect a sitting member² and there has also been some litigation relating to challenges to the eligibility of sitting members.³ There are procedures in each jurisdiction for the enforcement of the qualifications and disqualifications of members.⁴

Notes

(E) Qualification for Election — Extent of Political Rights

- 1 As to the criteria see CONSTITUTIONAL LAW [\[90-650\]-\[90-690\]](#).
- 2 See (QLD) Local Government Amendment Act (No 2) 1976 (repealed) s 3; (QLD) Crown Appointments Declaratory Act 1976 (repealed)
(VIC) Constitution (Validation of Elections) Act 1976 (repealed).
- 3 See, for example, *Re Walsh* [\[1971\] VR 33](#) .
- 4 See CONSTITUTIONAL LAW [\[90-695\]](#).

End of Document

(F) Access to Public Service Employment

Halsbury's Laws of Australia

Last updated: 07 March 2018

Justin Carter LLB(Hons) BIntBus BBusSt GradDipLegPrac

[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(F) ACCESS TO PUBLIC SERVICE EMPLOYMENT

[80-1840] Australian public service

The paragraph below is current to **07 March 2018**

The public services of the Commonwealth and each State and Territory¹ are in general open to any person, although permanent employment may be subject to conditions such as citizenship, formal qualifications, security and character clearances, and health clearances.² In all jurisdictions, appointments, transfers and promotions must be fair, made without discrimination on a number of specified grounds including race, sex, religion and political affiliation, and based on merit.³

The International Covenant on Civil and Political Rights' requirement is that all citizens should have access 'on general terms of equality' to the public service in their country.⁴ The human rights statutes in the Australian Capital Territory and Victoria have each adopted this provision among charter-listed rights.⁵

Notes

1 (CTH) [Public Service Act 1999](#) (composition of the Australian Public Service). See also:

(ACT) [Public Sector Management Act 1994](#)

(NT) [Public Sector Employment and Management Act 1993](#)

(NSW) [Government Sector Employment Act 2013](#)

(QLD) [Public Service Act 2008](#)

(SA) [Public Sector Act 2009](#)

(TAS) [State Service Act 2000](#)

(VIC) [Public Administration Act 2004](#)

(WA) [Public Sector Management Act 1994](#).

As to the Public Service see PUBLIC ADMINISTRATION [\[345-1\]-\[345-540\]](#).

(F) Access to Public Service Employment

- 2 See, for example, (CTH) [Public Service Act 1999](#) s [22\(6\)](#).

In New South Wales, conditions of engagement of a Public Service employee includes citizenship or residency requirements: (NSW) [Government Sector Employment Act 2013](#) s 54(2)(b).

See also:

(NT) [Public Sector Employment and Management Act 1993](#) s [31](#)

(QLD) [Public Service Act 2008](#) s [127](#).

There are some Commonwealth authorities which employ staff under the enabling provisions of their own legislation rather than under (CTH) [Public Service Act 1999](#). In such cases, there is normally no requirement for citizenship and the authority is able to select according to its own requirements. See, for example, (CTH) [Australian Postal Corporation Act 1989](#) ss [89](#), [90](#) (Australia Post as an employer). Other institutions do not have powers regulating employment of staff in their enabling legislation: see, for example, (CTH) [Telstra Corporation Act 1991](#).

- 3 See PUBLIC ADMINISTRATION [\[345-250\]](#).

- 4 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 25(c). As to *ibid* art 25 see [\[80-1740\]](#).

- 5 (ACT) [Human Rights Act 2004](#) s 17(c) (every citizen has the right and is to have the opportunity to have access, on general terms of equality, for appointment to the public service and public office)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [18\(2\)\(b\)](#) (every eligible person has the right and opportunity, without discrimination, to have access, on general terms of equality, to the Victorian public service and public office).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

End of Document

(G) Political Rights Relating to Local Government

Halsbury's Laws of Australia

Last updated: 07 March 2018

Justin Carter LLB(Hons) BIntBus BBusSt GradDipLegPrac

[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(1\) PARTICIPATION IN PUBLIC LIFE](#)

(G) POLITICAL RIGHTS RELATING TO LOCAL GOVERNMENT

[80-1845] Introduction

The paragraph below is current to **07 March 2018**

Local government is not constituted under the Commonwealth Constitution but under separate legislation in each of the States and the Northern Territory.¹ Local government is described separately because it is a system of government created and given authority by laws in each State and the Northern Territory. There is a basic similarity in the legal provisions in the various jurisdictions relating to voting rights,² the electoral system,³ the distribution of electorates⁴ and qualifications for election to office.⁵ However, the local government pattern differs in significant respects from the provisions outlined above for Commonwealth, State and Territory governments.⁶

Notes

- 1** As to local government see LOCAL GOVERNMENT [\[265-100\]-\[265-455\]](#). There is no local government in the Australian Capital Territory.
- 2** See [\[80-1850\]](#), [\[80-1855\]](#).
- 3** See [\[80-1860\]](#).
- 4** See [\[80-1865\]](#).
- 5** See [\[80-1870\]](#).
- 6** See [\[80-1745\]-\[80-1840\]](#).

[80-1850] Voting rights and qualifications for local government electors

The paragraph below is current to **07 March 2018**

In general, qualifications for electors for local government are the same as for Commonwealth and State legislatures¹ (residence, citizenship and age 18 or over). However, most jurisdictions add also the categories of property ownership and rental of rateable land.² In South Australia, Tasmania and Western Australia voting is not compulsory, but otherwise the pattern is the same as for Commonwealth, State

and Territory elections.³ In South Australia and Western Australia, there are courts of disputed returns to hear complaints about the validity of a local government election,⁴ but no special arrangements for disputed returns at elections are made in other jurisdictions.

Notes

- 1 See [\[80-1750\]](#). Victoria does not link entitlement to vote in local elections to broader electoral law provisions: (VIC) [Local Government Act 1989](#) s 11.
There is no local government in the Australian Capital Territory.
- 2 (NSW) [Local Government Act 1993](#) ss 266-270 (includes owners and lessees of rateable land and residents)
(QLD) [Local Government Electoral Act 2011](#) s 64 (no property requirements)
(SA) [Local Government \(Elections\) Act 1999](#) ss 14, 16 (includes a ratepayer and resident)
(TAS) [Local Government Act 1993](#) s 254 (includes owner or occupier of land)
(VIC) [Local Government Act 1989](#) ss 11, 12 (residents and ratepayers entitled to vote)
(WA) [Local Government Act 1995](#) ss 4.29-4.35 (includes owner and occupier of land if they have made an acceptable enrolment eligibility claim).
In the Northern Territory access to the electoral roll for an area or ward is on the same basis as access to a roll under the (NT) [Electoral Act 2004](#): (NT) [Local Government Act 2008](#) ss 87, 88; (NT) [Electoral Act 2004](#) s 21.
See further LOCAL GOVERNMENT [\[265-2030\]](#).
- 3 The compulsory provisions are:
(NT) [Local Government Act 2008](#) s 90
(NSW) [Local Government Act 1993](#) ss 286 (residential electors must vote, non-residential electors, occupiers and ratepaying lessee electors may vote), 312 (offence)
(QLD) [Local Government Electoral Act 2011](#) s 168
(VIC) [Local Government Act 1989](#) s 40.
As to compulsory voting generally see [\[80-1770\]](#).
- 4 (SA) [Local Government \(Elections\) Act 1999](#) Pt 13 (Disputed Returns) (district court judge: *ibid* s 67)
(WA) [Local Government Act 1995](#) Pt 4 Div 10 (magistrate: *ibid* s 4.81).

[80-1855] Disqualifications for electors

The paragraph below is current to **07 March 2018**

As the qualifications for electors in local government elections are primarily those for State elections, so the basic provisions for disqualification for local government elections are the same as for State electors.¹

Notes

- 1 Where the qualification is not that of electors for the State electoral role, the qualification is:
(TAS) [Local Government Act 1993](#) s 254(2) (a person not serving a term of imprisonment and not subject to an order under the (TAS) [Mental Health Act 2013](#) or an order under the (TAS) [Guardianship and Administration Act 1995](#))

(G) Political Rights Relating to Local Government

(VIC) [Local Government Act 1989](#) s 11 (ratepayer or resident).

As to qualifications for election in local government elections see [80-1850]. As to disqualifications for State elections see [\[80-1760\]](#).

There is no local government in the Australian Capital Territory.

See further LOCAL GOVERNMENT [\[265-2030\]](#).

[80-1860] Electoral system

The paragraph below is current to **07 March 2018**

Each jurisdiction sets a single date for local government elections, with the life for councils normally being 4 years but with Western Australia providing for two.¹ In some jurisdictions there is provision for rotational election of members to the council.²

Notes

- 1** (NT) [Local Government Act 2008](#) ss [38](#), [46](#), [84](#) (4 years)

(NSW) [Local Government Act 1993](#) s 287 (the second Saturday of September 2008 and on the second Saturday of September in every fourth year after 2008, with special provisions for delayed elections (ibid s 288) and elections of mayors (ibid ss 289, 290))

(QLD) [Local Government Electoral Act 2011](#) s 23(1)-(3)

(SA) [Local Government \(Elections\) Act 1999](#) s [5](#) (on the last business day before the second Saturday of November in 2006 and then the second Saturday of November every 4 years)

(TAS) [Local Government Act 1993](#) ss [44](#) (term of mayor and deputy mayor is 4 years), [46](#) (term of 4 years for councillors, some half term), [268A](#) (definition of 'closing day' — the last Tuesday in October in any uneven year or another day fixed by the Governor)

(VIC) [Local Government Act 1989](#) s 31 (the fourth Saturday of October 2012 and thereafter on the fourth Saturday in October in the fourth year after the last general election of Councillors for all Councils was held)

(WA) [Local Government Act 1995](#) ss [4.4](#), [4.5](#) (every 2 years), [4.6](#), [4.7](#) (ordinary elections on third Saturday in October every 2 years to elect councillors, every 4 years to elect mayor), [4.8](#) (provisions for extraordinary elections to fill vacancies in the intervening years).

There is no local government in the Australian Capital Territory.

See further LOCAL GOVERNMENT [\[265-2010\]](#)-[\[265-2025\]](#).

- 2** (TAS) [Local Government Act 1993](#) s [46](#) (4 year terms, 2 year rotational elections)

(WA) [Local Government Act 1995](#) s [4.5](#) (4 year terms, 2 year rotational elections with four yearly elections for mayor or president).

[80-1865] Determination of local government areas

The paragraph below is current to **07 March 2018**

Each State and the Northern Territory has separate schemes to determine electoral boundaries, usually by the Governor or Administrator acting on advice from either the Minister or relevant advisory board or

boundaries commission, or both. On occasion, the advice of such panels is a predicate to the exercise of executive power to adjust a boundary.¹

Notes

- 1** (NT) [Local Government Act 2008](#) s [9\(1\)\(g\)](#) (Administrator may determine boundaries of wards)
- (NSW) [Local Government Act 1993](#) ss 204 (Governor by proclamation determines boundaries), 210 (councils may divide area into divisions called wards and may alter boundaries), 212 (Governor may dissolve whole or part of an area), 218B (Governor by proclamation may alter the boundaries of one or more areas). Determination and alternation of boundaries by the Governor may only be exercised following procedure in *ibid* Ch 9 Pt 1 Div 2. A Local Government Boundaries Commission is also established: *ibid* Ch 9 Pt 3, Sch 2.
- (QLD) [Local Government Act 2009](#) ss [18-25](#) (changing a local government area, name or representation, role of the change commission). See also 'A New Local Government Electoral Act : Review of the Local Government Electoral System (excluding BCC), Report No 78, Nov 2010 at <http://www.qld.gov.au/>.
- (SA) [Local Government Act 1999](#) s [9](#) (constitution, amalgamation, altering, dividing, naming of councils by proclamation).
- (TAS) [Local Government Act 1993](#) ss [16\(1\)](#) (State divided into municipal areas), [16\(4\)](#) (Local Government Board may advise Minister on adjustments), [16\(5\)](#) (Governor may on recommendation of Minister adjust a boundary on recommendation of the Board), [17](#) (municipal area may be divided into electoral districts)
- (VIC) [Local Government Act 1989](#) ss 220A (establishing a local government panel), 220P (Minister not to recommend an order under s 220Q unless the Minister has established a local government panel to conduct a review of the matter, and considered its report), 220Q (Governor has power on recommendation of Minister to make order creating, adjusting or abolishing councils and municipal districts)
- (WA) [Local Government Act 1995](#) ss [2.1](#) (division of State into districts, Governor on recommendation by Minister may declare, change and abolish districts), [2.2](#) (districts may be divided into wards, Governor on recommendation by Minister may declare, change and abolish districts). There is also provision for creating and changing the boundaries and abolishing districts reviewed by the Local Government Advisory Board (see *ibid* ss 2.44, 2.45, Sch 2.5): *ibid* Sch 2.1.
- There is no local government in the Australian Capital Territory.
- See further LOCAL GOVERNMENT [\[265-145\]-\[265-190\]](#).

[80-1870] Qualifications for members of councils

The paragraph below is current to **07 March 2018**

Legislation provides that persons enrolled, or eligible to be enrolled, as electors in a local government area are eligible to stand for office.¹

Notes

- 1** (NT) [Local Government Act 2008](#) s [36](#)
- (NSW) [Local Government Act 1993](#) s 274
- (QLD) [Local Government Act 2009](#) s [152](#)
- (SA) [Local Government \(Elections\) Act 1999](#) s [17](#)

(G) Political Rights Relating to Local Government

(TAS) [Local Government Act 1993](#) s 270

(VIC) [Local Government Act 1989](#) s 28

(WA) [Local Government Act 1995](#) s 2.19.

There is no local government in the Australian Capital Territory.

As to disqualification from election see [80-1875]. See further LOCAL GOVERNMENT [\[265-515\]](#), [\[265-520\]](#).

[80-1875] Disqualifications for members of councils

The paragraph below is current to **07 March 2018**

The disqualifications for office are relatively standard, for example:¹

- (1) changing residence to a place outside the area;
- (2) the holding of judicial office;
- (3) being an employee of, or other holder of an office of profit from, the council;
- (4) being an undischarged bankrupt;
- (5) non-payment of council surcharges,
- (6) being a convicted offender;
- (7) being a member of an Australian Parliament;
- (8) being disqualified from election by court order; or
- (9) being of unsound mind.

Notes

¹ The exact details across jurisdictions vary, see:

(NT) [Local Government Act 2008](#) s 37

(NSW) [Local Government Act 1993](#) s 275

(QLD) [Local Government Act 2009](#) s 153 (no disqualification for judicial officers or non-payment of council surcharges)

(SA) [Local Government \(Elections\) Act 1999](#) s 17(3); (SA) [Local Government Act 1999](#) ss ss 55, 62(5)(d) (Court convicting a person against this section (concerning general duties of a member of council) can disqualify the person from becoming a member of a council), [267](#) (District Court can disqualify a person from council membership if satisfied that the grounds for complaint exist)

(TAS) [Local Government Act 1993](#) s 270 (no disqualification for judicial officers)

(VIC) [Local Government Act 1989](#) ss 28, 28A, 29, 30 (relief from disqualification by court order)

(WA) [Local Government Act 1995](#) ss 2.20-2.25 (no disqualification for judicial officers but for members of State or Federal Parliaments).

There is no local government in the Australian Capital Territory.

[80-1880] Access to local government employment

The paragraph below is current to **07 March 2018**

Each local authority is required by the State or Territory legislation to appoint a chief executive officer.¹ Power to appoint and dismiss staff is vested in the chief executive officer, although the local government may also retain such powers.² In several jurisdictions, the legislation requires that employment is based on merit and that there is no unfair discrimination.³ There is no unified local government service for any State or Territory, but employment awards achieve reasonable uniformity in terms and conditions of employment.⁴

Notes

1 (NT) [Local Government Act 2008](#) s [5\(2\)](#)

(NSW) [Local Government Act 1993](#) s 334(1) (general manager)

(QLD) [Local Government Act 2009](#) s [194](#) (chief executive officer)

(SA) [Local Government Act 1999](#) s [96](#) (chief executive officer)

(TAS) [Local Government Act 1993](#) s [61](#) (general manager)

(VIC) [Local Government Act 1989](#) s 94 (chief executive officer)

(WA) [Local Government Act 1995](#) s [5.36\(1\)](#) (chief executive officer).

As to the administration of local governments see LOCAL GOVERNMENT [\[265-1\]-\[265-3460\]](#).

There is no local government in the Australian Capital Territory.

2 (NT) [Local Government Act 2008](#) s 101(h)

(NSW) [Local Government Act 1993](#) s 335(2); see also *ibid* s 337 (Council to be consulted as to appointment and dismissal of senior staff)

(QLD) [Local Government Act 2009](#) s 196(3); but must consult with the councillors before appointing a senior executive employee: *ibid* s 196(4)

(SA) [Local Government Act 1999](#) s [103](#)

(TAS) [Local Government Act 1993](#) s [63\(1\)](#)

(VIC) [Local Government Act 1989](#) s 94A(2), 94A(3)

(WA) [Local Government Act 1995](#) ss [5.41](#) (subject to local government's roles with respect to senior employees under *ibid* s 5.37(2)).

3 (NT) [Local Government Act 2008](#) s [104](#)

(NSW) [Local Government Act 1993](#) s 345(2) (implementation of equal employment opportunity management plan)

(QLD) [Local Government Act 2009](#) s 13(3) (management practices)

(SA) [Local Government Act 1999](#) s [107\(2\)\(a\)](#), [107\(2\)\(g\)](#), [107\(2\)\(h\)](#)

(TAS) [Local Government Act 1993](#) s [63\(2\)](#)

(VIC) [Local Government Act 1989](#) s 96, Sch 6 (equal employment opportunity)

(WA) [Local Government Act 1995](#) s 5.40(a), 5.40(d).

- ⁴ As to award terms and conditions see INDUSTRIAL LAW [\[230-1\]](#).

[80-1885] Meetings of councils

The paragraph below is current to **07 March 2018**

In most jurisdictions, legislation requires that meetings of councils are reasonably frequent with the exception of Tasmania and Victoria.¹ All the legislation contains provisions relating to the holding of meetings in public, with prescribed reasons for closing meetings, for instance when discussion is of matters relating to contracts, commercial information or litigation.²

Notes

- ¹ (NT) [Local Government Act 2008](#) s [58\(1\)](#) (once in each successive period of 2 months)
(NSW) [Local Government Act 1993](#) s 365 (10 times per year in a different month)
(QLD) [Local Government Regulation 2012](#) reg 257 (at least once a month)
(SA) [Local Government Act 1999](#) s [81\(2\)](#) (at least once a month)
(TAS) [Local Government Act 1993](#) s [60F](#) (no number specified)
(VIC) [Local Government Act 1989](#) s 83 (no number specified)
(WA) [Local Government Act 1995](#) s [5.3\(2\)](#) (not more than 3 months apart).
There is no local government in the Australian Capital Territory.
- ² (NT) [Local Government Act 2008](#) s [65](#) (meetings to be open to the public)
(NSW) [Local Government Act 1993](#) ss 9, 10
(QLD) [Local Government Act 2009](#) s [84](#) (meetings about trust land generally open to the public). For other meetings note (QLD) [Local Government Regulation 2012](#) reg 260(2)(a) (voting must be open)
(SA) [Local Government Act 1999](#) s [90](#)
(TAS) [Local Government Act 1993](#) s [60F](#)
(VIC) [Local Government Act 1989](#) s 89
(WA) [Local Government Act 1995](#) s [5.23](#).

[80-1887] Right to public participation

The paragraph below is current to **07 March 2018**

The international obligation to provide every citizen with the opportunity to ‘take part in the conduct of public affairs’, although undefined, is a broad concept which relates to the exercise of legislative, executive and administrative power,¹ and thus to the right to public participation in the workings of government. This has been expanded upon most notably in the area of environmental rights, both internationally² and domestically.³ It potentially includes rights to access information in the public interest,⁴ the right to participate in decision-making processes (for example, the making of environmental plans or decisions about development applications),⁵ and the right to challenge, in a court of law, public

decisions, which might entail broad standing provisions.⁶ It has also received new emphasis in recent freedom of information reforms.⁷

Notes

- 1 See, for example, United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [5] available at <http://www.ohchr.org>.
- 2 See, for example, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, prepared at Aarhus, Denmark, on 25 June 1998. The Convention, which came into effect on 30 October 2001, provides for:
 - (1) The right of everyone to receive environmental information that is held by public authorities (ibid art 4). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment (ibid art 5). Citizens are entitled to obtain this information within 1 month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession.
 - (2) The right to participate from an early stage in environmental decision-making (ibid arts 6-8). Arrangements are to be made by public authorities to enable citizens and environmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programs relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it.
 - (3) The right to challenge, in a court of law, public decisions that have been made without respecting the two aforementioned rights or environmental law in general (ibid art 9).
- 3 For instance, the right to public participation appears as an object in many planning and environmental statutes. See:
 - (CTH) [Environment Protection and Biodiversity Conservation Act 1999](#) s 3(1)(d), 3(1)(e)
 - (ACT) [Environment Protection Act 1997](#) s 3D(1)(a)
 - (NT) [Environmental Assessment Act 1982](#) s 4(d)
 - (NSW) [Environmental Planning and Assessment Act 1979](#) s 5(c); (NSW) [Protection of the Environment Operations Act 1997](#) s 3(b)
 - (QLD) [Environmental Protection Act 1994](#) s 6
 - (SA) [Development Act 1993](#) s 3
 - (TAS) [Environmental Management and Pollution Control Act 1994](#) Sch 1 Pt 1 para 1(c)
 - (VIC) [Planning and Environment Act 1987](#) s 4(2)(h)
 - (WA) [Environmental Protection Act 1986](#) s 4A(2).
- 4 See ADMINISTRATIVE LAW [\[10-1000\]-\[10-1965\]](#).
- 5 See LOCAL GOVERNMENT [\[265-5000\]-\[265-5190\]](#).
- 6 See, for example, the broadening of standing provisions under state and federal legislation with respect to certain types of administrative decisions: ADMINISTRATIVE LAW [\[10-1300\]-\[10-1655\]](#).
- 7 (CTH) [Freedom of Information Amendment \(Reform\) Act 2010](#) amending (CTH) [Freedom of Information Act 1982](#) s 3 (objects) to explain the underlying rationale of the reformed legislation which is concerned with strengthening Australia's representative democracy through increasing participation in government processes and increasing the accountability of government.

[80-1890] Aborigines and Torres Strait Islander representation and participation

The paragraph below is current to **07 March 2018**

The abolition of the Aboriginal and Torres Strait Islander Commission (the 'ATSIC') in 2005 brought to an end the system of separate elected national representation for Indigenous people.¹ Although the Preamble to the (CTH) [Aboriginal and Torres Strait Islander Act 2005](#) recognises the appropriateness of establishing structures to represent Aboriginal persons and Torres Strait Islanders to ensure their maximum participation 'in the formulation and implementation of government policies that affect them',² the legislation provides no direct mechanisms for Indigenous representative structures other than establishing the elected Torres Strait Regional Authority.³ At a policy level, the Federal Government is advised by a National Indigenous Council, and promotes Regional Partnership Agreements and in particular Shared Partnership Agreements. These have resulted in numerous agreements for the funding of regional representative bodies. The Federal Government intends to create new regional representative arrangements in each of the 35 regions formerly covered by ATSIC Regional Councils,⁴ a plan which has the endorsement of all State and Territory governments. The Council of Australian Governments (the 'COAG') has been responsible for various Indigenous-specific National Partnership Agreements to guide Indigenous reform.⁵

Some States, such as Queensland, retain regimes for Indigenous representation and self-governance through community justice groups which have powers to address justice issues affecting members in their community.⁶ Land councils and bodies set up under native title and land rights legislation may similarly provide forums for representation, although the manner by which persons attain positions on such bodies varies widely.⁷

Legislation regulating land and water management frequently provides for explicit Indigenous input in decision-making processes, often through mandated membership on administrative committees.⁸ There are also several national parks that are run jointly with traditional owners.⁹

Despite some inquiries into Indigenous representation in parliaments,¹⁰ no jurisdiction has legislated to set aside seats for Indigenous representatives.

Notes

- 1 (CTH) [Aboriginal and Torres Strait Islander Commission Amendment Act 2005](#) received Royal Assent and was proclaimed with effect from 24 March 2005, and provided that ATSIC Regional Councils would cease on 30 June 2005.
- 2 (CTH) [Aboriginal and Torres Strait Islander Act 2005](#) Preamble, s 3(a) (object).
- 3 Ibid Pt 3A (Torres Strait Regional Authority).
- 4 For details of Regional Partnership Agreements and Shared Responsibility Agreements see website of the Agreements, Treaties and Negotiated Settlements (ATNS) project (<http://www.atns.net.au>).
- 5 As to COAG see <http://www.coag.gov.au>.
- 6 (QLD) [Aboriginal and Torres Strait Islander Communities \(Justice, Land and Other Matters\) Act 1984](#) ss 18-22.
For aboriginal representation at the State level, see ABORIGINES AND TORRES STRAIT ISLANDERS [\[5-4645\]](#).
- 7 For example, under (TAS) [Aboriginal Lands Act 1995](#), an 'aboriginal person' resident in an electoral area is entitled to be on the Aboriginal Land Council of Tasmania Electors Roll: ibid ss 8, 9. The definition of 'aboriginal person' was amended in 2005 so as to establish a 'three-part' test of Aboriginality: ibid s 3A. Native Title legislation provides for the

(G) Political Rights Relating to Local Government

establishment of native title representative bodies and native title prescribed bodies corporate. See ABORIGINALS AND TORRES STRAIT ISLANDERS [\[5-5045\]](#) for the legislation in each jurisdiction.

- 8 See [\[80-1535\]](#).
- 9 For example, Uluru and Kakadu national parks are jointly administered through a lease arrangement, and relevant provisions of the (CTH) [Environment Protection and Biodiversity Conservation Act 1999](#). See *ibid* Pt 15 Div 4, especially *ibid* ss 359A, 363-390A; and note the objects in *ibid* ss 3(1)(d), 3(1)(f), 3(2)(g)(iii).
- 10 See, for example, New South Wales Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales Parliament*, Report No 18, November 1998, available at <https://www.parliament.nsw.gov.au>; and Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland, *Hands On Parliament: A Parliamentary Committee Inquiry into Aboriginal and Torres Strait Islander Peoples' Participation in Queensland's Democratic Processes*, Report No 42, September 2003, Recommendation 24 on 'Dedicated Seats', at p 68 available at <http://www.parliament.qld.gov.au>.

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(A) Freedom of Expression as a Right

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > (2)
FREEDOM OF EXPRESSION

(2) FREEDOM OF EXPRESSION

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(A) FREEDOM OF EXPRESSION AS A RIGHT

(i) Introduction

[80-1945] Right in Australian law

The paragraph below is current to **07 March 2018**

Freedom of expression is among the rights and freedoms listed in the Australian Capital Territory and Victorian human rights charters.¹ At common law, freedom of expression, which includes speech, is a negative right or freedom in that it exists only where there is no legal restriction.² The many restrictions on freedom of expression which arise from both common law and legislation may be regarded as implying the existence of a right to both freedom of speech and freedom of action.³

There is no constitutionally recognised right to freedom of expression.⁴ However, there is an implied guarantee in the Commonwealth Constitution of freedom of communication, at least in relation to public and political discussion.⁵ This implied constitutional guarantee may also include as corollaries implied freedoms of movement and association.⁶ Under the implied guarantee, laws burdening communication are valid if they satisfy a two-pronged test:⁷

- (1) does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?; and
- (2) is the law reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with representative and responsible government?

(A) Freedom of Expression as a Right

In order to be valid under the second limb of the test, both the purpose of the law and the means adopted to fulfilling it must be compatible with the constitutionally prescribed system of representative and responsible government.⁸ Determining whether the law is reasonably appropriate and adapted to serving the legitimate end involves a three stage enquiry:⁹

(1) does the law have a rational connection to the purpose of the provision?;

(2) is the law necessary, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom?; and

(3) is the law adequate in its balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom?.

The High Court of Australia, as the highest court of appeal, has reinterpreted common law rules (especially with regard to defamation) so that they conform to the requirements of this implied freedom.¹⁰ The constitutional freedom extends to public discussion of the performance, conduct and fitness for office of members of State Parliaments,¹¹ but does not include public discussion of the judiciary,¹² nor public discussion about (or through) the electoral process.¹³ It prevents the Commonwealth legislating to create an offence of bringing a member of the Industrial Relations Commission into disrepute otherwise than in relation to the performance of the duties of the Commission,¹⁴ but it does not prevent the Commonwealth creating a legislative scheme restricting the giving of immigration assistance generally to those agents registered as migration agents.¹⁵ It also does not prevent states legislating to regulate the making of political donations if the regulation bears a rational connection to the purpose of preventing corruption.¹⁶

Provisions relating to free flow of information and protection of whistleblowers are designed to facilitate certain aspects of freedom of communication.¹⁷

Important statutory limits to the freedom of expression are found in the provisions relating to racial hatred, religious and racial vilification, and homosexual vilification.¹⁸

Notes

1 (ACT) [Human Rights Act 2004](#) s [16](#). See also *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32 ; 231 FLR 399; [\[2009\] ACTSC 117](#); [BC200908369](#) (no inconsistency with (ACT) [Human Rights Act 2004](#) s [16](#) to place limits on professional conduct compatible with a solicitor's duties).

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [15](#). See also *X v General Television Corp Pty Ltd* (2008) 187 A Crim R 533 ; [\[2008\] VSC 344](#); [BC200808361](#) (broadcast in contempt of court not inconsistent with (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [15](#)).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

2 *James v Commonwealth* (1936) 55 CLR 1 ; [\[1936\] AC 578](#) ; [\[1936\] 2 All ER 1449](#); [1936] ALR 333 per Lord Wright, PC ('Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law ...'). See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479  at 479; 38 SR (NSW) 33; [1937] ALR 597; (1937) 11 ALJ 197 per Latham CJ. See also *Evans v New South Wales* (2008) 168 FCR 576 ; [104 ALD 234](#); [\[2008\] FCAFC 130](#);

(A) Freedom of Expression as a Right

[BC200806500](#) at [\[78\]](#) per Branson, French and Stone JJ (the Court declared invalid restrictions in (NSW) World Youth Day Act 2006 and ancillary regulation on conduct which caused annoyance to World Youth Day attendees: ('freedom of expression in Australia is a powerful consideration favouring restraint in the construction of a broad statutory power when the terms in which that power is conferred so allow'), (following *Davis v Commonwealth* (1988) 166 CLR 79 ; [82 ALR 633](#); 63 ALJR 35; [BC8802637](#) (in which restrictions on certain expressions under (CTH) Australian Bicentennial Authority Act 1980 (repealed) were considered).

- 3 As to generally applicable restrictions on freedom of expression see [\[80-1975\]-\[80-2030\]](#). As to restrictions specifically applicable to the media see [\[80-2035\]-\[80-2070\]](#). For restrictions on particular activities see [\[80-2075\]](#), [\[80-2080\]](#). The right of freedom of expression is not absolute: *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57 ; [229 ALR 457](#); [2006] HCA 46; [BC200607692](#) at [\[114\]](#), [\[115\]](#) per Kirby J ('The competing values in Australia extend to protecting individuals against gross humiliation, irreparable damage, public and gratuitous harm and other like wrongs. In every case, the court from which relief is sought must weigh the competing interests at stake. It will do so knowing that sometimes media power is abused and, when this happens, that courts are often the only institutions in society with the authority and the will to protect the individual from such abuse of power').
- 4 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 133 per Mason CJ, at 149 per Brennan J, at 182, 183 per Dawson J; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#) (applied *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104  at 127, 128; [124 ALR 1](#); 68 ALJR 713; (1994) Aust Torts Reports ¶181-297 per Mason CJ, Toohey and Gaudron JJ).
- 5 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104  at 163; [124 ALR 1](#); 68 ALJR 713; (1994) Aust Torts Reports ¶181-297. See also *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520  at 559; [145 ALR 96](#) at [106](#), [115](#); 71 ALJR 818; [BC9702860](#) per the court, HC of A, Full Court (describing the freedom of communication on matters of government and politics as 'an indispensable incident' of the system of representative government) (followed in *Roach v Electoral Cmr* (2007) 233 CLR 162 ; [239 ALR 1](#); [2007] HCA 43; [BC200708182](#) at [\[85\]](#) per Gummow, Kirby and Crennan JJ (legislative voting disqualification of prisoners will be for a 'substantial' reason if reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government); *Haque v Cmr of Corrective Services (NSW)* (2008) 216 FLR 271 ; [\[2008\] NSWSC 253](#); [BC200802021](#) at [\[68\]](#) per Fullerton J (the implied freedom under the Commonwealth Constitution is a freedom from laws which effectively prevent communications about government and political matters, not a freedom to communicate at large nor does it create a right to require others to provide a means of communication); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 138, 140 per Mason CJ, at 149 per Brennan J, at 168, 169, 174 per Deane and Toohey JJ, at 211, 212, 214 per Gaudron J, at 227 per McHugh J; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 94, 95; [108 ALR 681](#) at [740](#), [741](#); 66 ALJR 658; [BC9202684](#) per Deane J; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ; [124 ALR 80](#); 68 ALJR 765; [BC9404651](#). Note, this implied freedom extends to non-verbal messages: *Levy v Victoria* (1997) 189 CLR 579 ; [146 ALR 248](#); 71 ALJR 837; [BC9703254](#) per Brennan CJ, McHugh, Kirby, Toohey and Gummow JJ. Note also that this implied freedom may only protect pre-existing common law rights: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181  at 223 per McHugh J, at 298 per Callinan J, at 303 per Heydon J (compare the implied dissent on this point at 267 per Kirby J); [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#). For more on the nature and scope of the implied right of freedom of expression in relation to public affairs and political discussion see DEFAMATION [\[145-5\]](#), [\[145-1550\]](#), CONSTITUTIONAL LAW [\[90-2047\]](#).
- 6 *Kruger v Commonwealth* (1997) 190 CLR 1  at 115, 116 per Gaudron J (for freedom of association), at 91 per Toohey J; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181  at 225 per McHugh J, at 234 per Gummow and Hayne JJ, at 277 per Kirby J; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#).
- 7 The test was first stated in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520  at 567 per the court; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) and the second limb was modified in *Coleman v Power* (2004) 220 CLR 1  at 50 per McHugh J (with whom Gleeson CJ, Gummow, Hayne and Kirby JJ agreed); [209 ALR 182](#); [\[2004\] HCA 39](#); [BC200405576](#). On application of the second limb see *New South Wales Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 ; [241 ALR 564](#); [\[2007\] FCA 896](#); [BC200704522](#) at [\[207\]](#) per Edmonds J (obiter) (supporting the National Classification Code under the second limb of the test in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 ; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#)); *McClure v Mayor and Councillors of the City of Stirling (No 2)* [\[2008\] WASC 286](#) ; [BC200810884](#); *Gibson v Cmr of Police* [\[2007\] NSWCA 251](#) ; [BC200707908](#) at [\[12\]](#) Beazley, Giles and Ipp JJA (power to exclude and remove those on an 'excluded persons list' from designated areas during APEC conference did not have a disproportionate effect on any burden of

(A) Freedom of Expression as a Right

- communication, noting the formulation in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 ; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) of reasonably appropriate and adapted legislation was equated with proportionality); *Windridge Farm Pty Ltd v Grassi* (2010) 238 FLR 289 ; [\[2010\] NSWSC 335](#); [BC201002420](#) at [\[54\]](#) per Latham J (injunctive proceedings arising out entry onto piggery without consent to obtain photographic evidence of failure to comply with appropriate standards for the maintenance and care of the animals, noted that dissenting comments in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 281-82; [185 ALR 1](#); [\[2001\] HCA 63](#); [BC200107043](#) per Kirby J on the application of the implied freedom of political communication to matters pertaining to animal welfare were confined to the facts of the particular case). Note, the courts have taken a restrictive view of what constitutes 'political' matters: *Brown v Classification Review Board* (1998) 82 FCR 225 ; [154 ALR 67](#) at [87](#), [88](#) per Heerey J, at 98 per Sundberg J; [BC9801120](#) (advocacy of lawbreaking not political); *Coleman v Power* (2004) 220 CLR 1  at 78 per Gummow and Hayne JJ, at 24 per Gleeson CJ, at 126 per Heydon J (fighting or insulting words not political); [209 ALR 182](#); [\[2004\] HCA 39](#); [BC200405576](#). On the need for caution when applying authorities such as *Coleman v Power*, above and consideration of individual circumstances: see *Ferguson v Walkley* (2008) 17 VR [647](#) ; 180 A Crim R 294; [\[2008\] VSC 7](#); [BC200800210](#) at [\[19\]](#) per Harper J (conviction on a charge of using insulting words in a public place upheld). An expanded, three-part test was set out in *McCloy v New South Wales* (2015) 325 ALR 15 ; 89 ALJR 857; [\[2015\] HCA 34](#); [BC201509677](#) at [\[2\]](#) per French CJ, Kiefel, Bell and Keane JJ, but did not expressly override the Lange test. Instead the three questions were said to reflect 'those propounded in Lange as modified in Coleman'. See also *Brown v Tasmania* (2017) 349 ALR 398 ; 91 ALJR 1089; [\[2017\] HCA 43](#); [BC201708656](#) at [\[104\]](#) per Kiefel CJ, Bell and Keane JJ (the High Court clarified the exposition by the plurality in *McCloy*. In *Brown*, the High Court struck down impugned provisions of the (TAS) *Workplaces (Protection from Protesters) Act 2014* as invalid for impermissibly burdening the implied freedom).
- 8 *McCloy v New South Wales* (2015) 325 ALR 15 ; 89 ALJR 857; [\[2015\] HCA 34](#); [BC201509677](#) at [\[2\]](#) per French CJ, Kiefel, Bell and Keane JJ.
- 9 See also *Unions New South Wales v New South Wales* (2013) 252 CLR 530 ; [304 ALR 266](#); [\[2013\] HCA 58](#); [BC201315812](#) at [\[55\]](#)–[\[56\]](#) per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
- 10 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 ; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) (an expanded defence of qualified privilege was created). Note that this role as the highest court of appeal may also apply to the rules of equity that conflict with the implied freedom: *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199  at 285 per Kirby J; [185 ALR 1](#); [\[2001\] HCA 63](#); [BC200107043](#). In contrast, as statutes are passed by Parliament, the High Court of Australia declares them unconstitutional if they conflict with the implied freedom: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#).
- 11 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ; [124 ALR 80](#); 68 ALJR 765; [BC9404651](#). See also *Lamont v Dwyer* [\[2008\] ACTSC 125](#) ; [BC200810203](#); *Hanna v Sibbons* (2010) 108 SASR 182 ; 272 LSJS 384; [\[2010\] SASC 291](#); [BC201007659](#) (unsuccessful parliamentary candidate challenged validity of election and claimed electoral leaflets were defamatory; imputations met by the defences of common law and statutory qualified privilege, honest opinion, and fair comment).
- 12 *APLA Ltd v Legal Services Cmr (NSW)* (2005) 224 CLR 322 ; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. See also *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694  at 709 per Spiegelman CJ; 158 FLR 81; [\[2000\] NSWCA 198](#); [BC200004288](#); *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1  at 10 per Winnecke ACJ, at 103 per Warren AJA; [\[2003\] VSCA 161](#); [BC200307044](#); *Conservation Council of SA Inc v Chapman* (2003) 87 SASR 62  per Doyle CJ and Besanko J; [\[2003\] SASC 398](#); [BC200307694](#); *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Tort Reports ¶181-789 ; [\[2005\] NSWCA 164](#); [BC200503139](#) per Giles JA.
- 13 *Langer v Commonwealth* (1996) 186 CLR 302 ; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#); *Muldowney v South Australia* (1996) 186 CLR 352 ; [136 ALR 18](#); 70 ALJR 515; [BC9601352](#) (public discussion of the electoral system); *McClure v Australian Electoral Commission* (1999) 163 ALR 734 ; 73 ALJR 1086; [\[1999\] HCA 31](#); [BC9903413](#); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#) (political expression through the electoral system).

(A) Freedom of Expression as a Right

- 14** *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ; [108 ALR 681](#); 66 ALJR 658; [BC9202684](#); *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 ; [344 ALR 317](#); [\[2017\] FCAFC 41](#); [BC201701359](#) (offences by Australian defence force personnel).
- 15** *Cunliffe v Commonwealth* (1994) 182 CLR 272 ; [124 ALR 120](#); 68 ALJR 791; [BC9404648](#).
- 16** *Unions New South Wales v New South Wales* (2013) 252 CLR 530 ; [304 ALR 266](#); [\[2013\] HCA 58](#); [BC201315812](#).
- 17** As to the free flow of information see [80-1955], [80-1960]. As to whistleblowers legislation see [80-1965], [80-1970].
- 18** As to vilification generally see [\[80-695\]-\[80-710\]](#). As to racial harassment see [\[80-685\]](#), [\[80-700\]](#), [\[80-705\]](#). As to sexual harassment see [\[80-655\]](#), [\[80-670\]](#). As to racial vilification or denigration see [\[80-700\]](#), [\[80-705\]](#). As to for homosexual vilification see [\[80-710\]](#).

[80-1950] Rights in international law

The paragraph below is current to **07 March 2018**

The International Covenant on Civil and Political Rights (the 'ICCPR') provides for both freedom of thought, conscience and religion¹ and freedom of opinion and expression.² The ICCPR also defines permissible limitations to each, and as a further restraint, includes a prohibition on hate speech.³ The ICCPR also allows for a limited range of restrictions on the right in relation to:⁴

- (1) the rights and reputation of others (which would include privacy);
- (2) national security; and
- (3) public health and morals.

Australian restrictions on the right to freedom of expression may be categorised as restrictions applying:

- (1) generally;⁵
- (2) to the broadcasting media;⁶
- (3) to the print media;⁷
- (4) to all media;⁸ and
- (5) to the activities of particular individuals or groups.⁹

Notes

- 1** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 18 (the 'ICCPR'). See also (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 9; (US) American Convention on Human Rights (San Jose, 22 Nov 1969; OAS TS No 36; 1144 UNTS 144; 9 ILM 673 (1970)) arts 12, 13; (INT) African Charter on

(A) Freedom of Expression as a Right

Human and Peoples' Rights (Banjul, 26 June 1981; OAU Doc CAB/LEG/67/3 Rev 5, 1981; 21 ILM 59 (1982)) art 9. As to freedom of thought, conscience and religion generally see [\[80-1445\]-\[80-1535\]](#).

2 Article 19 of the ICCPR provides that:

- (1) 'Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.
- (3) The exercise of the rights provided for in (2) above carries with it special duties and responsibilities, and it may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary
 - (a) for respect of the rights and reputations of others, or
 - (b) for the protection of national security, public health or morals.'

For interpretation see *Laptsevich v Belarus* Communication No 780/1997, UN Doc ICCPR/55/40 Vol II (20 March 2000); *Ross v Canada* Communication No 736/1997, UN Doc ICCPR/56/40 Vol II (18 October 2000); *Kang v Republic of Korea* Communication No 878/1999, UN Doc ICCPR A/58/40 Vol II (15 July 2003) and United Nations Human Rights Committee, *CCPR General Comment No 10 (Art 19)*, UN Doc HRI\GEN\1\Rev1 (1994) at [11] to be replaced by United Nations Human Rights Committee, Draft of the *CCPR General Comment No 34: Freedoms of opinion and expression (Art 19)*, One Hundred and Second Session of the Human Rights Committee, 11-29 July 2011. See also *Coleman v Australia*, Communication No 1157/2003, CCPR/C/87/D/1157/2003 (2006) art 19(2) in the arrest, conviction and sentence of the author for making a public address in a mall without a permit on issues of public interest in a manner that was not threatening, unduly disruptive or otherwise likely to jeopardise public order (ibid art 7(3)); *The Observer and the Guardian v United Kingdom* [1991] ECHR 49 (26 November 1991) for the European Court of Human Rights' interpretation of (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 9.

3 Ibid art 20 (any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law). For interpretation by the United Nations Human Rights Committee see United Nations Human Rights Committee, *CCPR General Comment No 10 (Art 19)*, UN Doc HRI\GEN\1\Rev1 (1994) at [11] to be replaced by United Nations Human Rights Committee, Draft of the *CCPR General Comment No 34: Freedoms of opinion and expression (Art 19)*, One Hundred and Second Session, 11-29 July 2011.

See *Faurisson v France* Communication No 550/1993, ICCPR A/52/40 Vol II (1996); *Zundel v Canada* Communication No 953/2000, ICCPR A/58/40 Vol II (2003) and United Nations Human Rights Committee, *CCPR General Comment No 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art 20)*, adopted at the Nineteenth Session, 29 July 1983.

4 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') art 19(3). See *Haque v Cmr of Corrective Services (NSW)* (2008) 216 FLR 271 ; [\[2008\] NSWSC 253](#); [BC200802021](#) at [\[36\]](#), [\[63\]](#) per Fullerton J ((INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) ('ICCPR') art 19(3) considered in the context of a refusal of permission to distribute newsletter to correctional centres).

5 See [\[80-1975\]-\[80-2030\]](#).

6 See [\[80-2035\]-\[80-2055\]](#).

7 See [\[80-2035\]](#), [\[80-2060\]](#).

8 See [\[80-2035\]](#), [\[80-2065\]](#), [\[80-2070\]](#).

9 See [\[80-2075\]](#), [\[80-2080\]](#).

(II) Free Flow of Information

[80-1955] Freedom of information legislation

The paragraph below is current to **07 March 2018**

There is freedom of information legislation in all jurisdictions.¹ The legislation is designed to provide access to information in the possession of the government² and to create a right in the public to such access.³ Many exemptions or exceptions are provided in the legislation, and other statutory provisions containing restrictions on the release of information are not overridden.⁴ There are also provisions that allow for compulsory collection of information⁵ but, in the Commonwealth jurisdiction, restrictions exist on the use of that information between different arms of the executive government.⁶ At Commonwealth level recent reforms apply a stronger public interest test to withholding access, which is deliberately weighted towards disclosure, as part of a new regime for providing access to government information and promoting a culture of disclosure across government.⁷

Notes

- 1** (CTH) [Freedom of Information Act 1982](#)
(ACT) [Freedom of Information Act 2016](#)
(NT) [Information Act 2002](#)
(NSW) [Government Information \(Public Access\) Act 2009](#)
(QLD) [Right to Information Act 2009](#)
(SA) [Freedom of Information Act 1991](#)
(TAS) [Right to Information Act 2009](#)
(VIC) [Freedom of Information Act 1982](#)
(WA) [Freedom of Information Act 1992](#).
- 2** (CTH) [Freedom of Information Act 1982](#) s [3\(1\)](#)
(ACT) [Freedom of Information Act 2016](#) s 6(a)
(NT) [Information Act 2002](#) s [3\(1\)](#)
(NSW) [Government Information \(Public Access\) Act 2009](#) s 3
(QLD) [Right to Information Act 2009](#) s 3
(SA) [Freedom of Information Act 1991](#) s [3\(1\)](#)
(TAS) [Right to Information Act 2009](#) s 3
(VIC) [Freedom of Information Act 1982](#) s 3(1)
(WA) [Freedom of Information Act 1992](#) s [3\(2\)](#).
As to freedom of information legislation see further ADMINISTRATIVE LAW [\[10-1000\]-\[10-1965\]](#).
- 3** (CTH) [Freedom of Information Act 1982](#) s [11\(1\)](#)
(ACT) [Freedom of Information Act 2016](#) s 7
(NT) [Information Act 2002](#) ss [15](#), [16](#)
(NSW) [Government Information \(Public Access\) Act 2009](#) Pt 2 Div 1
(QLD) [Right to Information Act 2009](#) ss [24-29](#)
(SA) [Freedom of Information Act 1991](#) s [12](#)
(TAS) [Right to Information Act 2009](#) s 7

(A) Freedom of Expression as a Right

(VIC) [Freedom of Information Act 1982](#) s 13

(WA) [Freedom of Information Act 1992](#) s 10.

- 4 See *Fisse v Secretary, Dept of the Treasury* (2008) 172 FCR 513; (2008) 109 ALD 1; [2008] FCAFC 188; BC200811020 (unsuccessful FOI application for access to working party report and executive summary; (CTH) [Freedom of Information Act 1982](#) s 34 (cabinet submission exemption)). This should now be viewed in light of changes to ibid s 34 introduced by (CTH) [Freedom of Information Amendment \(Reform\) Act 2010](#) widening access to government information. See also *Osland v Secretary, Dept of Justice (No 2)* (2010) 241 CLR 320; 116 ALD 1; [2010] HCA 24; BC201004221 at [14] per French CJ, Gummow and Bell JJ (high threshold public interest test) (followed in *Knight v Corrections Victoria* [2010] VSC 338; BC201005594 at [23]-[30] per Bell J (FOI request by prisoner made to prepare parole application, the public interest override in (VIC) [Freedom of Information Act 1982](#) s 50 given extensive discussion). See also (CTH) [Crimes Act 1914](#) s 79 (offence for a Commonwealth officer to divulge information obtained in the course of duty to a person not authorised to receive it). For an example of the expansive interpretation given to these exceptions see *McKinnon v Secretary, Dept of the Treasury* (2006) 229 ALR 187; 80 ALJR 1549; [2006] HCA 45; BC200606901.
- 5 See, for example, (CTH) [Income Tax Assessment Act 1936](#); (CTH) [Census and Statistics Act 1905](#); (CTH) [Migration Regulations 1994](#) reg 3.01(4).
- 6 See, for example, (CTH) [Data-matching Program \(Assistance and Tax\) Act 1990](#).
- 7 (CTH) [Freedom of Information Amendment \(Reform\) Act 2010](#).

[80-1960] Journalists' sources

The paragraph below is current to **07 March 2018**

There is no specific public interest immunity or privilege at common law under which a journalist can, in court proceedings, claim a right not to reveal the name of an informant.¹ However, in a defamation action involving publication in the press, there is a practice known as the 'newspaper rule' whereby a media defendant may not be compelled to disclose a source prior to an action for defamation, libel or slander.² The journalist is compelled to reveal the source only if it is 'necessary in the interests of justice'.³ Ordering disclosure of journalist's sources is not precluded by the implied freedom of political communication.⁴

The (CTH) [Evidence Act 1995](#) includes provisions to protect confidential communications at the trial and pre-trial stages of civil and **criminal** proceedings between journalists and their sources to assist journalists to reconcile their ethical obligations with their legal duty to provide courts with relevant evidence when requested.⁵ The statutory privilege can be abrogated upon application to the Court if the public interest in the disclosure of evidence of the identity of the informant outweighs any adverse effect on the informant or the public interest in the communication of facts from the media.⁶

The privilege is not available in family proceedings if it would be in the best interests of a child for the information to be disclosed.⁷ It does not apply where for public policy reasons the privilege has already been abrogated.⁸

Similar protection exists in some States and Territories.⁹

(A) Freedom of Expression as a Right

- 1 *McGuinness v A-G (Vic)* (1940) 63 CLR 73  at 92; [1940] ALR 110; (1940) 14 ALJ 38 per Starke J ('Apart from statutory provisions, the press, in courts of law, has no greater and no less privilege than every subject of the King') (applied *Re Buchanan* [1964-65] NSW 1379 ; (1964) 65 SR (NSW) 9; 82 WN (Pt 2) (NSW) 83). See further DEFAMATION [\[145-445\]](#).
- 2 *McGuinness v A-G (Vic)* (1940) 63 CLR 73  at 104; [1940] ALR 110; (1940) 14 ALJ 38 per Dixon J. See also *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 ; [82 ALR 1](#); 62 ALJR 640; [BC8802649](#). For a review of the nature, scope and application of the 'newspaper rule' see *West Australian Newspapers Ltd v Bond* (2009) 40 WAR 164 ; [\[2009\] WASCA 127](#); [BC200906481](#) at [\[45\]-\[91\]](#) per Buss JA. As to the newspaper rule generally see DEFAMATION [\[145-445\]-\[145-460\]](#).
- 3 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346  at 354, 355; [82 ALR 1](#); 62 ALJR 640; [BC8802649](#). See also *Lew v The Herald & Weekly Times* [\[1999\] 1 VR 313](#) ; [\[1998\] VSC 2](#); [BC9803386](#); *Bateman v Fairfax Media Publications Pty Ltd* [\[2014\] NSWSC 400](#) ; [BC201402522](#). See further DEFAMATION [\[145-450\]](#).
- 4 *Liu v Age Co Ltd* [\(2012\) 285 ALR 386](#) ; 257 FLR 360; [\[2012\] NSWSC 12](#); [BC201200265](#) (it was not necessary to read down (NSW) [Uniform Civil Procedure Rules 2005](#) r 5.2. to preclude the disclosure of journalist sources).
- 5 (CTH) [Evidence Act 1995](#) ss [126J](#), [126K](#).
- 6 *Ibid* s 126K(2).
- 7 (CTH) [Family Law Act 1975](#) s [69ZX\(4\)](#).
- 8 (CTH) [Proceeds of Crime Act 2002](#) ss [197\(2\)\(b\)](#), [338](#); (CTH) [James Hardie \(Investigations and Proceedings\) Act 2004](#) ss [3\(1\)](#), [4A](#).
- 9 (NSW) [Evidence Act 1995](#) ss 126J-126L
(TAS) [Evidence Act 2001](#) ss [126A-126F](#) (professional confidential relationship privilege, cast more broadly than the Commonwealth provisions).

(III) Whistleblowers

[80-1965] Common law

The paragraph below is current to **07 March 2018**

At common law an obligation to preserve confidence may exist, such as:

- (1) between employer and employee;¹
- (2) between spouses;²
- (3) in matters of security;³
- (4) in matters involving defence;⁴ or
- (5) the workings of government;⁵

but may be overridden where there is some form of iniquity involved.⁶ This is so even if earlier disclosure might have been more for the credit of the witness.⁷ The concept of iniquity is to be interpreted broadly to include misconduct generally.⁸ The person making the disclosure must have some reasonable ground for making the allegation of wrongdoing. Furthermore, the disclosure may not amount to a mere roving suggestion⁹ and the person making the disclosure must bear the burden of establishing the facts to relieve the obligation to observe the confidence.¹⁰

(A) Freedom of Expression as a Right

Notes

- 1 *Gartside v Outram* (1856) 3 Jur NS 39 ; 26 LJ Ch 113; 28 LTOS 120; 5 WR 35. See also *AG Australia Holdings Ltd v Burton* [\(2002\) 58 NSWLR 464](#) ; [58 IPR 268](#); [\[2002\] NSWSC 170](#); [BC200202299](#).
- 2 *Lennon v News Group Newspapers Ltd* [1978] FSR 573 .
- 3 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [\(1987\) 10 NSWLR 86](#) ; [75 ALR 353](#); [10 IPR 153](#).
- 4 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 ; [32 ALR 485](#); 55 ALJR 45.
- 5 *Victoria v Nine Network* [\(2007\) 19 VR 476](#) ; [\[2007\] VSC 431](#); [BC200710734](#) at [\[14\]-\[42\]](#) per Osborn J (the law of confidence was extensively reviewed; permanent injunction sought (and upheld for certain information) in public interest to restrain publication of information based on mislaid prison records concerning allegations of misconduct by prison officer, acknowledging (at [22]) particular sensitivity surrounding misconduct or inaction in the administration of the criminal justice system) (citing *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57 ; [229 ALR 457](#); [2006] HCA 46; [BC200607692](#) at [\[26\]](#), [\[31\]](#) per Gleeson CJ and Crennan J). For the scope of public interest against disclosure involving cartel whistleblowers see *Cadbury Schweppes Pty Ltd v Amcor Ltd* [\(2008\) 246 ALR 137](#) ; (2008) ATPR ¶42-218; [\[2008\] FCA 88](#); [BC200800675](#).
- 6 *Gartside v Outram* (1856) 3 Jur NS 39 ; 26 LJ Ch 113 at 114; 28 LTOS 120; 5 WR 35 per Wood VC (no confidence as to the disclosure of iniquity).
- 7 *Annesley v Earl of Anglesea* [\(1743\) LR 5 QB 317n](#) ; 17 State Tr 1139.
- 8 *A v Hayden (No 2)*(ASIS case) (1984) 156 CLR 532  at 545; [56 ALR 82](#); 59 ALJR 6; [BC8400488](#) per Gibbs CJ. See also *Fraser v Evans* [\[1969\] 1 QB 349](#)   at [362](#) ; [\[1969\] 1 All ER 8](#); [\[1968\] 3 WLR 1172](#)  per Lord Denning, CA (iniquity is merely an instance of just cause or excuse for breaking confidence); *Castrol Australia Pty Ltd v EmTech Assocs Pty Ltd* [\(1980\) 33 ALR 31](#) ; 51 FLR 184 at 310-16 per Rath J (however, compare *NRMA v Yates* [\[1999\] NSWSC 701](#) ; [BC9903889](#)).
- 9 *Gartside v Outram* (1856) 3 Jur NS 39 ; 26 LJ Ch 113 at 114; 28 LTOS 120; 5 WR 35.
- 10 *A v Hayden (No 2)*(ASIS case) (1984) 156 CLR 532  at 546; [56 ALR 82](#); 59 ALJR 6; [BC8400488](#) per Gibbs CJ.

[80-1970] Statutory provisions

The paragraph below is current to **07 March 2018**

In all jurisdictions, legislation exists specifically to protect persons who make specific public interest disclosures ('whistleblowers') in specific circumstances.¹ The legislation applies to persons who make public interest disclosures² relating to maladministration, waste, corruption, illegal conduct (and in some jurisdictions a substantial risk to public health or safety, or to the environment) in the public sector,³ which includes government departments and agencies as well as members of parliament.⁴

In Queensland a distinction is made between what may be disclosed by a public officer and any person.⁵ Any person may make a disclosure about a substantial and specific danger to the health and safety of a person with a disability⁶ or to the environment from particular contraventions.⁷ Any person may make a disclosure about another person's conduct if it constitutes a reprisal for making a public interest disclosure.⁸

(A) Freedom of Expression as a Right

A person does not incur any **liability** for making a public interest disclosure.⁹ There are provisions allowing the suppression of the identity of the informant¹⁰ and protecting the informant against reprisals and victimisation.¹¹

In the Commonwealth, New South Wales, and Western Australia, the rights and privileges of parliament in relation to freedom of speech, and debates and proceedings in parliament are unaffected by the whistleblower legislation.¹²

Additional protections for whistleblowers may be derived in appropriate circumstances from equal opportunity and anti-discrimination legislation and from legislation directed at official corruption.¹³

Notes

1 (CTH) [Public Interest Disclosure Act 2013](#)

(ACT) [Public Interest Disclosure Act 2012](#). See also *Jones v University of Canberra* (2016) 311 FLR 1 ; [\[2016\] ACTSC 78](#); [BC201602753](#).

(NT) Public Interest Disclosure Act 2008

(NSW) [Public Interest Disclosures Act 1994](#)

(QLD) [Public Interest Disclosure Act 2010](#)

(SA) Whistleblowers Protection Act 1993; (SA) [Public Sector Act 2009](#) s 7

(TAS) [Public Interest Disclosures Act 2002](#)

(VIC) Protected Disclosure Act 2012.

(WA) [Public Interest Disclosure Act 2003](#).

Legislation authorising inquiries and legislation directed at official corruption also protects activities of a whistleblowing nature, as well as allegations made from outside the public sector or connected to some other bond of confidentiality: see, for example:

(NSW) [Independent Commission Against Corruption Act 1988](#) ss 50 (protection of witnesses and persons assisting Commission), 70 (confidentiality of Parliamentary Joint Committee), Pt 3 (specific offences)

(QLD) [Commissions of Inquiry Act 1950](#)

(WA) Corruption and Crime Commission Act 2003 s 156.

As to the protection of public servants from disciplinary or other action in respect of whistleblowing see PUBLIC ADMINISTRATION [\[345-535\]](#).

2 (CTH) [Public Interest Disclosure Act 2013](#) ss [26\(1\)\(a\)](#) (public interest disclosure made by a person who is, or has been, a public official), [69](#) (definition of 'public officials')

(ACT) [Public Interest Disclosure Act 2012](#) ss [7](#) (definition of 'public interest disclosure'), [14](#) (any person may make a public interest disclosure to a proper authority)

(NT) Public Interest Disclosure Act 2008 ss 4 (definitions of 'public interest disclosure'), 10

(NSW) [Public Interest Disclosures Act 1994](#) Pt 2 ss 4 (definition of 'protected disclosures'), 8(1) (public disclosures must be made by public officials to an investigating authority, to the principal officer or another officer of a public authority or investigating authority, to a member of parliament or to a journalist)

(QLD) [Public Interest Disclosure Act 2010](#) ss [13](#) (certain types of public interest disclosures may be disclosed by a 'public officer', which includes any officer of a 'public sector entity'), [12](#) (other types of public interest disclosures which

(A) Freedom of Expression as a Right

may be made by anybody), [6](#) (definition of 'public sector entity'), [11](#), [7](#) (definitions of 'public interest disclosure' and 'public officer' respectively)

(SA) Whistleblowers Protection Act 1993 s 4 (definition of 'public interest information')

(TAS) [Public Interest Disclosures Act 2002](#) ss ss 3, [14](#) (definition of 'protected disclosure'), [6](#) (protected disclosures about improper conduct or detrimental action), [7](#) (persons to whom disclosures can be made)

(VIC) Protected Disclosure Act 2012 ss 3 (definition of 'protected disclosure'), 9 (natural person may make a disclosure), 13 (entities to which disclosures may be made)

(WA) [Public Interest Disclosure Act 2003](#) ss [3](#) (definition of 'public interest information'), [5](#) (definition of public interest disclosure), [6](#) (**liability** of person disclosing information unaffected).

3 (CTH) [Public Interest Disclosure Act 2013](#) s [29](#) (definition of 'disclosable conduct')

(ACT) [Public Interest Disclosure Act 2012](#) s [7](#) (definition of 'public interest disclosure'), [8](#) (definition of 'disclosable conduct')

(NT) Public Interest Disclosure Act 2008 ss 4 (definitions of 'public interest disclosure'), 5 ('improper conduct')

(NSW) [Public Interest Disclosures Act 1994](#) ss 3(1), 4 (definitions of 'corrupt conduct' and 'maladministration'), 11(2)

(QLD) [Public Interest Disclosure Act 2010](#) ss [7](#) (definition of 'public officer'), [13](#) (public officer may make a public interest disclosure about corrupt conduct, maladministration, misuse of public resources, dangers to public health, safety or the environment), Sch 4 (definition of 'corrupt conduct' and 'maladministration')

(SA) Whistleblowers Protection Act 1993 s 3

(TAS) [Public Interest Disclosures Act 2002](#) s [3](#) (definitions of 'corrupt conduct' and 'improper conduct'), Pt 2 (public interest disclosures)

(VIC) Protected Disclosure Act 2012 s 3 (definitions of 'corrupt conduct' and 'improper conduct'), Pt 2 (disclosures)

(WA) [Public Interest Disclosure Act 2003](#) s [3](#) (definition of 'public interest information'), Pt 2 (public interest disclosures).

4 (CTH) [Public Interest Disclosure Act 2013](#) ss [29](#) (definition of 'disclosable conduct'), [69](#) (definition of 'public official')

(ACT) [Public Interest Disclosure Act 2012](#) ss [9](#) (definition of 'public sector entity'), [10](#) (definition of 'public official')

(NT) Public Interest Disclosure Act 2008 s 5 (definition of 'improper conduct' refers to conduct on the part of a public body or public officer in, or related to, the performance of official functions)

(NSW) [Public Interest Disclosures Act 1994](#) s 4 (definition of 'public official')

(QLD) [Public Interest Disclosure Act 2010](#) ss [6](#) (definition of 'public sector entity'), [7](#) (definition of 'public officer')

(SA) Whistleblowers Protection Act 1993 s 4 (definition of 'public officer')

(TAS) [Public Interest Disclosures Act 2002](#) ss [3](#), [4](#) (definitions of 'public body' and 'public officer')

(VIC) Protected Disclosure Act 2012 s 6 (definitions of 'public body' and 'public officer')

(WA) [Public Interest Disclosure Act 2003](#) s [3](#) (definitions of 'public authority', 'public officer' and 'public sector contractor').

5 (QLD) [Public Interest Disclosure Act 2010](#) ss [12](#), [13](#).

6 Ibid s 12(1)(a). For the definition of 'disability' see (QLD) [Disability Services Act 2006](#).

7 (QLD) [Public Interest Disclosure Act 2010](#) s 12(1)(b), 12(1)(c) (anybody may disclose a substantial and specific danger to the environment from contraventions of the provisions of Acts listed in ibid Sch 2). For the definitions of 'public health or safety' and 'environment' see ibid Sch 4.

8 Ibid s 12(1)(d). As to reprisal and grounds for reprisal see ibid ss 40-42.

9 (CTH) [Public Interest Disclosure Act 2013](#) s [10](#) (protection of disclosures)

(ACT) [Public Interest Disclosure Act 2012](#) s [35](#) (a person is not subject to any **liability** for making a public interest disclosure)

(NT) Public Interest Disclosure Act 2008 s 14 (but note ibid s 10(2) (cannot be based solely or substantially on disagreement with a policy or an employment related grievance or other personal grievance))

(A) Freedom of Expression as a Right

(NSW) [Public Interest Disclosures Act 1994](#) ss 17 (disclosure concerning merits of government policy is not a protected disclosure), 18 (disclosure motivated by the objective of avoiding disciplinary action is not a protected disclosure), 19 (a public official who makes a disclosure to a member of parliament or journalist is protected in certain specified circumstances), 21(1) (a person is not subject to any **liability** for making a protected disclosure), 28 (a public official who makes a false or misleading disclosure is guilty of an offence)

(QLD) [Public Interest Disclosure Act 2010](#) ss 36 (a person is not liable, civilly, criminally or under an administrative process for making a public interest disclosure), 66 (a person who makes a false or misleading disclosure is guilty of an offence)

(SA) Whistleblowers Protection Act 1993 s 5(1) (a person who makes an appropriate disclosure of public interest information will not incur civil or **criminal liability** for making the disclosure). An appropriate disclosure is one where the person believes on reasonable grounds that the information is true, or that the information may be true and is of sufficient significance to justify its disclosure so that the truth may be investigated, provided that the information is disclosed to an appropriate authority, such as a Minister, the police, the Auditor-General (concerning irregular or unauthorised use of public money), the Chief Justice (concerning the judiciary), or the Ombudsman: *ibid* s 5. A false disclosure is not a protected disclosure and thus constitutes an offence: *ibid* s 10.

(TAS) [Public Interest Disclosures Act 2002](#) ss 16 (immunity from **liability** for public interest disclosure), 87 (offence of false disclosure)

(VIC) Protected Disclosure Act 2012 ss 39 (immunity from **liability** for disclosure of improper conduct), 41 (protection from defamation actions), 72 (offence of false disclosure)

(WA) [Public Interest Disclosure Act 2003](#) ss 6 (public interest disclosure does not affect a person's **liability** for anything to which the information relates), 13 (immunity for proper disclosure of public interest information), 24 (offence of making a false and misleading disclosure).

- 10** (CTH) [Public Interest Disclosure Act 2013](#) ss 20 (offence to disclose identity of the informant), 21 (identifying information not to be disclosed to courts or tribunals)

(ACT) [Public Interest Disclosure Act 2012](#) s 26 (limitations on obligations to keep people informed)

(NSW) [Public Interest Disclosures Act 1994](#) s 22 (confidentiality guidelines)

(QLD) [Public Interest Disclosure Act 2010](#) s 65 (preservation of confidentiality)

(SA) Whistleblowers Protection Act 1993 s 7 (identity of informant to be kept confidential)

(TAS) [Public Interest Disclosures Act 2002](#) s 23 (offence to reveal confidential information)

(VIC) Protected Disclosure Act 2012 s 74 (offence to disclose certain advice)

(WA) [Public Interest Disclosure Act 2003](#) s 16 (disclosure of identity of informant restricted).

- 11** (CTH) [Public Interest Disclosure Act 2013](#) ss 13 (what constitutes taking a reprisal), 19 (offences against reprisals and threats)

(ACT) [Public Interest Disclosure Act 2012](#) s 40 (taking detrimental action is unlawful)

(NT) Public Interest Disclosure Act 2008 s 15 (offence to commit act of reprisal)

(NSW) [Public Interest Disclosures Act 1994](#) s 20 (protection against reprisals)

(QLD) [Public Interest Disclosure Act 2010](#) ss 40 (reprisals are unlawful), 41 (reprisal is an indictable offence), 42 (reprisal is a tort and a person who takes a reprisal is liable in damages to anyone who suffers detriment as a result of a reprisal), 43 (vicarious **liability** of public sector entity), 49 (a person may apply for an injunction against reprisal)

(SA) Whistleblowers Protection Act 1993 s 9 (an act of victimisation under the Act may be dealt with as a tort or as if it were an act of victimisation under the (SA) [Equal Opportunity Act 1984](#)). As to victimisation under Equal Opportunity and Anti-Discrimination legislation see [\[80-715\]](#)

(TAS) [Public Interest Disclosures Act 2002](#) ss 19 (protection from reprisal), 20 (damages for reprisal), 21 (application for injunction or order), 22 (injunction or order)

(VIC) Protected Disclosure Act 2012 ss 43 (detrimental action in reprisal for protected disclosure), 45 (protection from reprisal), 47 (damages for reprisal), 49 (injunction or order), 50 (proceedings for injunction for reprisal)

(A) Freedom of Expression as a Right

(WA) Public Interest Disclosure Act 2003 ss 14 (reprisal an offence), 15 (remedies for reprisals), 15A (injunction as to detrimental action).

12 (CTH) [Public Interest Disclosure Act 2013](#) s [80](#) (legal professional privilege not affected)

(NT) Public Interest Disclosure Act 2008 s 36 (privileges of Legislative Assembly not affected)

(NSW) [Public Interest Disclosures Act 1994](#) s 23

(QLD) [Public Interest Disclosure Act 2010](#) s [35](#) (Legislative Assembly may still deal with disclosure)

(WA) [Public Interest Disclosure Act 2003](#) s [25](#) (protection given by Act is in addition to, and does not derogate from, any privilege, protection or immunity existing apart from the Act).

There are no equivalent provisions in the other jurisdictions.

As to equality and discrimination see [\[80-175\]](#).

13 See, for example, (WA) Corruption and Crime Commission Act 2003 s 156.

End of Document

(B) General Restrictions on Freedom of Expression

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(2\) FREEDOM OF EXPRESSION](#)

(B) GENERAL RESTRICTIONS ON FREEDOM OF EXPRESSION

(i) Obscenity and Indecency

[80-1975] Standard

The paragraph below is current to **07 March 2018**

The law relating to obscenity and indecency has the effect of restricting freedom of speech in relation to certain matters, but requires some form of publication. There is no definition of 'obscenity' at common law, although the generally accepted test is 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.¹ Obscenity and indecency may be treated conjunctively rather than disjunctively,² and both are concerned with public morals.³ The test to be applied is one of fact and is whether the publication transgresses 'the generally accepted bounds of decency'.⁴ The circumstances of the exhibition or distribution will affect the standards to be applied.⁵ A publication will be considered obscene or indecent if, following the common law standard, they are likely to cause offence to a reasonable adult person.⁶

Notes

- 1** *R v Hicklin* (1868) LR 3 QB 360  at 371  per Cockburn CJ (discussed in *Crowe v Graham* (1968) 121 CLR 375  at 392, 393; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J).
- 2** *Crowe v Graham* (1968) 121 CLR 375  at 391; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J.
- 3** *Crowe v Graham* (1968) 121 CLR 375  at 389; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J. In *Shaw v DPP* [1962] AC 220  ; [1961] 2 All ER 446; [1961] 2 WLR 897  the House of Lords identified a new common law offence of conspiracy to corrupt morals which so far has not been followed in Australia: *R v Cahill* [1978] 2 NSWLR 453 ; [1978] 22 ALR 361; 46 FLR 453; 4 Fam LN N59, CA(NSW) (relating to (CTH) [Crimes Act 1914](#) s 86(1)(b)). See also DEFAMATION [\[145-3300\]](#) (obscene libel).
- 4** *Crowe v Graham* (1968) 121 CLR 375  at 395; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J (in deciding the common law meaning of the word 'obscene', the question is 'does the publication, by reason of the

(B) General Restrictions on Freedom of Expression

extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency?'). See also *Director of Public Prosecutions v Jordan* ([\(1977\) 141 JP 13](#), HL).

- 5 *Molony v Mercer* ([\[1971\] 2 NSWLR 207](#)) (following *Crowe v Graham* (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#)).
- 6 Discussed in *Crowe v Graham* (1968) 121 CLR 375 at 394, 399; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J. See also *John Calder (Publications) Ltd v Powell* ([\[1965\] 1 QB 509](#)); [1965] 2 All ER 159; [\[1965\] 2 WLR 138](#) (advocacy of drug taking). As to standards applicable under the National Classification Code see [80-1985]. Note, however, that (ACT) *Human Rights Act 2004* ss [16](#), [30](#) and (VIC) *Charter of Human Rights and Responsibilities Act 2006* s [15](#) may lead courts in those states to construe common law tests of obscenity and indecency narrowly so as to preserve the freedom of expression set out in those sections.

[80-1980] Publication

The paragraph below is current to **07 March 2018**

Obscenity and indecency in this context are in themselves not punishable. There must be some form of publication, and whether the matter published is indecent or obscene may depend upon the manner of its publication.¹ To 'publish' means to sell, offer for sale, let on hire, exhibit, display, distribute or demonstrate.² The onus is on the prosecution to negative an honest and reasonable belief, if shown, that the publication was not illegal.³

Notes

- 1 *Crowe v Graham* (1968) 121 CLR 375 at 396; [1968] ALR 524; (1968) 41 ALJR 402; [BC6800790](#) per Windeyer J. See also *Molony v Mercer* ([\[1971\] 2 NSWLR 207](#)) at 207 (principle applied to charge of indecent exposure under (NSW) Summary Offences Act 1970 (repealed) s 11).
- 2 (CTH) *Classification (Publications, Films and Computer Games) Act 1995* s [5](#) (definitions). 'Publication' means any written or pictorial matter, but does not include a film, a computer game or an advertisement for a publication, film or computer game: *ibid* s 5. As to regulation of publications see generally ENTERTAINMENT, SPORT AND TOURISM [\[175-4765\]-\[175-4850\]](#).
- 3 *R v Wampfler* ([\(1987\) 11 NSWLR 541](#)); 34 A Crim R 218, CCA(NSW).

[80-1985] Censorship

The paragraph below is current to **07 March 2018**

Commonwealth, State and Territory legislation enshrines the general principle that adults should be able to read, hear and see what they want.¹ However, this general right is subject to a number of exceptions, in particular:

- (1) that minors should be protected from material likely to harm or disturb them;²
- (2) that everyone should be protected from exposure to unsolicited material that they find offensive;³

(B) General Restrictions on Freedom of Expression

- (3) the need to take into account community concerns about depictions that condone or incite violence, particularly sexual violence;⁴
- (4) the need to take into account community concerns about the portrayal of persons in a demeaning manner;⁵ and
- (5) the particular needs of the prison environment.⁶

In addition, Commonwealth, State and Territory authorities whose role it is to classify certain material submitted to them may refuse an application for classification, and in effect ban, material that offends the standards of morality, decency and propriety generally accepted by reasonable adults.⁷ The legislative restriction is operative on the consumer. Classification decisions are enforced through the State and Territory classification legislation.⁸

Classification decisions are made by the Classification Board.⁹ Appeals against these decisions are handled by the Classification Review Board.¹⁰ There is also a further avenue of appeal to the Federal Court of Australia.¹¹

Notes

- 1** A National Classification Code (the 'Code') in the form originally enacted in the schedule to (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#), has been enacted by Commonwealth legislation (and is enforced, in various ways, in all jurisdictions. See also *New South Wales Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108; [241 ALR 564](#); [\[2007\] FCA 896](#); [BC200704522](#) at [\[67\]](#), [\[83\]](#) per Edmonds J (unsuccessful challenge to the Review Board's finding that a publication 'promotes, incites or instructs in matters of crime or violence' (within the National Classification Code (May 2005), item 1(c)); 'promote' and 'incite' do not require examination of the effect or likely effect of the relevant action; an exhortation to take up arms against "non-believers" can constitute the promotion or incitement of violence within Australia, by reason of the existence of 'non-believers' in Australia).

See:

(ACT) [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#)

(NT) [Classification of Publications, Films and Computer Games Act 1985](#)

(NSW) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#)

(QLD) [Classification of Computer Games and Images Act 1995](#) s 5(3); (QLD) [Classification of Films Act 1991](#); (QLD) [Classification of Publications Act 1991](#)

(SA) [Classification \(Publications, Films and Computer Games\) Act 1995](#) s 18 (publications, films and computer games are to be classified by the Council or the Minister in accordance with the National Classification Code and the national classification guidelines)

(TAS) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#)

(VIC) [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#) s [3](#) (as amended in accordance with (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) s [6](#))

(WA) [Classification \(Publications, Films and Computer Games\) Act 1996](#).

In New South Wales the National Classification Code is included as a note. See, for example:

(NSW) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) s 3 note

(B) General Restrictions on Freedom of Expression

Whether the National Classification Code is expressly incorporated into the various State and Territory statutes or not, they are all enforcement statutes which implement the general principles of the National Classification Code. Some provisions relating to obscene publications still remain in other legislation. See, for example:

(SA) [Summary Offences Act 1953](#) ss [33](#) (indecent or offensive material), [35](#) (restrictions on reports of immorality)

(TAS) [Criminal Code](#) s 138(1) (obscene publication will include exhibiting a disgusting object or indecent show).

As to the classification of publications, films, computer games, television, advertising and on-line services generally see ENTERTAINMENT, SPORT AND TOURISM [\[175-4550\]-\[175-5165\]](#).

- 2 (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) (in Sch (repealed) as originally enacted).

Some jurisdictions specifically emphasise child protection by targeting child pornography:

(QLD) [Classification of Films Act 1991](#) s [43](#); (QLD) [Classification of Publications Act 1991](#) ss [12](#), [14](#), [16](#), 17(3), [18](#)

(TAS) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) ss [71-74B](#)

(WA) [Criminal Code Act Compilation Act 1913](#) ss 216-221B (added by (WA) [Child Pornography and Exploitation Material and Classification Legislation Amendment Act 2010](#)).

- 3 (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) (in Sch (repealed) as originally enacted).

- 4 Ibid Sch (repealed) (in Act as originally enacted).

- 5 As to compatibility of the power of prison governors to intercept or censor distressing or traumatic correspondence in (VIC) [Corrections Act 1986](#) ss [47D](#), [47DA](#) see *Knight v Corrections Victoria* [\[2009\] VSC 607](#), [BC200911424](#).

- 6 (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) Sch (repealed) (in Act as originally enacted). See also *R v Butler* (1993) 89 DLR (4th) 449; 70 CCC 129 (material that may be said to exploit sex in a 'degrading and dehumanising' manner will necessarily fail the 'community standards' test, not because it offends against morals but because it is perceived by public opinion to be harmful to society).

- 7 (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) s 11(a)

(ACT) [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#) Dictionary (definition of 'submittable publication' adopting definition in (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) s [5](#))

(NT) [Classification of Publications, Films and Computer Games Act 1985](#) s [3](#) (definition of 'submittable publication' adopting definition in (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#))

(NSW) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) s 4(1) adopting definition in (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#). See also (NSW) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) s 46.

(QLD) [Classification of Publications Act 1991](#) s [3](#) (definition of 'submittable publication')

(SA) [Classification \(Publications, Films and Computer Games\) Act 1995](#) s [4](#) (definition of 'submittable publication' adopting definition in (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#)). See also (SA) [Classification \(Publications, Films and Computer Games\) Act 1995](#) Pt 3, Sch 1.

(TAS) [Classification \(Publications, Films and Computer Games\) Enforcement Act 1995](#) s [3](#) (definition of 'objectionable publication')

(VIC) [Classification \(Publications, Films and Computer Games\) \(Enforcement\) Act 1995](#) s [3](#) (definitions of 'objectionable publication' and 'objectionable film')

(WA) [Classification \(Publications, Films and Computer Games\) Act 1996](#) s 3 (definition of 'submittable publication' adopting definition in (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#)). See also (WA) [Classification \(Publications, Films and Computer Games\) Act 1996](#) s 102A.

The criteria for refusing classification include publications that:

- (1) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards discussed above;

(B) General Restrictions on Freedom of Expression

- (2) describe or depict, in a way that is likely to cause offence to a reasonable adult, a minor who is, or who appears to be, under the age of 16 years (whether the minor is engaged in sexual activity or not); or
- (3) promote, incite or instruct matters of crime or violence: (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) Sch (repealed) (in Act as originally enacted).

Similar provisions apply to film and computer games: *ibid* Sch (repealed) (in Act as originally enacted).

- 8 See generally ENTERTAINMENT, SPORT AND TOURISM [\[175-4550\]-\[175-5165\]](#).
- 9 (CTH) [Classification \(Publications, Films and Computer Games\) Act 1995](#) Pt 6. As to the Classification Board see ENTERTAINMENT, SPORT AND TOURISM [\[175-4590\]-\[175-4605\]](#).
- 10 *Ibid* Pt 7. As to the Classification Review Board see ENTERTAINMENT, SPORT AND TOURISM [\[175-4610\]](#), [\[175-4615\]](#).
- 11 As to appeals to the Federal Court of Australia see ADMINISTRATIVE LAW [\[10-11030\]-\[10-11055\]](#).

(III) Other Areas of Restriction

[80-1990] Blasphemy or blasphemous libel

The paragraph below is current to **07 March 2018**

Blasphemy is a common law offence that is punishable by fine or imprisonment.¹ It is constituted by the publication of material which, with a malicious or mischievous intention, asperses the truth of Christianity or of the scriptures in language that is calculated to and has the effect of shocking the feelings and outraging the belief of the general community.² The offence developed in the United Kingdom to the effect that it was not unlawful to publish criticisms of religion provided scurrility and intemperance³ or the decencies of controversy were observed,⁴ and to the extent that it only applied where there was a danger to general peace and order.⁵

Determination of whether a particular publication is blasphemous is a matter of fact for the jury,⁶ and the prevailing view in the United Kingdom has been that the necessary mens rea is established by the act of publishing material that is in fact blasphemous.⁷ In Australia, there have been a number of official inquiries into the offence.⁸ The common law offence is assumed to exist as such in all jurisdictions except Tasmania, where there is a similar statutory offence.⁹ In the Australian Capital Territory and New South Wales the offence has been modified to provide that there is to be no prosecution where there is no purpose of scoffing or reviling or violating public decency.¹⁰ In Queensland no substitute offence has been established.¹¹ In some other jurisdictions, various enactments refer to, and therefore must be taken to assume the existence of, the common law offence of blasphemy.¹²

Notes

- 1 See *Whitehouse v Lemon* [\[1979\] AC 617](#)  ; [\[1979\] 2 WLR 281](#)  sub nom *R v Lemon* [\[1979\] 1 All ER 898](#)  . See also DEFAMATION [\[145-3290\]](#) (blasphemous libel). As to blasphemy generally see RELIGION [\[365-685\]-\[365-725\]](#).
- 2 See *R v Bradlaugh* (1883) 15 Cox CC 217 .
- 3 *Bowman v Secular Society Ltd* [\[1917\] AC 406](#)   at [422](#); [\[1916-17\] All ER Rep 1](#) per Lord Finlay LC.
- 4 *R v Bradlaugh* (1883) 15 Cox CC 217 ; *Whitehouse v Lemon* [\[1979\] AC 617](#)  ; [\[1979\] 2 WLR 281](#)  sub nom *R v Lemon* [\[1979\] 1 All ER 898](#)  .
- 5 *Bowman v Secular Society Ltd* [\[1917\] AC 406](#)   at [446](#) per Lord Parker, at 459-61, 467 per Lord Sumner; [\[1916-17\] All ER Rep 1](#).

(B) General Restrictions on Freedom of Expression

- 6 *R v Bradlaugh* (1883) 15 Cox CC 217 ; *Whitehouse v Lemon* [1979] AC 617  ; [1979] 2 WLR 281  sub nom *R v Lemon* [1979] 1 All ER 898 .
- 7 *Whitehouse v Lemon* [1979] AC 617  ; [1979] 2 WLR 281  sub nom *R v Lemon* [1979] 1 All ER 898  at 923, 925-7 per Lord Scarman, HL. However there are powerful dissents in favour of a 'milder' view that the offence is 'no longer one of strict *liability*, but is one requiring proof of ... a specific intention, namely to shock and arouse resentment among those who believe in or respect the Christian faith': *R v Lemon* [1979] 1 All ER 898  at 901 per Lord Diplock. In the United Kingdom the crime has been held not to apply to publications offensive to persons adhering to religions other than Christianity: *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury (Satanic Verses case)* [1991] 1 QB 429  ; [1991] 1 All ER 306; [1990] 3 WLR 986  at 999  per Watkin LJ (refusing to extend the law: 'We have no doubt that as the law stands it does not extend to religions other than Christianity').
- 8 See New South Wales Law Reform Commission, *Blasphemy*, Discussion Paper No 24, 1992; New South Wales Law Reform Commission, *Blasphemy*, Report No 74, 1994; Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57, 1992 pp 163-7.
- 9 (TAS) *Criminal* Code s 119 (consent by the Attorney-General in writing is necessary for a prosecution; the offence requires wilful publication; the determination of blasphemy as a question of fact and an exemption exists for any opinion expressed 'in good faith and in decent language'). See also RELIGION [365-695].
- 10 (ACT) *Crimes Act 1900* s 440 (abolished prosecutions for blasphemy where the publication is by way of argument or statement, is not for the purpose of scoffing or reviling or violating public decency or tending to a breach of the peace) (NSW) *Crimes Act 1900* s 574.
- See also RELIGION [365-695].
- 11 (QLD) *Criminal* Code s 5 (the Code contains an exclusive list of offences).
- 12 For example:
- (NT) *Criminal* Code ss 203-208 (*criminal* defamation, but no specific reference to blasphemy. Refers to civil law of defamation)
- (NSW) *Crimes Act 1900* s 574
- (SA) *Criminal Law Consolidation Act 1935* s 257 (*criminal* defamation, but no specific reference to blasphemous libel)
- (VIC) *Crimes Act 1958* s 469AA (seizure and destruction of documents after conviction for blasphemous libel)
- (WA) *Criminal* Code s 345 (*criminal* defamation, but no specific reference to blasphemous libel).
- See also RELIGION [365-695], DEFAMATION [145-3285]-[145-3335] (blasphemous, seditious and obscene libel generally).

[80-1995] Defamation

The paragraph below is current to **07 March 2018**

Defamation is a common law or statutory wrong that allows a person to recover damages for injury to reputation through the publication of adverse or disparaging comments or imputations that are measured by reference to a 'standard common to society generally'.¹ Qualified privilege at common law permits comments where one person has a duty or interest to make the statement and the recipient has a corresponding duty or interest to receive it.² All Australian jurisdictions have passed uniform laws covering defamation that modify the common law.³ Broadcast material is deemed to be publication in a permanent form for the purposes of defamation law.⁴

The defences of absolute and qualified privilege, which exist under the uniform legislation, allow for greater freedom of speech than would otherwise be permitted.⁵ In exceptional circumstances an interest or duty may exist to publish defamatory matter to the general public.⁶ The issue in terms of international standards is whether both criteria fall within the restrictions allowed by the International Covenant on Civil and Political Rights.⁷

(B) General Restrictions on Freedom of Expression

Notes

- 1 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 ; [38 ALR 417](#) at [421](#); 56 ALJR 214 per Brennan J; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 ; [254 ALR 606](#); [\[2009\] HCA 16](#); [BC200902941](#) at [\[41\]-\[50\]](#) per French CJ, Gummow, Kiefel and Bell JJ (general test for defamation reviewed in context of business or professional reputation and inter-relation between defamation and injurious falsehood — community standards relevant to assessment of the effect of an imputation but do not form part of the general test for defamation). As to defamation generally see DEFAMATION [\[145-1\]](#). As to the common law standard of defamatory meaning see DEFAMATION [\[145-740\]](#).
- 2 *Roberts v Bass* (2002) 212 CLR 1 ; [194 ALR 161](#); [\[2002\] HCA 57](#); [BC200207519](#) at [\[62\]](#) per Gaudron, McHugh and Gummow JJ. See also *Guise v Kouvelis* (1947) 74 CLR 102  at 116; 53 ALR (CN) 617b; 21 ALJR 71b; 47 SR (NSW) 394 per Dixon J (consideration of the relevant circumstances for the privilege to apply). For a review of the development of qualified privilege see *Bennette v Cohen* [\[2009\] NSWCA 60](#) ; [BC200901805](#) at [\[2\]-\[25\]](#) per Ipp JA.
- 3 (ACT) [Civil Law \(Wrongs\) Act 2002](#)
(NT) [Defamation Act 2006](#)
(NSW) [Defamation Act 2005](#); see *Habib v Nationwide News Pty Ltd* (2008) Aust Torts Reports ¶81-938 ; [\[2008\] NSWSC 181](#); [BC200801426](#) (discussion of justification and public interest or benefit under (NSW) Defamation Act 1974 (repealed))
(QLD) [Defamation Act 2005](#)
(SA) [Defamation Act 2005](#); see *Hanna v Sibbons* (2010) 108 SASR 182 ; 272 LSJS 384; [\[2010\] SASC 291](#); [BC201007659](#) (unsuccessful parliamentary candidate challenged validity of election and claimed electoral leaflets were defamatory; imputations met by the defences of common law and statutory qualified privilege, honest opinion, and fair comment)
(TAS) [Defamation Act 2005](#)
(VIC) [Defamation Act 2005](#)
(WA) [Defamation Act 2005](#).
- 4 (CTH) [Broadcasting Services Act 1992](#) s [206](#). See further DEFAMATION [\[145-235\]](#), [\[145-355\]](#).
- 5 For the defence of absolute privilege see:
(ACT) [Civil Law \(Wrongs\) Act 2002](#) s [137](#)
(NT) [Defamation Act 2006](#) s [24](#)
(NSW) [Defamation Act 2005](#) s [27](#)
(QLD) [Defamation Act 2005](#) s [27](#)
(SA) [Defamation Act 2005](#) s [25](#)
(TAS) [Defamation Act 2005](#) s [27](#)
(VIC) [Defamation Act 2005](#) s [27](#)
(WA) [Defamation Act 2005](#) s [27](#).
For the defence of qualified privilege see:
(ACT) [Civil Law \(Wrongs\) Act 2002](#) s [139A](#)
(NT) [Defamation Act 2006](#) s [27](#)
(NSW) [Defamation Act 2005](#) s [30](#)
(QLD) [Defamation Act 2005](#) s [30](#)

(B) General Restrictions on Freedom of Expression

(SA) [Defamation Act 2005](#) s 28

(TAS) [Defamation Act 2005](#) s 30

(VIC) [Defamation Act 2005](#) s 30

(WA) [Defamation Act 2005](#) s 30.

See also *Lucas-Smith v Coroner's Court of the Australian Capital Territory* (2009) 166 ACTR 42 ; [2009] ACTSC 40; BC200902322 at [44] per Higgins CJ (limit on the exercise of power to quash adverse comment (against those responsible for controlling and suppressing rural fires) would be inconsistent with the right to vindicate a reputation unfairly or unreasonably traduced in (ACT) [Human Rights Act 2004](#) s 12(b)).

- 6 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520  at 570-72; [145 ALR 96](#) at 115; 71 ALJR 818; BC9702860; *Mundine v Brown* (No 6) [2010] NSWSC 1285 ; BC201008281; *Aktas v Westpac Banking Corp Ltd* (2010) 241 CLR 79 ; [268 ALR 409](#); [2010] HCA 25; BC201005389.
- 7 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 17) art 19(3). See further [\[80-1950\]](#).

[80-2000] Common law incitement

The paragraph below is current to **07 March 2018**

Under the common law¹ it is a misdemeanour to solicit or incite another person to commit an offence.² Incitement of an offence involves seeking to encourage another person to commit it.³ The fault or mental element of incitement at common law is intention that the offence be committed; recklessness does not suffice.⁴ Incitement does not necessarily require origination or initiation.⁵

Notes

- 1 As to the statutory provisions see [80-2005]. As to the distinction between common law and code jurisdictions in **criminal** law generally see **CRIMINAL** LAW [\[130-5\]](#).
- 2 *R v Higgins* (1801) 2 East 5 ; [102 ER 269](#) (followed *R v Gregory* (1867) LR 1 CCR 77; 10 Cox CC 459).
- 3 *R v Crichton* [1915] SALR 1 , SC(SA), Full Court (followed *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637  at 671; [\(1989\) 95 ALR 211](#); (1989) Aust Torts Reports ¶180-290). See also *Hamberger v Construction, Mining and Energy Union* (2000) 103 IR 249 ; [\[2000\] FCA 1923](#); BC200008062.
- 4 *Giorgianni v R* (1985) 156 CLR 473  at 506; [58 ALR 641](#); 59 ALJR 461; [BC8501134](#) per Wilson, Deane and Dawson JJ (applied in *R v Abbouchi* [2008] VSCA 171 ; [BC200809015](#)). As to the requirement of a mental element see **CRIMINAL** LAW [\[130-80\]](#), [\[130-7015\]](#).
- 5 *R v Crichton* [1915] SALR 1 .

[80-2005] Statutory incitement

The paragraph below is current to **07 March 2018**

(B) General Restrictions on Freedom of Expression

All jurisdictions except South Australia have included the offence of incitement in their general legislation, and some have included it as an unlawful act in anti-discrimination legislation.¹ Legislation in most jurisdictions provides that the offence of incitement is committed even if the crime incited does not take place.² The term 'incites' is variously defined in the different jurisdictions.³ Some jurisdictions have special additional offences to cover certain forms of incitement such as to murder,⁴ sexual offences,⁵ to commit an offence against a law in force only outside the jurisdiction⁶ or to print or publish writing that incites the commission of a crime.⁷

In the anti-discrimination legislation of some jurisdictions, incitement has been included as an unlawful act.⁸ The incitement may be to commit an unlawful act of discrimination,⁹ to incite hatred, serious contempt or severe ridicule,¹⁰ or to assist or promote, by financial assistance or otherwise, the doing of an unlawful act.¹¹ In the Commonwealth jurisdiction, the offence relates to racial and disability incitement.¹² In New South Wales, the offence relates to incitement to racial, transgender, homosexual and HIV or AIDS vilification.¹³ In Queensland, it covers inciting people to hatred on the grounds of race, religion, sexuality and gender identity.¹⁴ In the Australian Capital Territory, the unlawful act is to 'cause, instruct, induce, aid or permit' and it extends to all grounds of discrimination defined in the legislation and also to sexual harassment and racial vilification.¹⁵

Notes

- 1 The criminal law of incitement in South Australia is still under the common law: see generally CRIMINAL LAW [30-5]. As to incitement in anti-discrimination legislation see [80-695].
- 2 (CTH) Criminal Code s 11.4. See also *New South Wales Council for Civil Liberties Inc v Classification Review Board* (No 2) (2007) 159 FCR 108; [241 ALR 564]; [2007] FCA 896; BC200704522.
(ACT) Criminal Code 2002 s 47
(NT) Criminal Code s 43BI
(NSW) Crimes Act 1900 s 351; (NSW) Crimes Prevention Act 1916 s 2
(QLD) Criminal Code s 7(1)(d)
(TAS) Criminal Code s 298
(VIC) Crimes Act 1958 ss 321G-321L
(WA) Criminal Code ss 553, 555A, 556 (attempted procurement).
See also *Dimozantos v R* (1991) 56 A Crim R 345 .
- 3 (CTH) Criminal Code s 11.4 ('urges')
(ACT) Criminal Code 2002 s 47 ('urges')
(NSW) Crimes Prevention Act 1916 s 2 ('aids' as well as 'incites, urges or encourages')
(VIC) Crimes Act 1958 s 2A (includes 'command, request, propose, advise, encourage or authorize')
(WA) Criminal Code s 1 (includes soliciting and attempting to persuade).
- 4 (NSW) Crimes Act 1900 s 26.
- 5 Ibid s 80G.
- 6 (NT) Criminal Code s 16
(VIC) Crimes Act 1958 s 321H.
- 7 (NSW) Crimes Prevention Act 1916 s 3.
- 8 See [80-695].

(B) General Restrictions on Freedom of Expression

- 9 (CTH) [Racial Discrimination Act 1975](#) s 17(a); (CTH) [Disability Discrimination Act 1992](#) s 43(a).
- 10 See, for example, (NSW) [Anti-Discrimination Act 1977](#) ss 20C, 20D (racial vilification).
- 11 (CTH) [Racial Discrimination Act 1975](#) s 17(b); (CTH) [Disability Discrimination Act 1992](#) s 43(c).
- 12 (CTH) [Racial Discrimination Act 1975](#) s 17(a); (CTH) [Disability Discrimination Act 1992](#) s 43(a).
- 13 (NSW) [Anti-Discrimination Act 1977](#) ss 20C, 20D (racial vilification), 38R-38T(transgender vilification), 49ZT, 49ZTA (homosexual vilification), 49ZXB, 49ZXC (HIV/AIDS vilification). See *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62 ; [236 ALR 385](#); [\[2006\] NSWCA 349](#); [BC200610346](#) (claim that (NSW) [Anti-Discrimination Act 1977](#) s 49ZT contravened the constitutional immunity for political speech) (followed in *Owen v Menzies* (2010) 243 FLR 357 ; [\[2010\] QSC 387](#); [BC201007617](#) (similar claim under (QLD) [Anti-Discrimination Act 1991](#) s 124A(1)).
- 14 (QLD) [Anti-Discrimination Act 1991](#) s [131A](#) (described as offence of serious racial, religious, sexuality or gender identity vilification).
- 15 (ACT) [Discrimination Act 1991](#) s [67A](#) (racial, sexuality, intersex status, gender identity and HIV/AIDS status vilification). As to the grounds of discrimination see [\[80-290\]-\[80-400\]](#). As to sexual harassment generally see [\[80-645\]-\[80-650\]](#). As to racial vilification see [\[80-700\]](#), [\[80-705\]](#). As to homosexual and HIV/AIDS vilification see [\[80-710\]](#).

[80-2010] Racial and other vilification

The paragraph below is current to **07 March 2018**

In the Australian Capital Territory racial, sexuality, intersex status, gender identity and HIV/AIDS status vilification is unlawful.¹ In New South Wales, vilification is unlawful and includes racial, homosexual, transgender and HIV or AIDS vilification.² Under the Commonwealth discrimination legislation, an act is unlawful if it is reasonably likely to offend, insult, humiliate or intimidate, and an act includes the public communication of words, sounds, images or writing.³ In Western Australia, ***criminal*** offences exist in respect of incitement to racial hatred.⁴ Exemptions are provided to permit communication of privileged material or public acts done in good faith in the interests of academic, artistic or scientific discussion or debate.⁵

Notes

- 1 (ACT) [Discrimination Act 1991](#) s [67A](#).
- 2 (NSW) [Anti-Discrimination Act 1977](#) ss 20C (racial), 38R-38T (transgender), 49ZS-49ZTA(homosexual), 49ZXA-49ZXC (HIV/AIDS).
- 3 (CTH) [Racial Discrimination Act 1975](#) s [18C\(1\)](#), [18C\(2\)](#). No ***criminal*** offence is created.
- 4 (WA) ***Criminal*** Code ss 76-80I.
- 5 (CTH) [Racial Discrimination Act 1975](#) s [18D](#)
(ACT) [Discrimination Act 1991](#) s [67A\(2\)\(c\)](#)
(NSW) [Anti-Discrimination Act 1977](#) ss 20C(2), 38S(2)(c), 49ZT(2), 49ZXB(2).

[80-2015] Contempt of court

The paragraph below is current to **07 March 2018**

(B) General Restrictions on Freedom of Expression

Under the common law a person, which includes a publisher or broadcaster, may be punished for certain forms of expression that are determined to amount to contempt of court, including:

- (1) interruption of the proceedings of a court, for example, by an expression of dissent;¹
- (2) bringing a court into ridicule or contempt by acts or statements that adversely affect that court;² or
- (3) actions or published material that would threaten a fair trial.³

Inferior courts may have statutory definitions of 'contempt of court'.⁴

Notes

- 1 *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23  CA(NSW). See further CONTEMPT [\[105-25\]](#), [\[105-30\]](#).
- 2 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 ; [1935] ALR 232 (applied *Gallagher v Durack* (1983) 152 CLR 238 ; [45 ALR 53](#); 57 ALJR 191; [BC8300056](#)); *Director of Public Prosecutions v Francis (No 2)* (2006) 245 LSJS 377 ; [\[2006\] SASC 261](#); [BC200606566](#); *R v Hoser* [\[2001\] VSC 443](#) ; [BC200107506](#). As to contempts that scandalise or undermine the authority of a court see CONTEMPT [\[105-227\]](#), [\[105-230\]](#).
- 3 *Packer v Peacock* (1912) 13 CLR 577 ; 18 ALR 70; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation (BLF Case)* (1982) 152 CLR 25 ; [41 ALR 71](#); *X v General Television Corp Pty Ltd* (2008) 187 A Crim R 533 ; [\[2008\] VSC 344](#); [BC200808361](#) (broadcast held in contempt of court not inconsistent with (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 15). As to contempt by publication generally see CONTEMPT [\[105-35\]](#)-[\[105-120\]](#). As to contempts which interfere with the administration of justice generally see CONTEMPT [\[105-225\]](#)-[\[105-244\]](#).
- 4 See, for example, (SA) [Magistrates Court Act 1991](#) s 45.

[80-2020] Contempt of parliament

The paragraph below is current to **07 March 2018**

Any House of an Australian Parliament may bring a person before it for contempt, which can involve words or actions considered by the relevant House to constitute a contempt.¹ Only the Commonwealth Parliament has legislated to modify the common law powers.²

Notes

- 1 *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 ; [1955] ALR 705; (1955) 29 ALJ 125 (leave to appeal to Privy Council refused); *Egan v Willis* (1998) 195 CLR 424 ; [158 ALR 527](#); 73 ALJR 75; [BC9806110](#). See also *Highway v Tudor-Stack* (2006) 18 NTLR 58 ; 226 FLR 135; [\[2006\] NTCA 4](#); [BC200603111](#) per Mildren J on creation of offences analogous to the common law offence.

(B) General Restrictions on Freedom of Expression

- 2 *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 ; [1955] ALR 705; (1955) 29 ALJ 125. There are, however, statutes in other jurisdictions that recognise the common law powers: (TAS) [Parliamentary Privilege Act 1858](#); (TAS) [Parliamentary Privilege Act 1957](#) and (WA) [Parliamentary Privileges Act 1891](#). As to contempt of parliament see (CTH) [Parliamentary Privileges Act 1987](#) and generally CONSTITUTIONAL LAW [\[90-500\]](#).

[80-2025] Production for purposes of court proceedings

The paragraph below is current to **07 March 2018**

Article 19 of the International Covenant on Civil and Political Rights provides that freedom of expression includes freedom to seek, receive and impart information of all kinds.¹ Courts have inherent powers to order the production of documents for the purpose of assisting the judicial process, thereby promoting the flow of information for the purposes of litigation.² The court will not order production where it would be injurious to the public interest (through harm to the nation or the public service) to disclose it.³ Orders to produce documents recording the deliberations of Cabinet will only be issued in exceptional circumstances⁴ and this is especially so in civil proceedings.⁵ Where exceptional circumstances exist, such that the public interest in the proper administration of justice may outweigh the very high public interest in the confidentiality of Cabinet deliberations, it will usually be the duty of the judge to inspect the documents with a view to determining the issue.⁶ When ruling on a claim for public interest immunity a judge's reasons can be given in general terms.⁷ The public interest in maintaining national security will often outweigh the public interest in the administration of civil justice.⁸ The courts also have extensive powers to order that material not be published through the issue of suppression orders,⁹ including pseudonym (and similar) orders,¹⁰ and the public interest may be argued when an order is sought¹¹ though potential distress, embarrassment and damage to reputation would not be sufficient justification.¹² Some non-curial bodies, such as Royal Commissions established under statute, also have powers to order the non-publication of evidence.¹³

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 16 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 19(2). See further [\[80-1950\] note 2](#).
- 2 See, for example, *Connelly v DPP* [\[1964\] AC 1254](#)  at [1357](#) ; [\[1964\] 2 All ER 401](#); [\[1964\] 2 WLR 1145](#) ; (1964) 48 Cr App R 183 per Lord Devlin (jurisdiction remains even if there is a statutory power); *Browne v Cmr for Railways* (1935) 36 SR (NSW) 21  at 29; 53 WN (NSW) 1 per Jordan CJ; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* [\(2000\) 175 ALR 209](#) ; 74 ALJR 1404; [\[2000\] HCA 50](#); [BC200005690](#). As to the inherent powers of superior courts see PRACTICE AND PROCEDURE [\[325-10\]](#). See also COURTS AND JUDICIAL SYSTEM [\[125-110\]](#). Statutes also confer powers on either courts or the executive to make rules of court: see PRACTICE AND PROCEDURE [\[325-25\]](#), COURTS AND JUDICIAL SYSTEM [\[125-150\]-\[125-160\]](#). See, for example, rules relating to subpoenas for the production of documents (PRACTICE AND PROCEDURE [\[325-7275\]-\[325-7295\]](#)) and rules relating to discovery generally (PRACTICE AND PROCEDURE [\[325-4140\]-\[325-4550\]](#)). See also *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518 ; [\[2007\] FCA 1000](#); [BC200705229](#) at [\[18\]-\[29\]](#) (extent of Parliament's ability to make laws relating to the admissibility or inadmissibility of evidence).
- 3 *Sankey v Whitlam* (1978) 142 CLR 1  at 38-9; [21 ALR 505](#); 53 ALJR 11; [BC7800068](#) per Gibbs ACJ (citing Lord Reid in *Conway v Rimmer* [\[1968\] AC 910](#)  at [940](#) ). For the application of public interest immunity principles see *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia* [\[2007\] WASC 143](#) ; [BC200704989](#); *Collard v Australian Securities and Investments Commission (ASIC)* [\[2008\] FCA 1650](#) ; [BC200809891](#); *R (Commonwealth) v Baladjam (No 31)* [\[2008\] NSWSC 1453](#) ; [BC200813562](#); *R (Commonwealth) v Baladjam (No 29)* [\[2008\] NSWSC 1452](#) ; [BC200813561](#); *Victoria v Brazel* [\(2008\) 19 VR 553](#) ; 181 A Crim R 562;

(B) General Restrictions on Freedom of Expression

- [2008] VSCA 37; [BC200801300](#); *Police Federation of Australia v Nixon* [2010] FCA 315 ; [BC201001978](#); *P Dawson Nominees Pty Ltd v Australian Securities and Investments Commission (No 3)* [2009] FCA 779 ; [BC200906340](#).
- 4 *Commonwealth v Northern Land Council* (1993) 176 CLR 604  at 618; [112 ALR 409](#); 67 ALJR 405 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ. See also *Whitlam v Australian Consolidated Press Ltd* (1985) 60 ACTR 7 ; 73 FLR 414; *Sankey v Whitlam* (1978) 142 CLR 1 ; [21 ALR 505](#); 53 ALJR 11; [BC7800068](#); *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 98 FCR 31 ; [171 ALR 379](#); [2000] FCA 453; [BC200001727](#); *Egan v Chadwick* (1999) 46 NSWLR 563 ; [1999] NSWCA 176; [BC9903330](#). For a detailed review of public interest immunity see *RP Data Ltd v Western Australian Land Information Authority* (2010) 188 FCR 378 ; [272 ALR 332](#); [2010] FCA 922; [BC201006140](#) per Barker J. See also PRACTICE AND PROCEDURE [\[325-5900\]](#) (Crown in right of the Commonwealth's **liability** to give discovery and answer interrogatories).
- 5 As to documentary evidence generally see EVIDENCE [\[195-3000\]-\[195-4240\]](#).
- 6 *Commonwealth v Northern Land Council* (1993) 176 CLR 604  at 619; [112 ALR 409](#); 67 ALJR 405 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ. See also EQUITY [\[185-1275\]-\[185-1290\]](#) (confidential information). As to actions for breach of confidence generally see INTELLECTUAL PROPERTY [\[240-500\]-\[240-1145\]](#). As to the public interest immunity defence specifically see INTELLECTUAL PROPERTY [\[240-1030\]](#).
- 7 *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* (2008) 234 CLR 532 ; [242 ALR 191](#); [2008] HCA 4; [BC200800373](#) at [\[180\]](#), [\[185\]](#) per Crennan J. See also *Lodhi v R* (2007) 179 A Crim R 470 ; [2007] NSWCCA 360; [BC200711455](#) (judicial power not usurped by legislation empowering judges to make non-disclosure orders).
- 8 *Church of Scientology v Woodward* (1982) 154 CLR 25 ; [4 ALN N186](#); [43 ALR 587](#) at [615](#); [BC8200127](#) Brennan J; *New South Wales Commissioner of Police v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 ; [2007] NSWCA 366; [BC200801597](#).
- 9 Every jurisdiction has many courts with such powers. See, for example, in Victoria: (VIC) [Adoption Act 1984](#) s 83 (restriction on access to reports and records); (VIC) [Coroners Act 2008](#) s 73 (publication of findings and reports); (VIC) [Judicial Proceedings Reports Act 1958](#) ss 3 (restriction on publication of reports of judicial proceedings), 4 (prohibition of reporting names); (VIC) [Evidence Act 2008](#) s 195.
- See also (CTH) [Evidence Act 1995](#) s 195 (prohibited question not to be published)
- (NSW) [Evidence Act 1995](#) s 195
- (TAS) [Evidence Act 2001](#) s 195.
- See also *Hogan v Hinch* (2011) 275 ALR 408 ; 85 ALJR 398; [2011] HCA 4; [BC201101056](#) at [\[50\]](#) per French CJ ((VIC) Serious Sex Offenders Monitoring Act 2005 (repealed) s 42 may burden political communication but it is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of representative and responsible government provided for by the Commonwealth Constitution).
- 10 For a review of the use of pseudonym orders and what must be established in an application to restrict publication by the use of pseudonym orders: see *ABC v D1* [2007] VSC 480 ; [BC200710447](#). See also *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 ; [97 ALD 241](#); [2007] HCA 4; [BC200700720](#) at [\[86\]](#) per Kirby J; *G v Armellin* (2008) 219 FLR 359 ; [2008] ACTSC 68; [BC200806732](#) (names of twins resulting from error in single embryo transfer suppressed but insufficient reason to suppress parents' names); *Ives v Western Australia (No 2)* [2010] WASC 221 ; [BC201007115](#); *Anon 2 v XYZ* [2008] VSC 466 ; [BC200809887](#).
- 11 *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153 ; *John Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131 ; [26 ALD 471](#); 59 A Crim R 68.
- 12 *John Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131  at [142](#), [143](#); [26 ALD 471](#); 59 A Crim R 68. See also *Anon 2 v XYZ* [2008] VSC 466 ; [BC200809887](#) at [\[28\]](#) per Kaye J (open justice applies with less force and vigour when not court hearings involving the exercise of judicial functions and determination).
- 13 See, for example, (CTH) [Royal Commissions Act 1902](#) s 6D(3). See also *McDonald v Brott* [1989] VR 177 .

[80-2030] National security restrictions

The paragraph below is current to **07 March 2018**

It is an offence to urge a person to:¹

- (1) overthrow by force or violence the Constitution or Commonwealth, State or Territory governments;
- (2) interfere in parliamentary elections or constitutional referenda by force or violence;
- (3) engage in violence against a targeted group distinguished by race, religion, nationality, national or ethnic origin or political opinion;
- (4) assist a country at war with Australia; and
- (5) engage in armed hostilities against Australia.

These offences do not include conduct within several defences of acts done in good faith.² At common law seditious words must be 'for the purpose of disturbing constituted authority' and not simply to create ill-will or hostility between different groups in the community.³ Disclosure of confidential information will only be restrained if it appears it will be inimical to the public interests because national security, foreign relations or the ordinary business of government will be prejudiced by its release.⁴

Notes

- 1** (CTH) **Criminal** Code ss 80.2, 80.2A, 80.2B, 80.2C. See also *ibid* s 102.1 (terrorist organisations that 'advocate' the doing of a terrorist act). As to seditious libel see DEFAMATION [\[145-3295\]](#).
- 2** (CTH) **Criminal** Code s 80.3.
- 3** *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury (Satanic Verses case)* [\[1991\] 1 QB 429](#)  ; [\[1991\] 1 All ER 306](#); [\[1990\] 3 WLR 986](#)  at [1004](#) , [1005](#) . Seditious words have been held to include a statement in 1949 that, if Australia were to be involved in war with Russia, 'We would fight on the side of Soviet Russia': *Burns v Ransley* (1949) 79 CLR 101 ; [1949] 56 ALR 817; (1949) 23 ALJ 441; [BC4900330](#). See also *R v Sharkey* (1949) 79 CLR 121 ; [1949] ALR 828; (1949) 23 ALJ 435.
- 4** *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39  at 52; [32 ALR 485](#); 55 ALJR 45 per Mason J. As to actions for breach of confidence generally see INTELLECTUAL PROPERTY [\[240-500\]-\[240-1145\]](#). As to the government as plaintiff in actions seeking to prevent disclosure see INTELLECTUAL PROPERTY [\[240-1080\]](#).

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(C) Restrictions on Media Freedom of Expression

Halsbury's Laws of Australia

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Halsbury's Laws of Australia > **80 — Civil and Political Rights** > **III POLITICAL RIGHTS** > **(2) FREEDOM OF EXPRESSION**

(C) RESTRICTIONS ON MEDIA FREEDOM OF EXPRESSION

(i) Introduction

[80-2035] Introduction

The paragraph below is current to **07 March 2018**

In relation to publication by the media through broadcasting, television, newspapers and other publications, the ordinary laws apply in so far as they relate to publication, for example, of defamatory material¹ or of indecent or obscene material.² In addition, some specific provisions have been imposed that have the effect of restricting freedom of expression.³

Notes

1 See [\[80-1995\]](#).

2 See [\[80-1975\]](#), [\[80-1980\]](#).

3 See [\[80-2040\]](#)-[\[80-2070\]](#).

(ii) Broadcasting and Television

[80-2040] General

The paragraph below is current to **07 March 2018**

A special regulatory regime for the holders of broadcasting and television licences is in force under Commonwealth legislation.¹ The controls may compel the broadcaster to broadcast, or to refrain from broadcasting, in relation to many areas, for example:

(C) Restrictions on Media Freedom of Expression

- (1) bands or frequencies that may be used;²
- (2) program standards;³
- (3) advertising;⁴
- (4) grant, renewal and cancellation of licences;⁵
- (5) broadcasting of political matter;⁶ and
- (6) broadcasting of religious and national interest material.⁷

Notes

- 1** See (CTH) [Broadcasting Services Act 1992](#) Pts 4, 5 (many licences continue to be affected by the provisions of the (CTH) Broadcasting Act 1942 (repealed) by virtue of (CTH) [Broadcasting Services \(Transitional Provisions and Consequential Amendments\) Act 1992](#). As to the details of these rules and of their administration by the two authorities see MEDIA AND COMMUNICATIONS [\[275-4850\]-\[275-5110\]](#).
- 2** (CTH) Broadcasting Act 1942 (repealed); (CTH) [Broadcasting Services Act 1992](#) Pt 3.
- 3** (CTH) Broadcasting Act 1942 (repealed) Pt IV; (CTH) [Broadcasting Services Act 1992](#) Pt 9.
- 4** See [80-2070].
- 5** (CTH) Broadcasting Act 1942 (repealed) Pt IIIB; (CTH) [Broadcasting Services Act 1992](#) s [143](#), Pt 4.
- 6** See [80-2045].
- 7** See [80-2050].

[80-2045] Political material

The paragraph below is current to **07 March 2018**

Restrictions are imposed on the broadcast of political matter or political advertisements during the Thursday to Saturday immediately preceding Commonwealth, State or Territory elections.¹ However, in order to avoid infringing the constitutionally implied right to freedom of communication on matters relevant to political discussion,² it is not possible for the Commonwealth Parliament to legislate to restrict the transmission of political advertisements during election periods in connection with Commonwealth, State or Territory elections.³ Any restrictions would have to either meet a public interest test⁴ or be appropriately related to the relevant provisions of the Constitution.⁵

Notes

- 1** (CTH) [Broadcasting Services Act 1992](#) Sch 2 cl 3A.
- 2** As to the implied right in relation to government and political matters see further [\[80-1945\]](#).
- 3** *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ; [108 ALR 577](#); 66 ALJR 577; [BC9202654](#). See also discussion in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#).

(C) Restrictions on Media Freedom of Expression

- 4 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 143 per Mason J ('reasonably necessary to achieve the competing public interest'), at 159 per Brennan J (be subject to a 'margin of appreciation'), at 174 per Deane and Toohey JJ ('conducive to ... effective ... communication' or 'not beyond what is reasonably necessary for the preservation of an ordered and democratic society'), at 221 per Gaudron J ('reasonable and appropriate regulation'); [108 ALR 577](#); 66 ALJR 577; [BC9202654](#).
- 5 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 187 per Dawson J ('incompatible with [the relevant] sections of the Constitution'), at 238 per McHugh J ('constitutionally unacceptable interference with the rights of the electors'); [108 ALR 577](#); 66 ALJR 577; [BC9202654](#).

[80-2050] Requirement to broadcast religious and national interest programs

The paragraph below is current to **07 March 2018**

The Australian Communications and Media Authority (the 'ACMA')¹ may determine during what periods a licensee is to broadcast religious matter, and whether it is to be broadcast without charge.² The relevant Minister may require a licensee to broadcast, without charge, specified items of national interest.³ Commercial, community, subscription and open narrowcasting licensees are required to develop, in consultation with the ACMA, codes of practice applicable to their operations.⁴ The codes may relate to such matters as accuracy and fairness in news and current affairs programs,⁵ the time devoted to advertising⁶ and must ensure that censorship arrangements are adhered to.⁷ The ACMA is to maintain a public register of codes of practice⁸ and, where there is no code or where it has failed in relation to a matter, must determine a standard for that matter⁹ after seeking public comments.¹⁰

Notes

- 1 See (CTH) [Broadcasting Services Act 1992](#) s 5. See generally MEDIA AND COMMUNICATIONS [\[275-6640\]-\[275-6695\]](#).
- 2 Ibid s 42, Sch 2 cl 7(2)(c).
- 3 Ibid s 42, Sch 2 cl 7(1)(d).
- 4 Ibid s 123.
- 5 Ibid s 123(2)(d).
- 6 Ibid s 123(2)(f).
- 7 Ibid s 123(3A)(a), 123(3C). As to censorship see [\[80-1985\]](#).
- 8 Ibid s 124.
- 9 Ibid s 125.
- 10 Ibid s 126.

[80-2055] Children's broadcasts

The paragraph below is current to **07 March 2018**

The Australian Communications and Media Authority (the 'ACMA')¹ must, in addition to its general powers, specifically determine standards relating to children's television programs and may require, in the case of programs for children, that the programs, or samples of them, be approved by it before the programs are shown.²

Notes

- 1** As to the ACMA see MEDIA AND COMMUNICATIONS [\[275-6640\]-\[275-6695\]](#).
- 2** (CTH) [Broadcasting Services Act 1992](#) ss [122](#), [129\(2\)](#). As to program standards generally see MEDIA AND COMMUNICATIONS [\[275-6285\]-\[275-6307\]](#).

(III) Printed Publications

[80-2060] Newspapers and other publications

The paragraph below is current to **07 March 2018**

The right to freedom of expression includes the right to impart information freely¹ in writing or in print. While it is not necessary to obtain approval in Australia to launch a newspaper or printing enterprise, some jurisdictions require the inclusion of the publisher in a newspaper.² A trend in Australian jurisdictions appears to be the repeal of legislation that required registration of newspaper publishers and the inclusion of their names on the published material.³ There are legislative requirements for lodging of all printed material with the Australian National Library and some other State libraries.⁴ All publications are subject to the ordinary laws relating to indecent and obscene material.⁵ Import or export of printed material is subject to these rules and also to a prohibition on the promotion of terrorism or the use of certain drugs.⁶

Notes

- 1** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 19(2). See further [\[80-1950\] note 2](#).
- 2** (NT) [Printers and Newspapers Act 1984](#) s [6](#)
(NSW) [Printing and Newspapers Act 1973](#) s [4](#)
(QLD) [Printing and Newspapers Act 1981](#) s [7](#)
(VIC) [Wrongs Act 1958](#) s [13C](#).
- 3** For example, the repeal of the (ACT) Printing and Newspapers Act 1961 (repealed) in the Australian Capital Territory.
- 4** See EDUCATION AND RESEARCH [\[160-1165\]](#). See, for example, (CTH) [Copyright Act 1968](#) s [195CD](#).
- 5** See generally [\[80-1975\]-\[80-1985\]](#).
- 6** (CTH) [Customs Act 1901](#) s [50](#); (CTH) [Customs \(Prohibited Imports\) Regulations 1956](#) reg 4A(1A), 4A(1B), 4A(2). As to customs generally see TAXATION AND REVENUE [\[405-80\]-\[405-85\]](#), [\[405-25000\]-\[405-27345\]](#).

(IV) All Media

[80-2065] Publication of court proceedings

The paragraph below is current to **07 March 2018**

Special rules apply to the publication of court proceedings in a number of jurisdictions. The common law rule is that there may be 'fair and accurate' reporting of proceedings¹ but a court is sometimes permitted to forbid the publication of particular evidence, or of particular names, where that is necessary in order to prevent prejudice to the administration of justice.²

Notes

- 1 *Kimber v Press Assn Ltd* [1893] 1 QB 65  ; [1861-73] All ER Rep 115n; *R v Dunbabin*; *Ex parte Williams* (1935) 53 CLR 434  at 442 per Rich J, at 448 per Dixon J; [1935] ALR 232; *Allen v John Fairfax & Sons Ltd* [1971] 1 NSWLR 773 ; *Whear v Northern Territory News Services Ltd* (1981) 8 NTR 13 ; 50 FLR 458; *Burnett & Hallamshire Fuel Ltd v Sheffield Telegraph and Star Ltd* [1960] 1 WLR 502  . See generally CONTEMPT [105-95].

- 2 See, for example:

(CTH) *Federal Court of Australia Act 1976* Pt VAA, s 50 (repealed) (includes forbidding publication in the interest of 'the security of the Commonwealth'). Principles to be applied to prohibition of publication of evidence under *ibid* s 50 (repealed) were reviewed in: *Adultshop.Com Ltd* (ACN 009 147 924) v *Members of the Classification Review Board* (No 2) (2007) 243 ALR 776 ; 99 ALD 251; [2007] FCA 1872; BC200710474 at [23]-[31] per Jacobson J; *Specsavers Pty Ltd v Optical Superstore Pty Ltd* [2010] FCA 151 ; BC201000944 at [19]-[30] per Katzmann J (applying *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 ; 43 FLR 129; (1980) ATPR ¶140-154). See also *Minister for Immigration and Multicultural and Indigenous Affairs v X* (2005) 147 FCR 243 ; [2005] FCAFC 217; BC200507730

(CTH) *Family Law Act 1975* s 121(1) (see *In the Marriage of Bau* (1986) 10 Fam LR 897 )

(NT) *Evidence Act 1939* s 56F(2)

(NSW) *Evidence Act 1995* s 126E

(QLD) *Evidence Act 1977* s 21K(7)

(SA) *Evidence Act 1929* s 69A

(TAS) *Evidence Act 2001* s 126E

(VIC) *Evidence (Miscellaneous Provisions) Act 1958* ss 32F, 42BQ

(WA) *Evidence Act 1906* s 19J.

As to statutory restriction on the publication of certain court documents see CONTEMPT [105-100]. As to pseudonym and similar orders see [80-225].

[80-2070] Tobacco advertising

The paragraph below is current to **07 March 2018**

Special legislation in all jurisdictions prohibits, with certain exceptions, the advertising of tobacco.¹

Notes

(C) Restrictions on Media Freedom of Expression

1 See generally:

(CTH) [Tobacco Advertising Prohibition Act 1992](#)

(ACT) [Tobacco and Other Smoking Products Act 1927](#)

(NT) [Tobacco Control Act 2002](#)

(NSW) [Public Health \(Tobacco\) Act 2008](#)

(QLD) [Tobacco and Other Smoking Products Act 1998](#)

(SA) Tobacco Products Regulation Act 1997

(TAS) [Public Health Act 1997](#)

(VIC) [Tobacco Act 1987](#)

(WA) [Tobacco Products Control Act 2006](#).

Note, the United Nations Human Rights Committee has ruled that the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 19 can protect commercial advertising: *Ballantyne, Davidson & McIntyre v Canada* Communication No 359/1989 CCPR/C/47/D/359/1989 (31 March 1993).

As to restrictions on the promotion of tobacco products see PUBLIC HEALTH [\[350-3175\]-\[350-3205\]](#) (tobacco advertising), [\[350-3210\]-\[350-3225\]](#) (tobacco sponsorship).

(v) Restrictions on Particular Activities

[80-2075] Use of theatres and public halls for public entertainment or meeting

The paragraph below is current to **07 March 2018**

The right to freedom of expression is defended broadly in international law to cover the conveying of ideas of all kinds in the form of art or through any form of media, and theatres and public halls have been important vehicles for expressing such views.¹ In New South Wales, there is special legislation designed to provide for self-regulation of the entertainment industry and the handling of complaints.²

Notes

1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 19(2). See further [\[80-1950\] note 2](#).

2 (NSW) [Entertainment Industry Act 2013](#).

[80-2080] Expression of sexuality

The paragraph below is current to **07 March 2018**

The expression of affection through sexual acts between consenting adults of the same sex is no longer an offence in any jurisdiction. In relation to public homosexual acts, no distinction is drawn between them and other offensive behaviour in most jurisdictions.¹

(C) Restrictions on Media Freedom of Expression

The age of consent for sexual intercourse between males is 16 years in all States and Territories other than South Australia and Tasmania,² and 17 years in South Australia and Tasmania.³

The Family Court of Australia has held that homosexuality is not a disentitling factor for guardianship or custody of children⁴ and the manner of expression of affection between a parent and the homosexual partner is not considered relevant to decisions regarding custody or access.⁵

Privacy rights have been claimed in relation to the expression of sexuality⁶ and the expression also gives rise to issues relating to the rights of assembly and procession.⁷

Notes

- 1** (ACT) [Crimes Act 1900](#) ss [392](#), [393](#)
(NSW) [Summary Offences Act 1988](#) s 4
(QLD) Criminal Code s 227
(SA) [Criminal Law Consolidation Act 1935](#) ss [56](#), [68A](#); (SA) [Summary Offences Act 1953](#) s [23](#)
(VIC) [Summary Offences Act 1966](#) s [17](#).
- 2** (ACT) [Crimes Act 1900](#) s [55](#)
(NT) Criminal Code s 127
(NSW) [Crimes Act 1900](#) s 66C
(QLD) Criminal Code s 215
(VIC) [Crimes Act 1958](#) ss [47-49](#)
(WA) Criminal Code ss 321, 186 (occupier or owner allowing certain persons to be on premises for unlawful carnal knowledge).
- 3** (SA) [Criminal Law Consolidation Act 1935](#) s [49](#)
(TAS) Criminal Code s 124.
As to sexual offences against young persons generally see CRIMINAL LAW [\[130-2095\]-\[130-2155\]](#).
- 4** *In the Marriage of Doyle* [\(1992\) 15 Fam LR 274](#) ; (1992) FLC ¶92-286; *In the Marriage of O'Reilly* (1977) FLC ¶90-300; *In the Marriage of Schmidt* (1979) 29 ALR 84; [5 Fam LR 421](#); (1979) FLC ¶90-685; *In the Marriage of Shepherd* (1979) 5 Fam LN 20; (1979) FLC ¶90-729.
- 5** *Campbell v Campbell* (1974) 9 SASR 25 .
- 6** See [\[80-1265\]](#).
- 7** See [\[80-2200\]](#).

End of Document

(A) Introduction — Freedom of Association, Assembly and Procession

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > (3)
FREEDOM OF ASSOCIATION, ASSEMBLY AND PROCESSION

(3) FREEDOM OF ASSOCIATION, ASSEMBLY AND PROCESSION

This chapter was updated by

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(A) INTRODUCTION — FREEDOM OF ASSOCIATION, ASSEMBLY AND PROCESSION

[80-2135] Introduction

The paragraph below is current to **07 March 2018**

Interference with the freedom to associate with others operates as a significant restriction on personal liberty.¹ The rights to freedom of association, peaceful assembly and procession are to some extent accorded by the common law.² There is also a right implied in the Commonwealth Constitution that freedom of association and assembly related to political matters will be protected from undue legislative interference.³ The common law has been modified by statute, mainly in relation to the right to associate and the activities of trade unions⁴ and to obtaining approval for holding an assembly or procession in a public place.⁵ The rights to assemble and participate in a procession are simply particular facets of the right to freedom of association⁶ that have received particular attention, and hence are considered here, rather than as separate rights.

Notes

- 1** *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [\[2010\] HCA 39](#); [BC201008388](#) at [\[423\]](#) per Crennan and Bell JJ. See also *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1\[2011\] HCA 24](#); [BC201104388](#).
- 2** As to rights of freedom of association, peaceful assembly, and procession in common law see [\[80-2145\]](#).
- 3** See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106  at 139 per Mason J, at 150 per Brennan J, at 212 per Gaudron J, at 227 per McHugh J (at least in relation to the right of people to participate in the federal election process but possibly more broadly, at 232, 233 per McHugh J); [108 ALR 577](#); 66 ALJR 577; [BC9202654](#); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1  at 72; [108 ALR 681](#); 66 ALJR 658;

(A) Introduction — Freedom of Association, Assembly and Procession

[BC9202684](#) per Deane and Toohey JJ (doctrine of representative government 'presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf'). See also (CC) Commonwealth Constitution ss 7, 24. See CONSTITUTIONAL LAW [\[90-2047\]](#) (freedom of communication on political issues).

- 4 See [\[80-2165\]](#) (discriminatory action by trade unions or in awards).
- 5 See [\[80-2200\]](#) (right to peaceful assembly), [\[80-2230\]](#)-[\[80-2240\]](#) (special cases).
- 6 Compare the general right to freedom of expression and the particular rights within it to freedom of speech and freedom to receive and impart information. See [\[80-1945\]](#)-[\[80-2080\]](#).

[80-2140] Rights in international law

The paragraph below is current to **07 March 2018**

The right to freedom of association is recognised in article 22 of the International Covenant on Civil and Political Rights (the 'ICCPR'),¹ and specific reference is made to the right to form and join trade unions and to article 1 of the Convention concerning the Application of the Principles of the Right to Organize and Bargain Collectively.² The right is recognised in more detail in relation to trade unions in the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR').³ Other relevant international instruments are:

- (1) International Labour Organisation Conventions Numbers 87,⁴ 98⁵ and 135;⁶
- (2) Article 5(d)(ix) of the International Convention on the Elimination of all Forms of Racial Discrimination;⁷ and
- (3) the Convention on the Elimination of All Forms of Discrimination against Women, in several specific contexts.⁸

The rights to freedom of assembly and movement are contained in articles 21 and 12 respectively of the ICCPR.⁹

The right to freedom of association and the right to freedom of assembly in the ICCPR are both mirrored in the Australian Capital Territory and Victorian human rights charters.¹⁰

Notes

- 1 The (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).

Ibid art 22 provides:

- (1) 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests;
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and the police in their exercise of this right;

(A) Introduction — Freedom of Association, Assembly and Procession

- (3) Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.'

As to the ICCPR generally see FOREIGN RELATIONS [\[215-635\]](#).

- 2 (INT) Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively (Geneva, 1 July 1949; ILO Convention No 98; Aust TS 1974 No 5) art 1. As to article 1 see note 6 below. As to the ILO conventions on human rights see also FOREIGN RELATIONS [\[215-680\]](#).
- 3 (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) art 8. As to the provisions of the ICESCR see [\[80-2155\] note 1](#). As to the provisions of the ICESCR see FOREIGN RELATIONS [\[215-640\]](#).
- 4 (INT) Freedom of Association and Protection of the Right to Organise Convention (San Francisco, 9 July 1948; ILO Convention No 87; Aust TS 1974 No 3; 68 UNTS 17) arts 2 (workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation), 3(1) (workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom to organise their administration and activities, and to formulate their programs), 3(2) (public authorities shall refrain from any interference which would restrict this right or impede its lawful exercise).
- 5 (INT) Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively (Geneva, 1 July 1949; ILO Convention No 98; Aust TS 1974 No 5) art 1. Ibid art 1 provides:

- (1) 'Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
- (2) Such protection shall apply more particularly in respect of acts calculated to:

- (a) make the employment of a worker subject to the condition that he or she must not join a union or must relinquish trade union membership, or
- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.'

- 6 (INT) Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (Geneva, 23 June 1971; ILO Convention No 135; Aust TS 1994 No 3; 883 UNTS 111) . Ibid arts 1, 2 provide:

Article 1

'Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.'

Article 2

- (1) 'Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
- (2) In this connection account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.
- (3) The granting of such facilities shall not impair the efficient operation of the undertaking concerned.'
- 7 (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; Aust TS 1975 No 40; 660 UNTS 195) art 5(d)(ix) (equal enjoyment, without distinction as to race, of 'the right to freedom of peaceful assembly and association').
- 8 (INT) Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979; Aust TS 1983 No 9; 19 ILM 33 (1980)) arts 7(c) (the right, without discrimination and on equal terms with men 'to participate in non-governmental organisations and associations concerned with the public and political life of the country'), 14(2)(f) ('to participate in all community activities'), 16(1) ('to enter into marriage' and 'freely to choose a spouse and to enter into marriage only with ... free and full consent').

(A) Introduction — Freedom of Association, Assembly and Procession

- 9** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 12, 21. As to ibid art 12 see [\[80-1140\]](#).

Ibid art 21 provides:

'The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

- 10** (ACT) [Human Rights Act 2004](#) s [15](#)

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [16](#).

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

End of Document

(B) Freedom of Association

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(3\) FREEDOM OF ASSOCIATION, ASSEMBLY AND PROCESSION](#)

(B) FREEDOM OF ASSOCIATION

(I) General

[80-2145] Common law right

The paragraph below is current to **07 March 2018**

At common law, a person has a right to associate with others. This right, which is more accurately but less often referred to as a 'freedom', is negative in character, in that a person cannot lawfully prevent other persons from freely associating with each other and from discussing issues of common concern relating to the first person, even if that first person may apprehend that the consequence may be some detriment.¹ However, the common law has recognised significant limits to the freedom through common law offences of:²

- (1) conspiring to commit a crime;³
- (2) associating with persons when a felony is committed to the point of becoming aiders and abettors;⁴ and
- (3) belonging to an unlawful company or association.⁵

Furthermore, the common law's concern with freedom of trade and contract meant that agreements made in restraint of such freedoms would be found to be void.⁶

Notes

- 1 *Allen v Flood* [1898] AC 1  at 94, 98, 99 per Lord Watson, 126-8, 140-2 per Lord Herschell, at 147-51 per Lord Macnaghten; [1895-99] All ER Rep 52; (1897) 77 LT 717.
- 2 As to conspiracy generally see CRIMINAL LAW [130-7400]-[130-7478]. See also CRIMINAL LAW [130-1165] (false imprisonment), [130-1000]-[130-2200] (assault and related offences).
- 3 *Quinn v Leathem* [1901] AC 495  at 505, 506 per Earl Halsbury LC (a conspiracy, with threats, and action to cause 'loss of business and interference with the plaintiff's legal rights' to carry on his business as he chose), at 510, 511 per

(B) Freedom of Association

Lord Macnaghten; [\[1900-3\] All ER Rep 1](#). For the crime of conspiracy when meeting to raise wages, see *R v Mawbey* (1796) 101 ER 736. See [80-2185].

- 4 *Re Heavers Case* (1768) 1 Leach 64 ; 168 ER 134. As to the overriding statutory provisions see [80-2195].
- 5 *Duvergier v Fellows* (1828) 5 Bing 248 at 268; [130 ER 1056](#) at [1064](#), HL ('persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of contempt of the King, by usurping his prerogative'); *Blundell v Winsor* (1837) 8 Sim 601 ; 59 ER 238 (deed purporting to create shares in a body other than a corporation illegal because trenching upon the prerogative of the King). Compare *Walburn v Ingilby* (1833) 1 My & K 61 at 76; 3 LJ Ch 21; [39 ER 604](#) at [610](#) per Brougham LC (dubitante).
- 6 See discussion in *Williams v Hursey* (1959) 103 CLR 30  at 61; [1959] ALR 1383; (1959) 33 ALJR 269 per Fullagar J, who notes that at common law 'any agreement which involved the "imposition of restrictions on the conduct of a trade or business" was an agreement in unreasonable restraint of trade and void'.

(II) Statutory Provisions

(A) General

[80-2150] Statutory provisions affecting the common law right

The paragraph below is current to **07 March 2018**

Many statutory provisions affect or modify the common law rules relating to association.¹ The two most important types of statutory provision relate to trade unions² and to the right to peaceful assembly.³ Other statutory provisions relate to:

- (1) the regulation of the legal obligations of members of voluntary (non-governmental) organisations;⁴
- (2) the crimes of conspiracy, membership of unlawful associations and association with known criminals;⁵ and
- (3) discrimination law.⁶

Notes

- 1 As to the common law rules relating to association see [80-2145].
- 2 As to trade unions, employer organisations and awards see [80-2155]-[80-2165].
- 3 As to the right to peaceful assembly see [\[80-2200\]](#).
- 4 As to voluntary associations see [80-2175].
- 5 As to provisions of the criminal law see [80-2185]-[80-2195]. As to conspiracy see further CRIMINAL LAW [\[130-7400\]](#)-[\[130-7478\]](#).
- 6 As to anti-discrimination legislation see [80-2170]. As to equality and discrimination generally see [\[80-175\]](#)-[\[80-830\]](#).

[80-2155] Trade unions and employer organisations

The paragraph below is current to **07 March 2018**

The International Covenant on Economic, Social and Cultural Rights¹ (the 'ICESCR') specifically extends the provisions of the International Covenant on Civil and Political Rights² (the 'ICCPR') which recognise the right to freedom of association, to include the right to choice of unions, the right of unions to function freely and the right to strike. Some industrial relations legislation specifically guarantees freedom of association by ensuring the rights of employees and employers to join an organisation or association of their choice, or not to join, and providing that a person can not be discriminated against or victimised because they are or are not members of industrial associations.³ Industrial relations legislation in all jurisdictions now regulates the activities of registered organisations of both trade unions and employers in matters involving industrial disputes.⁴ Commonwealth legislation requires that the rules of a registered organisation (whether an employer's or employee's organisation) must be in accordance with any relevant law or award,⁵ and must not contain provisions that are 'oppressive, unreasonable or unjust'.⁶ Provisions exist in most legislation that may be used to determine what organisation (of employers or employees) may cover a particular area of work, or receive recognition in respect of an employer or industry sector.⁷ Situations can occur in which individuals must join, or cannot relinquish membership of, a relevant union if they wish to obtain or retain employment.⁸

Under Commonwealth legislation, an employee or employer wishing to obtain membership of an organisation may seek a declaration that the worker or employer is entitled to membership of the relevant organisation.⁹ In the context of a claim that an employer victimised or discriminated against employees by not dismissing them, it was held that the selection of employees for retrenchment had no scintilla of connection with freedom of association.¹⁰

Notes

- 1** (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3) art 8. The text of this article reads:

(1) 'The State parties to the present Convention undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others, and
- (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

(B) Freedom of Association

- (2) This article shall not prevent the imposition of lawful restriction on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
- (3) Nothing in this article shall authorise State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such manner as would prejudice, the guarantees provided for in that Convention.'

2 The relevant provision is the (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 22. See [\[80-2140\]](#).

3 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) ss ss 21, [22](#) (prohibited conduct by employers and organisations respectively); (CTH) [Fair Work Act 2009](#) ss [354](#), [772](#). On the construction of ibid ss 340, 346 in the context of the right of union officials and members to associate and pursue common goals see *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 ; [\[2010\] FCA 284](#); [BC201001699](#). See also *Harrison v P and T Tube Mills Pty Ltd* (2009) 181 IR 162 ; [\[2009\] FCA 220](#); [BC200901567](#) at [\[285\]-\[302\]](#) per Dowsett J (no breach of (CTH) Workplace Relations Act 1996 s 792 (now (CTH) [Fair Work Act 2009](#)); union membership and position as a delegate were not reasons for his dismissal) (following *General Motors-Holden's Pty Ltd v Bowling* [\(1976\) 12 ALR 605](#) ; 51 ALJR 235; [BC7600115](#)); *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 ; 196 IR 241; [\[2010\] FCA 399](#); [BC201002546](#) (complaint that union orchestrated a campaign against her concerning enterprise bargaining negotiations and in taking adverse action against her employer yielded to this campaign in contravention of (CTH) [Fair Work Act 2009](#)). In *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96 ; 176 IR 346; [\[2008\] FCA 1470](#); [BC200808632](#) it was argued unsuccessfully that (CTH) Workplace Relation Act 1996 Pt 16 (ibid s 793(1)-(k)) (now (CTH) [Fair Work Act 2009](#)) was only operative when freedom of association rights have been infringed (that is, a right to join or not to join, or to associate with, an industrial organisation, not individual rights).

(NSW) [Industrial Relations Act 1996](#) Ch 5 Pt 1, s 209(1) (organisation acting under its rules can prevent person from becoming a member), 209(2) (person cannot be compelled to become or to remain a member of an organisation)

(QLD) Industrial Relations Act [1999 Ch 4](#)  (persons free to join or not to join organisations, and members of registered organisations protected from discrimination)

(SA) [Fair Work Act 1994](#) ss [115](#) (discrimination on the ground of not being a member of an organisation prohibited), [116](#), [116A](#) (no compulsion to become or remain a member). Note also (SA) [Fair Work \(Commonwealth Powers\) Act 2009](#) and (SA) [Statutes Amendment \(National Industrial Relations System\) Act 2009](#), to effect South Australia's participation in the national Industrial Relations system.

(TAS) [Industrial Relations Act 1984](#) s [87\(1\)](#) (not compulsory for any person to be a member of, or to join or not join, any organisation or association), [87\(2\)](#) (persons, organisations and associations must not take action against a person to coerce that person to, or make that person, join, not join or become or remain a member of an organisation or association)

(WA) [Industrial Relations Act 1979](#) s [96B](#) (no award may contain such provisions). Note also (WA) Industrial Relations Amendment Act 2010 to amend (WA) [Industrial Relations Act 1979](#) to allow access for public sector employees to have the same rights as private sector employees.

The (CTH) [Fair Work Act 2009](#) applies in the Australian Capital Territory pursuant to (CTH) [Seat of Government \(Administration\) Act 1910](#) s [5](#), in the Northern Territory pursuant to (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 53(1) and in Victoria pursuant to (VIC) [Fair Work \(Commonwealth Powers\) Act 2009](#) which distinguishes between referred and excluded subject matter. See particularly ibid s 3 (refers matters of freedom of association to the Commonwealth).

4 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#); (CTH) [Fair Work Act 2009](#)

(NSW) [Industrial Relations Act 1996](#)

(QLD) Industrial Relations Act 1999

(SA) [Fair Work Act 1994](#)

(TAS) [Industrial Relations Act 1984](#)

(WA) [Industrial Relations Act 1979](#).

As to the application of the Commonwealth law to the Australian Capital Territory, Northern Territory and Victoria see note 3 above.

(B) Freedom of Association

As to employer and employee organisations see further INDUSTRIAL LAW [\[230-105\]-\[230-125\]](#), [\[230-225\]](#) (Commonwealth), [\[230-1730\]-\[230-1790\]](#) (New South Wales), [\[230-2650\]-\[230-2700\]](#) (Queensland), [\[230-3400\]-\[230-3500\]](#) (South Australia), [\[230-4740\]-\[230-4820\]](#) (Tasmania), [\[230-5370\]](#) (Victoria), [\[230-6410\]-\[230-6501\]](#) (Western Australia).

5 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [142](#).

6 Ibid s 142(1)(c).

7 Ibid Chs 2 Pt 2 (registration and cancellation), 4 (representation and demarcation disputes)

(NSW) [Industrial Relations Act 1996](#) Ch 5 Pt 6 (demarcation orders)

(QLD) Industrial Relations Act 1999 s 279 (demarcation disputes, employee organisations)

(SA) [Fair Work Act 1994](#) s [116](#)

(TAS) [Industrial Relations Act 1984](#) ss [3\(1\)](#), [33](#), [34](#)

(WA) [Industrial Relations Act 1979](#) ss [7\(4\)](#), [23\(3\)\(e\)](#), [23\(3\)\(f\)](#).

As to the application of the Commonwealth law to the Australian Capital Territory, Northern Territory and Victoria see note 3 above.

8 See, for example, *Marett v Petroleum Refineries (Aust) Pty Ltd* (1987) EOC ¶92-206; 24 IR 101 (exclusion from work but not workplace). See also *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2008) 166 FCR 376 ; [\(2008\) 247 ALR 147](#); [\[2008\] FCAFC 22](#); [BC200801382](#) (dispute over false or misleading representation about another person's obligation to join an industrial association).

9 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [169](#).

10 *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 175 IR 320 ; [\[2008\] FCA 1224](#); [BC200807195](#) at [\[32\]](#) per Gyles J (even if the necessary injury or alteration of position had been established, a sole or dominant prohibited reason has not been established ((CTH) [Workplace Relations Act 1996](#) s 792(4) (renamed as (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s 792(4))); selection for retrenchment was not made for any reason associated with union membership or non-membership, or union activity or non-activity).

[80-2160] Conscientious objection

The paragraph below is current to **07 March 2018**

In the Commonwealth, New South Wales and South Australia, there is legislation containing provisions for the protection of persons having a conscientious objection to joining a union or other registered organisation.¹ Under the Commonwealth legislation, a person may object to trade unions in general or to a particular association, whether of employers or employees,² and the belief may be accepted as conscientious whether or not it is of a religious character or part of the doctrine of any religion.³

The South Australian definition of 'conscientious objection' is confined to religious belief,⁴ while the Queensland provision relates to beliefs based on the moral values or fundamental religious beliefs of an individual and does not include beliefs founded wholly or principally on objections to policies of industrial organisations generally, or of a particular organisation.⁵

Under the Commonwealth scheme and in New South Wales, Queensland and South Australia, a conscientious objector must apply to the registrar of the relevant court or tribunal for a certificate of conscientious objection and pay an amount equivalent to the annual fee of the organisation.⁶ A registrar determining an application for a certificate of conscientious objection is not under obligation to assess more than that the belief is really held by the applicant.⁷ An employer is prohibited from discriminating against or otherwise disadvantaging an employee by reason of their becoming or not becoming a member of an association (which includes an organisation),⁸ and the provision can be enforced by the Federal Court of Australia or Supreme Court of the relevant State.⁹

(B) Freedom of Association

Commonwealth legislation prohibits conduct designed to compel people to pay compulsory bargaining services fees, prohibits the inclusion of bargaining services fee clauses in certified agreements, makes void existing clauses, and provides for their removal.¹⁰

The legislation effectively precludes associations from imposing such fees on non-members who benefit from, or 'free ride', on members. State industrial relations commissions have differed as to how they treat compulsory bargaining fee clauses.¹¹

Commonwealth legislation also prohibits all higher education providers (public and private) from requiring a person to become a member of a student association (union or guild), or requiring a student to pay fees for non-academic student services.¹² A higher education provider which breaches the voluntary student unionism requirements will incur a reduction in their basic grant amount for a grant year.¹³

Notes

1 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [180](#)

(NSW) [Industrial Relations Act 1996](#) s 212

(QLD) Industrial Relations Act [1999 Ch 4](#)  Pt 3

(SA) [Fair Work Act 1994](#) s [118](#).

As to the application of the Commonwealth law to the Australian Capital Territory, Northern Territory and Victoria see [80-2155] note 3.

There are no equivalent provisions in Tasmania.

See also INDUSTRIAL LAW [\[230-225\]](#) (Commonwealth), [\[230-1850\]](#) (New South Wales), [\[230-2655\]](#), [\[230-2675\]](#) (Queensland), [\[230-3410\]](#) (South Australia), [\[230-5370\]](#) (Victoria).

2 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [180\(1\)](#).

3 Ibid s 180(6). 'Conscientious objection' in an industrial context is discussed in *Re Aper* [\(1978\) 21 ALR 407](#) ; 35 FLR 388.

4 (SA) [Fair Work Act 1994](#) s [118\(1\)](#).

5 (QLD) Industrial Relations Act 1999 s 102.

6 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [180](#) (application to the General Manager of Fair Work Commission)

(NSW) [Industrial Relations Act 1996](#) s 212(1), 212(3) (application to the Industrial Registrar)

(QLD) Industrial Relations Act 1999 s 111 (application to the registrar or a magistrate)

(SA) [Fair Work Act 1994](#) s [118](#) (application to the Registrar; no fee required).

As to the application of the Commonwealth law to the Australian Capital Territory, the Northern Territory and Victoria see [80-2155] note 3.

7 *Re Appeals from Registrar* 1954 53 AR (NSW) 71 at 80, 81.

8 (CTH) [Fair Work Act 2009](#) ss [340](#), [772](#). See also (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) ss ss 21, [22](#) (prohibited conduct by employers and organisations respectively).

(NSW) [Industrial Relations Act 1996](#) s 211

(QLD) Industrial Relations Act 1999 s 105(2)(e)

(B) Freedom of Association

(SA) [Fair Work Act 1994](#) s [117](#) (supply of goods and services).

As to the application of the Commonwealth law to the Australian Capital Territory, Northern Territory and Victoria see [80-2155] note 3.

- 9 (CTH) [Fair Work Act 2009](#) s [562](#); (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) s [23](#)

(NSW) [Industrial Relations Act 1996](#) s 213 (enforcement by Industrial Relations Commission of New South Wales)

(QLD) Industrial Relations Act 1999 ss 242 (definition of 'court'), 248 (Court's jurisdiction)

(SA) [Fair Work Act 1994](#) ss [26](#) (jurisdiction of the Industrial Relations Commission), [116A](#) (general offences against the principle of freedom of association).

As to the application of the Commonwealth law to the Australian Capital Territory, the Northern Territory and Victoria see [80-2155] note 3. As to industrial law generally see INDUSTRIAL LAW [\[230-1\]-\[230-450\]](#) (Commonwealth), [\[230-1400\]-\[230-1925\]](#) (New South Wales), [\[230-2005\]-\[230-2855\]](#) (Queensland), [\[230-3000\]-\[230-3570\]](#) (South Australia), [\[230-4000\]-\[230-4955\]](#) (Tasmania), [\[230-5000\]-\[230-5400\]](#) (Victoria), [\[230-6000\]-\[230-7005\]](#) (Western Australia).

- 10 (CTH) [Fair Work Act 2009](#) s [353](#).

- 11 In Queensland, see, for example, *AWU v Skills Training Mackay* (2002) 51 AILR ¶19-206 in which the Full Bench held that certified agreements may not contain bargaining fee clauses irrespective of whether the parties have agreed to such a provision. Compare South Australian Industrial Relations Commission decisions which have approved the inclusion of bargaining fees but warned that the level of the fee may be discriminatory: *Ian Gregory Morrison Pty Ltd* (SA) *Patrol and Security Officers Enterprise Agreement 2002-2004 (No 1)* (2003) 134 IR 122 ; [2003] SAIRComm 36.

- 12 (CTH) [Higher Education Support Act 2003](#) s 19–37 (requiring membership of certain organisations or payment of certain amounts).

- 13 *Ibid* s 33–37 (adjustments for breach of *ibid* s 19–37).

[80-2165] Discriminatory action by trade unions or in awards

The paragraph below is current to **07 March 2018**

Some industrial relations legislation specifically prohibits discrimination on the ground of membership of an organisation,¹ or on other grounds such as race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.² In addition, provisions in anti-discrimination legislation in all jurisdictions specifically prohibit discrimination by trade unions and employer organisations in relation to conditions for admission to membership, membership rules and in relation to some activities.³

Commonwealth legislation also protects an independent contractor who, if performing their usual work, would be a national system employee.⁴

Notes

- 1 (CTH) [Fair Work Act 2009](#) ss [354](#), [772](#); (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) ss ss 21, [22](#) (prohibited conduct by employers and organisations respectively)

(QLD) Industrial Relations Act 1999 s 101

(SA) [Fair Work Act 1994](#) s [117](#) (supply of goods and services)

(WA) [Industrial Relations Act 1979](#) s [96C](#) (in relation to employment contracts).

(B) Freedom of Association

The (CTH) [Workplace Relations Act 1996](#) (renamed as (CTH) [Fair Work \(Registered Organisations\) Act 2009](#)) applies in the Australian Capital Territory pursuant to (CTH) [Seat of Government \(Administration\) Act 1910](#) s 5, in the Northern Territory pursuant to (CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 53(1) and in Victoria pursuant to (VIC) [Fair Work \(Commonwealth Powers\) Act 2009](#) which distinguishes between referred and excluded subject matter).

- 2 (CTH) [Fair Work Act 2009](#) ss ss 3, 6, 153 (award must not include discriminatory terms), 194-195 (discriminatory term), 217-218 (variation of enterprise agreement to remove discrimination), 342 (meaning of 'adverse action'), 351

(NSW) [Industrial Relations Act 1996](#) s 169 (anti-discrimination legislation to be taken into account). See also (CTH) [Fair Work Act 2009](#) s 578 (matters to be taken into account by the Fair Work Commission).
- 3 (CTH) [Racial Discrimination Act 1975](#) s 14 (membership); (CTH) [Sex Discrimination Act 1984](#) ss 19 (membership of registered organisation), 28D (sexual harassment of a member); (CTH) [Disability Discrimination Act 1992](#) s 20 (organisations); (CTH) [Age Discrimination Act 2004](#) s 23

(ACT) [Discrimination Act 1991](#) s 15

(NT) [Anti-Discrimination Act 1992](#) s 32

(NSW) [Anti-Discrimination Act 1977](#) ss 11 (race discrimination), 28 (sex discrimination), 38H (transgender), 43 (marital status), 49I (disability), 49ZA (carer), 49ZL (homosexuality), 49ZYF (age)

(QLD) [Anti-Discrimination Act 1991](#) ss 7(k) (trade union activity), 19, 20

(SA) [Equal Opportunity Act 1984](#) ss 35 (sex, gender, sexuality), 57 (race), 72 (disability), 85G (age)

(TAS) [Anti-Discrimination Act 1998](#) ss 16 (discrimination by a person on ground of attribute), 22(1)(e) (membership and activities of clubs), 22(1)(g) (awards, enterprise agreements or industrial agreements)

(VIC) [Equal Opportunity Act 2010](#) s 35

(WA) [Equal Opportunity Act 1984](#) ss 15 (sex, marital status, pregnancy), 35AG (gender history), 35F (family responsibility or family status), 35T (sexual orientation), 41 (race), 58 (religious or political conviction), 66F (impairment), 66ZA (age).

As to discrimination on the grounds of trade union or employer association activity see [\[80-395\]](#). As to discrimination on listed grounds see [\[80-290\]-\[80-400\]](#).
- 4 (CTH) [Fair Work \(Registered Organisations\) Act 2009](#) ss ss 21, 22 (prohibited conduct by employers and organisations respectively), 141 (rules of membership); (CTH) [Fair Work Act 2009](#) Ch 3.

[80-2170] Provisions in anti-discrimination law

The paragraph below is current to **07 March 2018**

Some jurisdictions have extended the grounds of unlawful discrimination to include discrimination arising from the association:¹

- (1) of one person with another in the status of carer;
- (2) of one person with the other in the status of parent;
- (3) where there are family responsibilities or assistance to disabled persons; and
- (4) with a person identified on the basis of one of the attributes or grounds set out in the legislation.

Notes

- 1** As to discrimination on the ground of family, parent or carer status generally see [\[80-325\]](#).

[80-2175] Voluntary associations

The paragraph below is current to **07 March 2018**

The courts will not intervene to enforce arrangements made by individuals, who are free to associate for virtually any form of legal activity.¹ The courts will not normally interfere in the affairs of a voluntary association, although attempts have been made to move them in this direction in relation to associations formed for:²

- (1) political purposes;
- (2) the pursuit of religious and cultural objectives;
- (3) educational and scientific purposes; and
- (4) sporting and like activities.

Notes

- 1** *Wise v Perpetual Trustee Co Ltd* [\[1903\] AC 139](#)   at [149](#) ; (1903) 72 LJPC 31; 87 LT 569 per Lord Lindley. See further VOLUNTARY ASSOCIATIONS [\[435-1\]](#).
- 2** As to intervention by the courts in the affairs of a voluntary association see VOLUNTARY ASSOCIATIONS [\[435-320\]](#)-[\[435-330\]](#).

[80-2180] Loitering for prostitution

The paragraph below is current to **07 March 2018**

In some jurisdictions, the common law right (or freedom) is curtailed by the creation of an offence to loiter or frequent a public place for the purpose of prostitution.¹

Notes

- 1** As to sex workers generally see PROFESSIONS AND TRADES [\[340-1760\]](#)-[\[340-1775\]](#).

(B) Criminal Law

[80-2185] Conspiracy

The paragraph below is current to **07 March 2018**

The common law recognised a right to freedom of association and, through the common law of criminal conspiracy, imposed limits on that right that affected the criminal status of the members of the conspiracy.¹ The basic common law right (or freedom) relating to associations, including the limitation that those involving a criminal conspiracy, is subject to the limitation that it is an offence to enter into agreements either to do an unlawful act or a lawful act by unlawful means.² Legislation in most jurisdictions either codifies the basic common law principle³ or modifies a particular aspect of it.⁴ To constitute a conspiracy, an agreement must be between two or more persons⁵ and may result in conviction even if only one accused is found guilty, provided conviction is consistent with acquittal of the other person or persons who have associated to make the agreement.⁶ Assuming the necessary common intent, all the members of such an association will be guilty of the conspiracy, even if only one of them actually commits the unlawful action.⁷ Secrecy is not a necessary element in a conspiracy.⁸ However, an agreement simply to cause a public mischief will not be held to be a conspiracy.⁹ There is also a tort of conspiracy that may lead to a civil remedy when there is an agreement to do a lawful act with the predominant purpose of injuring or damaging another,¹⁰ or where there is an agreement to do an unlawful act with intent to injure another.¹¹ In either case, damage must follow.¹²

Notes

- 1 As to the right to freedom of association see [80-2145]. As to conspiracy generally see CRIMINAL LAW [\[130-7400\]-\[130-7478\]](#).
- 2 *R v Jones* (1832) 4 B & Ad 345 at 348; [110 ER 485](#) at [486](#) per Lord Denman CJ.
- 3 (CTH) Criminal Code s 11.5
(NT) Criminal Code ss 282-293 (abolishes common law offence of conspiracy and creates statutory crimes confined to conspiracy to commit a crime and defraud)
(QLD) Criminal Code ss 541-543
(TAS) Criminal Code s 297.
- 4 (ACT) [Criminal Code 2002](#) s [48](#)
(NSW) [Crimes Act 1900](#) ss 341, 342, 580D
(SA) [Criminal Law Consolidation Act 1935](#) ss [258](#) (restricts the scope of the common law), 270
(VIC) [Crimes Act 1958](#) ss 321-321F, [339](#)
(WA) Criminal Code ss 558, 560.
- 5 *R v Orton* [1922] VLR 469  at 475; (1922) 28 ALR 193 per Cussen J.
- 6 *R v Darby* (1982) 148 CLR 668 ; [40 ALR 594](#); 56 ALJR 688; [BC8200067](#).
- 7 *R v Orton* [1922] VLR 469 ; (1922) 28 ALR 193.
- 8 *R v Orton* [1922] VLR 469  at 473; (1922) 28 ALR 193 per Cussen J.
- 9 *R v Boston* (1923) 33 CLR 386 ; 30 ALR 185; [BC2300011](#) (agreement to obtain certain decisions a conspiracy because of a bribe offered to a Member of Parliament); *R v Howes* (1971) 2 SASR 293  (conspiracy to effect public mischief held to be conspiracy only because in addition there was an intent to defraud). See also *Director of Public*

(B) Freedom of Association

Prosecutions v Withers [\[1975\] AC 842](#)  ; [\[1974\] 3 All ER 984](#); [\[1974\] 3 WLR 751](#)  (investigation agency not guilty of conspiracy because not a crime to obtain confidential information from banks).

- 10** See *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [\[1991\] 1 VR 637](#) ; [\(1989\) 95 ALR 211](#); (1989) Aust Torts Reports ¶80-290; *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 ; [115 ALR 411](#); [11 ACSR 103](#).
- 11** *Cox v Journeaux (No 2)* (1935) 52 CLR 713 ; [1936] ALR 40; (1935) 9 ALJ 127; *Williams v Hursey* (1959) 103 CLR 30 ; [1959] ALR 1383; (1959) 33 ALJR 269.
- 12** As to the tort of conspiracy see further TORT [\[415-1600\]-\[415-1615\]](#).

[80-2190] Unlawful associations

The paragraph below is current to **07 March 2018**

Until reforms were made by the (CTH) [National Security Legislation Amendment Act 2010](#) which repealed the relevant provisions of the (CTH) [Crimes Act 1914](#), unlawful associations were constituted by any body of persons which advocated or encouraged the overthrow of the Commonwealth Constitution, the overthrow of the government of the Commonwealth or a State by force or violence, or the destruction of property.¹ Similarly, any body of persons which advocated the doing of any act having as an object the carrying out of a 'seditious intention' was an unlawful association.² Any member of such an organisation, or any person who acted as a representative of or a teacher in such an organisation, and any person who contributed money or goods to, or received or solicited subscriptions or contributions of money or goods for an unlawful association, was guilty of an offence.³

The repeal of these provisions implemented recommendations of the Australian Law Reform Commission and the Gibbs Committee,⁴ as they were considered no longer relevant to the current security environment, and (CTH) Criminal Code offences relating to terrorist organisations address matters of associating with a terrorist organisation.⁵

In addition, a number of 'urging violence' offences exist in the (CTH) Criminal Code, namely urging violence against the Commonwealth Constitution,⁶ urging violence against groups⁷ and urging violence against members of groups.⁸ A similar offence also exists for advocating terrorism.⁹

Other Commonwealth offences include associating in support of serious organised criminal activity¹⁰ and supporting a criminal organisation.¹¹ Provision is also made for ancillary consequences such as visa cancellation for a person with 'association' with others involved in criminal conduct.¹²

Certain State legislation also limits freedom of association through the use of control orders.¹³

Notes

- 1** (CTH) [Crimes Act 1914](#) ss 30A, 30AA.
- 2** Ibid ss 30A(1)(b), 30A(3).
- 3** Ibid ss 30B, 30D.
- 4** Australian Law Reform Commission report, *Fighting Words: A Review of Sedition Laws in Australia*; 1991 Committee of Review of Commonwealth Criminal Law.

(B) Freedom of Association

- 5 For proscription of terrorist organisations see [80-2193].
- 6 (CTH) Criminal Code s 80.2.
- 7 Ibid s 80.2A.
- 8 Ibid s 80.2B.
- 9 Ibid s 80.2C.
- 10 Ibid s 390.3 (subject to defences for association with a close family member relating to a matter of family or domestic concern, for the purposes of public religious worship, providing aid of a humanitarian nature, legal advice or where it is reasonable in the circumstances).
- 11 Ibid s 390.4.
- 12 On the nature of association necessary under (CTH) [Migration Act 1958](#) s [501\(6\)\(b\)](#) to enliven ministerial discretion to cancel a visa if the person has or has had an 'association' with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct see *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 ; [243 ALR 606](#); [2007] FCAFC 203; [BC200711294](#) at [\[130\]](#) per Black CJ, French and Weinberg JJ (it involves some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation).
- 13 See, for example:

(NSW) [Crimes \(Criminal Organisations Control\) Act 2012](#) s 7 (provides for declaration if satisfied members of particular organisation 'associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity', and that organisation 'represents a risk to public safety and order'). See *Wainohu v New South Wales* (2011) 243 CLR 181 ; [278 ALR 1](#) [2011] HCA 24; [BC201104388](#) (the scheme for making control orders in (NSW) Crimes (Criminal Organisations Control) Act 2009 Pts 2, 3 (repealed by (SA) Crimes (Criminal Organisations Control) Act 2012) significantly differs from (SA) [Serious and Organised Crime \(Control\) Act 2008](#) s [14\(1\)](#)) (held invalid in *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [2010] HCA 39; [BC201008388](#) at [\[111\]](#) per Gummow, Hayne, Crennan and Bell JJ since there is no obligation imposed upon the Supreme Court to make an order upon the basis of the anterior declaration made by an eligible Judge). Note also (NSW) [Crimes \(Criminal Organisations Control\) Act 2012](#) s 19(7) permits the restriction of control orders so as not unreasonably to burden freedom of political communication.

(SA) [Serious and Organised Crime \(Control\) Act 2008](#). See *South Australia v Totani* (2010) 242 CLR 1 ; [271 ALR 662](#); [2010] HCA 39; [BC201008388](#) at [\[82\]](#) per French CJ, at [149] per Gummow J, at [236] per Hayne J, at [481] per Kiefel J ((SA) [Serious and Organised Crime \(Control\) Act 2008](#) s [10](#) empowered the Attorney-General to make a declaration (without reasons) in respect of an organisation to the effect that its members are involved in 'serious criminal activity' and represents a risk to public safety and order with the result under *ibid* s 14(1) that the Magistrates Court must (without questioning the merits) on application make a control order restricting freedom of association and communication. The High Court of Australia found that *ibid* s 14(1) reduced the judicial function of the Magistrates Court to an executive process (where the Magistrates Court was dependent on the executive's determination) so that it was not an independent and impartial tribunal).

As to further discussion of constitutional implications see [\[80-45\]](#).

[80-2193] Proscription of terrorist organisations

The paragraph below is current to **07 March 2018**

The (CTH) Criminal Code allows the Governor-General to make a regulation specifying an organisation as a 'terrorist organisation' in Australia when the Minister is satisfied 'on reasonable grounds' that the organisation 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act'.¹ The reference to the doing of a terrorist act includes a reference to a situation in which the planned act does not occur, or to more than one terrorist act.² The Minister must arrange a briefing for the Leader of the Opposition on any proposed regulation.³ The Parliamentary Joint Committee on Intelligence and Security may review the making of any such regulation and report to each House of Parliament within the 'applicable disallowance period', thus enabling the report to inform the disallowance process.⁴ The regulations cease to have effect on the third anniversary of the day on which

(B) Freedom of Association

they take effect.⁵ A person or organisation may make a 'de-listing application' to the Minister on the grounds that there is no basis for the Minister's satisfaction.⁶ This decision is open to judicial review.

The (CTH) Criminal Code creates a raft of terrorist-related offences which impact on freedom of association, including:⁷

- (1) providing or receiving training connected with terrorist acts;
- (2) possessing things connected with terrorist acts;
- (3) collecting or making documents likely to facilitate terrorist acts;
- (4) acts done in preparation for or planning terrorist acts;
- (5) directing the activities of a terrorist organisation;
- (6) membership of a terrorist organisation;
- (7) recruiting for a terrorist organisation;
- (8) training a terrorist organisation or receiving training from a terrorist organisation;
- (9) getting funds to, from or for a terrorist organisation;
- (10) providing support to a terrorist organisation;
- (11) associating with terrorist organisations;
- (12) financing terrorism; and
- (13) financing a terrorist.

Notes

- 1 (CTH) Criminal Code s 102.1(2). This provision was amended by the (CTH) [Criminal Code Amendment \(Terrorist Organisations\) Act 2004](#) which removed the requirement for the United Nations Security Council to have identified an organisation as a terrorist organisation.
- 2 (CTH) Criminal Code s 102.1(20).
- 3 Ibid s 102.1(2A).
- 4 Ibid s 102.1A.
- 5 Ibid s 102.1(3).
- 6 Ibid s 102.1(17).
- 7 Ibid ss 101.2, 101.4, 101.5, 101.6, 102.2, 102.3, 102.4, 102.5, 102.6, 102.7, 102.8, 103.1, 103.2. For the meaning of 'organisation' see *Benbrika v R* (2010) 247 FLR 1 ; [\[2010\] VSCA 281](#); [BC201007814](#) at [\[64\]-\[98\]](#), [\[111\]-\[120\]](#) per Maxwell P, Nettle and Weinberg JJA (meaning of 'foster'). As to preparatory acts and the need to identify a particular 'terrorist act' see *Lodhi v R* (2006) 199 FLR 303 ; [\[2006\] NSWCCA 121](#); [BC200602710](#) at [\[57\]-\[77\]](#) per Spigelman CJ, McClellan CJ at CL and Sully J; *Ul-Haque v R* [\[2006\] NSWCCA 241](#) ; [BC200611461](#) (confirming that the principles of construction in *Lodhi*, above that (CTH) Criminal Code Div 101 applies equally to *ibid* Div 102). As to anti-terrorism detention provisions see also [\[80-1120\]](#).

[80-2195] Consorting or associating with thieves or offenders

The paragraph below is current to **07 March 2018**

The common law right to freedom of association is limited in some jurisdictions by the existence of an offence of habitually associating with reputed thieves or convicted offenders.¹ The offence is punishable by fine or imprisonment.² Much depends on statutory construction, but the offence may be committed if the consorting is with a number of persons,³ if it is 'habitual' (which is a question of fact)⁴ and if the persons are 'reputed' though not necessarily convicted thieves.⁵ The purpose of consorting with thieves is not relevant.⁶ The view has been expressed that the offence, even with the possible exonerating clauses contained in the Tasmanian legislation, seriously infringes the right to freedom of association.⁷

Notes

- 1** (NSW) [Crimes Act 1900](#) s 93X (habitually consorting with convicted offenders). See also *ibid* s 93T (participating in criminal groups). See *Tajjour v New South Wales* (2014) 254 CLR 508; [313 ALR 221](#); [2014] HCA 35; [BC201408267](#) ((NSW) [Crimes Act 1900](#) s 93X held not to breach the implied freedom of political communication).
(SA) [Summary Offences Act 1953](#) s 13 (habitually consorting with convicted offenders)
(TAS) [Police Offences Act 1935](#) s 6 (unless an acceptable account can be given of that person's means or of the reason for the consorting).
There are no equivalent provisions in the other jurisdictions.
- 2** (NSW) [Crimes Act 1900](#) s 93X
(TAS) [Police Offences Act 1935](#) s 6 (imprisonment only).
See also *Wilson v Giles* [1966] SASR 361 (imprisonment held to be the more appropriate punishment).
- 3** *Johanson v Dixon* (1979) 143 CLR 376 at 385 per Mason J, at 393 per Murphy J; [25 ALR 65](#); 53 ALJR 494; *Jan v Fingleton* (1983) 32 SASR 379; 9 A Crim R 293, SC(SA), Full Court.
- 4** *Brealy v Buckley* [1934] ALR 371.
- 5** *Reardon v O'Sullivan* [1950] SASR 77, SC(SA), Full Court.
- 6** *Johanson v Dixon* (1979) 143 CLR 376; [25 ALR 65](#); 53 ALJR 494; [BC7900062](#); *Benson v Rogers* [1966] Tas SR 97 at 102 per Burbary CJ.
- 7** *Johanson v Dixon* (1979) 143 CLR 376 at 392; [25 ALR 65](#); 53 ALJR 494 per Murphy J.

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(C) Freedom of Assembly

Halsbury's Laws of Australia

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#) > [\(3\) FREEDOM OF ASSOCIATION, ASSEMBLY AND PROCESSION](#)

(C) FREEDOM OF ASSEMBLY

(I) Common Law Rights

[80-2200] Right to peaceful assembly

The paragraph below is current to **07 March 2018**

At common law, peaceful assembly, procession and association are generally not unlawful and so can be said to be the subject of a common law right (or freedom) which is negative in form.¹ Positive rights to peaceful assembly and association are recognised in the International Covenant on Civil and Political Rights, subject to wide-ranging restrictions which are 'necessary in a democratic society'.² At common law, no distinction is drawn between an assembly, a procession and a parade.³ So long as an assembly is held peaceably and in good order, without threats or incitement to violence or obstruction of traffic, it should not (prima facie) be prohibited⁴ but justification may reside in the (even unreasonable) reaction of those opposed to the procession.⁵ The exercise of the right is limited at least by the concept of lawful peaceful activity.⁶ The common law right is both enforced and limited through vesting powers of control in the police.⁷ In all jurisdictions, there are statutory provisions which impose penalties for specific common law offences such as tumultuous assembly, riot and affray.⁸ In all jurisdictions, except the Commonwealth, the Australian Capital Territory, the Northern Territory and Tasmania, there are also provisions regulating lawful assemblies.⁹ The Australian Capital Territory and Victoria include among charter-listed rights the right of peaceful assembly.¹⁰

Notes

- ¹ *Beatty v Gillbanks* (1882) 9 QBD 308 ⚠ at 313 per Field J. See also *Duncan v Jones* [1936] 1 KB 218 ⚠ at 222; [1935] All ER Rep 710 per Lord Hewart CJ (the right of assembly is 'nothing more than a view taken by the court of the individual liberty of the subject').
- ² (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) arts 21, 22. See [80-2140].
- ³ *Beatty v Gillbanks* (1882) 9 QBD 308 ⚠; *Hubbard v Pitt* [1976] QB 142 ☞+ at 178 ☞; [1975] 3 All ER 1; [1975] 3 WLR 201 ☞ per Lord Denning.

(C) Freedom of Assembly

In some jurisdictions 'assembly' includes a procession or parade. See, for example:

(CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) s 4 (assembly may be at a particular place or moving)

(NSW) [Summary Offences Act 1988](#) s 22 (public assembly includes a procession in a public place)

(QLD) [Peaceful Assembly Act 1992](#) s 4 (assembly may be at a particular place or moving)

(SA) [Public Assemblies Act 1972](#) s 3 (any assembly, convention, gathering or procession).

- 4 *Hubbard v Pitt* [1976] QB 142  at 178 ; [1975] 3 All ER 1; [1975] 3 WLR 201  per Lord Denning (while Lord Denning (in dissent on whether a nuisance had been committed) referred to a 'right of assembly', other justices indicated that the group would 'still be free' to assemble anywhere except outside the plaintiff's premises (at 186 per Stamp LJ), and that they were free 'to do acts which it was lawful for them to do' (at 188 per Orr LJ)). Compare *Campbell v Samuels* (1980) 23 SASR 389  at 393 per Zelling J (did not accept there is a juristic right to assemble or protest unless sanctioned by law).
- 5 See, for example, *Edwards v Raabe* (2000) 117 A Crim R 191 ; [2000] VSC 471; BC200006937 at [23], [36] per Smith J (breach of the peace occurs where the violence, or threatened violence, is not that of the offender but of others likely to be provoked by the offender's conduct). See also the European Commission decision in *Christians Against Racism and Fascism v United Kingdom*, App. No 88440/78 (1980) 21 D&R 138. Compare *Beatty v Gillbanks* (1882) 9 QBD 308 .
- 6 *Hubbard v Pitt* [1976] QB 142  at 178 ; [1975] 3 All ER 1; [1975] 3 WLR 201  per Lord Denning. See also the allowable limitations on the right in (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 21.
- 7 As to police powers to keep the peace see [80-2205].
- 8 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) ss 6 (creates offence), 25(1) (common law offences excluded)
(NT) [Criminal](#) Code ss 64-66
(NSW) [Crimes Act 1900](#) ss 93A-93C
(QLD) [Criminal](#) Code ss 61, 72. See also *ibid* s 51 (unlawful drilling).
(SA) [Summary Offences Act 1953](#) ss 18, 18A; (SA) [Criminal Law Consolidation Act 1935](#) ss 83B, 83C
(TAS) [Criminal](#) Code ss 73-77
(VIC) [Crimes Act 1958](#) s 206; (VIC) [Unlawful Assemblies and Processions Act 1958](#) ss 5 (riotous meetings), 10 (divisive religious, political or offensive meetings or parades celebrating or commemorating a festival anniversary or political event), 7 (exception of election meetings)
(WA) [Criminal](#) Code ss 62-65, 71.
In the Australian Capital Territory, the Commonwealth provisions apply.
- 9 (NSW) [Summary Offences Act 1988](#) Pt 4. See also *Commissioner of Police (NSW) v Keep Sydney Open Ltd* [2017] NSWSC 5 ; BC201700142.
(QLD) [Peaceful Assembly Act 1992](#)
(SA) [Public Assemblies Act 1972](#)
(VIC) [Unlawful Assemblies and Processions Act 1958](#)
(WA) [Public Order in Streets Act 1984](#).
- 10 (ACT) [Human Rights Act 2004](#) s 15(1)
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 16.
For the significance of charter-listed rights see [80-27], [80-28].

[80-2205] Police power to keep the peace

The paragraph below is current to **07 March 2018**

At common law, police have power to keep the peace in relation to groups or assemblies of persons that allows arrest when:¹

- (1) actual breaches of the peace² through acts of violence occur;
- (2) such breaches of the peace are reasonably apprehended in the immediate future; or
- (3) a renewal of an earlier breach of the peace is reasonably feared.

No substantive offence need have been committed by a member or members of the group, and no actual damage need have been caused — a magistrate has power to bind over any person to keep the peace even though no other formal proceedings have been instituted.³ It is a breach of the peace to attempt to conduct a meeting at the same location as an earlier meeting which led to a disturbance.⁴ The police power is limited by the requirement that the apprehension of violence must be reasonable in an objective sense, having regard to the circumstances of the time and place of the arrest,⁵ and should be used as a measure of last resort.⁶ However, exercise of the power should not be avoided, even if the exercise is unpopular.⁷

Notes

- 1 *R v Howell* [1982] QB 416   at 426 ; [1981] 3 All ER 383; [1981] 3 WLR 501  per Watkins LJ, CA (there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance) (followed *Bhattacharya v New South Wales* [2003] NSWSC 261 ; BC200301523 (to find apprehension and detention unjustified and unlawful); *New South Wales v Kuru* (2007) Aust Torts Reports ¶81-893 ; [2007] NSWCA 141; BC200704621; *Tomarchio v Pocock* [2002] WASCA 156 ; BC200203157; *Innes v Weate* [1984] Tas R 14  at 22; (1984) 12 A Crim R 45 per Cosgrove J). See also *Nicholson v Avon* [1991] 1 VR 212   at 223; at 221 per Marks J (definition in *R v Howell*, above not exhaustive); *Nilsson v McDonald* [2009] TASSC 66 ; BC200907514 at [7] per Crawford CJ (no breach where merely argumentative or excessively noisy, without a consequent likelihood of violence or harm to any person or property, or of persons being put in fear of such violence or harm). See also *Kuru v New South Wales* (2008) 236 CLR 1 ; 246 ALR 260; [2008] HCA 26; BC200804305 at [50] per Gleeson CJ, Gummow, Kirby and Hayne JJ (acknowledgment of the difficulties in determining a breach of the peace).
- 2 The term 'breach of the peace' has largely defied authoritative definition. In *R v Howell* [1982] QB 416   at 426 ; 427 ; [1981] 3 All ER 383; [1981] 3 WLR 501 , Watkins LJ referred to there being a breach of the peace whenever harm is done or likely to be done to a person or his property, or where a person is in fear of being so harmed through 'an assault, an affray, a riot, an unlawful assembly or other disturbance.' Most statutes have failed to provide greater clarification, although they codify police powers with respect to breaches of the peace. See, for example, (QLD) *Police Powers and Responsibilities Act 2000* ss 50-52.
- 3 *Carr v Werry* [1979] 1 NSWLR 144  ; *Police v Newnham* [1978] 1 NZLR 844  at 848 per Mahon J. See [80-2215] for binding over offences.
- 4 *Duncan v Jones* [1936] 1 KB 218   at 223; [1935] All ER Rep 710 per Lord Hewart CJ and Humphreys J. Compare *Beatty v Gillbanks* (1882) 9 QBD 308   at 313-4.

(C) Freedom of Assembly

- 5 *Kavanagh v Hiscock* [\[1974\] QB 600](#)   at [611](#) , [612](#)  per Boreham J, at 612 per May J; *Piddington v Bates* [\[1960\] 3 All ER 660](#)  at [663](#); [\[1961\] 1 WLR 162](#)  at [169](#)  per Lord Parker CJ.
- 6 *Innes v Weate* [1984] Tas R 14  at 22; (1984) 12 A Crim R 45 per Cosgrove J.
- 7 *R v Commissioner of Police (Tas); Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99 ; 61 A Crim R 390 at 396; 44 IR 214.

[80-2210] Unlawful assembly

The paragraph below is current to **07 March 2018**

At common law, an offence occurs when a person takes part in an unlawful assembly which can include, or take the form of, a procession or parade.¹ An unlawful assembly occurs when there is an assembly of three or more persons with an intent to commit a crime by open force, or to carry out any common purpose, whether lawful or unlawful, in such a manner as to cause reasonable people to fear a breach of the peace.² An unlawful assembly may not occur when a breach of the peace occurs because of the hostile reaction of the audience.³

Notes

- 1 *Hubbard v Pitt* [\[1976\] QB 142](#)   at [178](#) , [179](#) ; [\[1975\] 3 All ER 1](#); [\[1975\] 3 WLR 201](#)  per Lord Denning MR.
- 2 *R v O'Sullivan* (1948) 48 SR (NSW) 400 ; 65 WN (NSW) 155 at 156 per Jordan CJ; *Kamara v DPP* [\[1974\] AC 104](#)   at [115](#) , [116](#) ; [\[1973\] 2 All ER 1242](#); [\[1973\] 3 WLR 198](#)  per Lord Hailsham.
- 3 *Beatty v Gillbanks* [\(1882\) 9 QBD 308](#)  (conviction of the organisers of a Salvation Army procession that assembled at the hall at Weston-super-Mare and resulted in violent opposition from the Skeleton Army dismissed by Field and Cave JJ).

[80-2212] Riot

The paragraph below is current to **07 March 2018**

A breach of the peace that occurs during an assembly or procession may constitute the common law offence of riot. At common law, a riot occurs if at least three people are involved, if they have a common purpose, if that purpose is being carried out, if they will if necessary use force to carry it out and if the force used or displayed is such as to alarm at least one person of reasonable firmness and courage.¹ All Australian jurisdictions except New South Wales and South Australia have legislation authorising the reading of a proclamation or order to an assembly directing dispersal within a certain time,² where it is reasonably apprehended that the assembly of 12 or more people will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property.³ **Criminal liability** attaches to a failure to disperse.⁴

(C) Freedom of Assembly

Notes

- 1 *Field v Metropolitan Police Receiver* [1907] 2 KB 853  at 860 per Phillimore J.
- 2 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) ss 8, 17 (unlawful physical violence to persons or unlawful damage to property)
(TAS) [Criminal](#) Code ss 34-38, 76
(VIC) [Unlawful Assemblies and Processions Act 1958](#) s 6
(WA) [Criminal](#) Code s 66.
In the Northern Territory see (NT) [Criminal](#) Code s 66(1). In Queensland, note (QLD) [Criminal](#) Code ss 61, 261-265, and in South Australia see (SA) [Summary Offences Act 1953](#) s 6A (violent disorder).
- 3 See, for example, (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) s 8.
- 4 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) ss 8(3), 17(3)
(NT) [Criminal](#) Code s 66
(TAS) [Criminal](#) Code s 77
(VIC) [Unlawful Assemblies and Processions Act 1958](#) s 6
(WA) [Criminal](#) Code s 66(2).

[80-2215] Remedies

The paragraph below is current to **07 March 2018**

The initial remedy for a breach of the peace that occurs during an assembly or procession is arrest.¹ A person charged may be bound over to keep the peace, even if an offence has not actually been committed,² and the order may also include a stipulation that the defendant be of good behaviour.³ Binding over has been abolished in some jurisdictions, and replaced in most with statutory provisions for release on good behaviour bonds or equivalent.⁴ The Commonwealth, Australian Capital Territory and Queensland legislatures have not deprived courts of the common law power to release on bond.⁵

Notes

- 1 See, for example, [80-2200]-[80-2212].
- 2 *Devine v R* (1967) 119 CLR 506  at 514; [1968] ALR 17; (1967) 41 ALJR 200; [BC6700190](#) per Windeyer J; *R v Wright*; *Ex parte Klar* (1971) 1 SASR 103 .
- 3 *R v Wright*; *Ex parte Klar* (1971) 1 SASR 103  at 106, 107 per Bray CJ.
- 4 (CTH) [Crimes Act 1914](#) ss 19B, 20
(ACT) [Crimes \(Sentencing\) Act 2005](#) ss 13, 85-92, 93-100, 101-104, 105, 106
(NT) [Sentencing Act 1995](#) ss 11, 13, 124
(NSW) [Crimes \(Sentencing Procedure\) Act 1999](#) s 9, 10, 12, 101
(QLD) [Penalties and Sentences Act 1992](#) ss 22, 28, 30-32
(SA) [Criminal](#) Law (Sentencing) Act 1988 ss 36-44
(TAS) [Sentencing Act 1997](#) ss 7, 59, 101; (TAS) [Police Offences Act 1935](#) s 10

(C) Freedom of Assembly

(VIC) [Sentencing Act 1991](#) ss [71](#), [72](#), [75](#)

(WA) [Sentencing Act 1995](#) ss [12](#), [49](#).

5 (CTH) [Crimes Act 1914](#) ss [19B](#), [20](#)

(ACT) [Crimes \(Sentencing\) Act 2005](#) ss [13](#), [17](#); (QLD) [Penalties and Sentences Act 1992](#) ss [22](#), [28](#), 30-32.

[80-2220] Legislative regulation of the right

The paragraph below is current to **07 March 2018**

In all jurisdictions, there is legislation in relation to some aspects of the common law right (or freedom) of assembly and procession, and all except the Commonwealth, the Australian Capital Territory and Victoria have instituted some form of regulation over the holding of assemblies or processions.¹ The legislation, which has implications for recognition of the right to peaceful assembly, includes statutory offences to reinforce the common law,² and in all jurisdictions except the Commonwealth, the Australian Capital Territory and Victoria the legislation is accompanied by regulatory regimes as follows:

- (1) optional notification in the Northern Territory, New South Wales, Queensland, South Australia and Western Australia with subsequent authorisation without which the procession may still be held but there is no protection from charges of obstruction;³
- (2) notification to a designated authority of intention to hold an assembly or procession, with the consequence that the association or procession is unlawful unless followed by the issue of a permit;⁴ and
- (3) power, often given to local authorities, to regulate or control a type of event, activity in or the use of public places such as beaches, parks and shopping malls.⁵

Notes

1 See note 2 below. In Victoria, there is significant regulation by the City of Melbourne: see note 5 below.

2 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) (replaces common law offences with statutory offences)

(NT) [Criminal Code](#) ss 64-66

(NSW) [Crimes Act 1900](#) ss 93A-93D

(QLD) [Criminal Code](#) ss 61, 72. See also *ibid* s 51 (unlawful drilling)

(SA) [Summary Offences Act 1953](#) ss [18](#), [18A](#)

(TAS) [Criminal Code](#) ss 73, 74

(VIC) [Crimes Act 1958](#) s [206](#); (VIC) [Unlawful Assemblies and Processions Act 1958](#) ss [5](#) (riotous assemblies), 10-12 (unlawful processions and assemblies), 7, 10 (exemption of parliamentary elections)

(WA) [Criminal Code Act Compilation Act 1913](#) ss 62-67, 71.

In the Australian Capital Territory, the Commonwealth provisions apply, although the right to assembly is also protected by the (ACT) [Human Rights Act 2004](#) s [15](#).

(C) Freedom of Assembly

3 (NT) [Traffic Regulations 1999](#) reg 38

(NSW) [Summary Offences Act 1988](#) Pt 4 (notice may be given to the Police Commissioner). See also *Commissioner of Police v Vrankovic* (unreported, SC(NSW), Lee J, 28 November 1980); *Commissioner of Police v Allen* (1984) 14 A Crim R 244  at 245, 246.

(QLD) [Peaceful Assembly Act 1992](#)

(SA) [Public Assemblies Act 1972](#) ss 4, 6 (notice may be given to the Chief Secretary, the Police Commissioner or the clerk of the council for the area in which the assembly is to be held); (SA) [City of Adelaide Act 1998](#) s 37A (concerning Rundle Mall). See also *Hollobone v Foley* (1980) 23 SASR 251 ; 40 LGRA 41 (by-law made under (SA) Rundle Street Mall Act 1975 (repealed) which prohibited soliciting of donations was held invalid because it contained no evidence that the Adelaide City Council had formed the opinion, as required by the Act, that such activity would 'affect the use or enjoyment of the Mall'); (SA) [Public Assemblies Act 1972](#) s 6.

(WA) [Public Order in Streets Act 1984](#) s 5.

There is conflicting authority as to whether failure to gain authorisation leads to an offence being committed if the assembly goes ahead: *Commissioner of Police v Allen* (1984) 14 A Crim R 244 . Compare *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566 .

4 (TAS) [Police Offences Act 1935](#) s 49AB.

5 (NT) [Local Government Act 2008](#) s 188 (by-law power)

(QLD) [Peaceful Assembly Act 1992](#) s 5(4) (the power of local authorities to regulate pedestrian malls is subject to the right of a person 'to assemble peacefully with others in a public place')

(TAS) [Local Government Act 1993](#) ss 20 (powers), 145 (by laws); (TAS) [Traffic Act 1925](#) s 31(1)

(VIC) [Local Government Act 1989](#) ss 205, 207, Sch 11 cl 10(1)(a), 11 (by-laws have been issued by the Melbourne City Council to cover processions in Melbourne).

In New South Wales, for instance, the (NSW) [Sydney Cricket Ground and Sydney Football Stadium By-Law 2009](#) have been made pursuant to the (NSW) [Sydney Cricket and Sports Ground Act 1978](#); and the (NSW) Royal Botanic Gardens and Domain Trust Regulation 2008 (repealed by (NSW) [Royal Botanic Gardens and Domain Trust Regulation 2013](#)) has been made under the (NSW) [Royal Botanic Gardens and Domain Trust Act 1980](#). See also (NSW) [Local Government Act 1993](#).

(II) Special Cases

[80-2225] Picketing

The paragraph below is current to **07 March 2018**

Picketing is a means of expressing views, most often by way of protest, by a group of people that assembles at a place in order to make their views known. A picket is lawful so long as it is done merely to obtain or communicate information, or peacefully to persuade, and does not submit any other person to any kind of constraint or restriction of his or her personal freedom.¹ As an assembly, a picket may be contrary to the common law as indicated above, although not necessarily a nuisance.²

Pickets most commonly express views about industrial matters,³ often in the context of an industrial dispute.⁴ A 'picket', in the industrial relations setting, is a person who stands outside an establishment to make a protest, to dissuade or to prevent employees, suppliers, clients or customers of the employer from entering the establishment.⁵ Where accompanied by obstruction and besetting, such action may amount to an actionable tort.⁶ In at least one case, the Court has found that picketing that is otherwise unlawful at common law is not a form of industrial action within the statutory definition of that term, and therefore cannot be granted immunity from suit as 'protected action' under industrial relations law.⁷ Furthermore, a picket may also infringe the secondary boycott provisions of industrial law.⁸ Pickets may

(C) Freedom of Assembly

also express views about social,⁹ religious or political issues.¹⁰ The Courts have recognised that picketing which interferes with a person's liberty and freedom of movement infringes that person's common law rights, in particular, the right to free passage in public places and on public roads and footpaths, and have interpreted legislation against the backdrop of such rights.¹¹

Notes

- 1 *Hubbard v Pitt* [1976] QB 142   at 177 ; [1975] 3 All ER 1; [1975] 3 WLR 201  per Lord Denning MR dissenting, CA. See also *Hunt v Broome* [1973] QB 691   per Lord Reid.
- 2 *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Assn of Australia* [1971] 1 NSWLR 760  at 767 per Mason J, CA(NSW). *Hubbard v Pitt* [1976] QB 142  ; [1975] 3 All ER 1; [1975] 3 WLR 201  (nuisance found).
- 3 See, for example, *Dollar Sweets Pty Ltd v Federated Confectioners Assn of Australia* (*Dollar Sweets case*) [1986] VR 383 ; (1985) Aust Torts Reports ¶80-755; *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 ; 165 ALR 550; [1999] FCA 1108; BC9904631; *Cahill v Construction, Forestry, Mining and Energy Union* (CFMEU) (No 2) (2008) 170 FCR 357 ; 250 ALR 223; [2008] FCA 1292; BC200807432.
- 4 *Mudginberri Station v Australasian Meat Industry Employees' Union* (AMIEU) (1985) 27 AILR 245 (initial injunction restraining union members, not employees from picketing to prevent work under a workplace agreement) (confirmed *Australasian Meat Industry Employees' Union* (AMIEU) v *Mudginberri Station* (1985) 27 AILR 393; (1986) 28 AILR at [21] (sequestration by Full Court)).
- 5 *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers* (WA Branch) (1992) 111 ALR 502 ; 46 IR 263; *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 ; 165 ALR 550; [1999] FCA 1108; BC9904631 at [69] per Wilcox and Cooper JJ.
- 6 See *Dollar Sweets Pty Ltd v Federated Confectioners Assn of Australia* (*Dollar Sweets case*) [1986] VR 383  at 388, 389; (1985) Aust Torts Reports ¶80-755 per Murphy J; *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (CEPU) v *Laing* (1998) 89 FCR 17 ; 159 ALR 73 at 88; 86 IR 142; BC9805905 per French J; *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 ; 165 ALR 550; [1999] FCA 1108; BC9904631 at [69] per Wilcox and Cooper JJ; *Auspine Ltd v Construction, Forestry, Mining & Energy Union* (2000) 97 IR 444 ; [2000] FCA 501; BC200001861; *Cadbury Schweppes Pty Ltd v Australian Liquor Hospitality and Miscellaneous Worker's Union* (2000) 106 FCR 148 ; 185 ALR 480; [2000] FCA 1793; BC200007519.
- 7 See *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 ; 165 ALR 550; [1999] FCA 1108; BC9904631 at [71] per Wilcox and Cooper JJ. The court considered the definition of 'industrial action' in (CTH) Workplace Relations Act 1996 s 4 (now the (CTH) *Fair Work Act 2009*), and the category of 'protected action' under (CTH) Workplace Relations Act 1996 s 170MT(2). These provisions were replaced in May 2009 by (CTH) *Fair Work Act 2009* s 9 and ibid Pt 3–3 Div 8 respectively.
- 8 (CTH) *Competition and Consumer Act 2010* ss 45D, 45DA.
- 9 *Hubbard v Pitt* [1976] QB 142  ; [1975] 3 All ER 1; [1975] 3 WLR 201  (social workers' views opposing and picketing the business premises of real estate agents whose selling policies were seen as affecting the social structure of Islington).
- 10 In *Meriton Units Pty Ltd v Rule* (unreported, SC(NSW), Needham J, 1983), an environmental protest on a building site would not be prevented in the interests of the common law rights of freedom of speech and association, even though it might create an annoyance.
- 11 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 ; 165 ALR 550; [1999] FCA 1108; BC9904631 at [72] per Wilcox and Cooper JJ.

[80-2230] Protest

The paragraph below is current to **07 March 2018**

Peaceful protests are allowable at common law, or under statute, provided they comply with the common law and statutory requirements.¹ Control of a protest or demonstration is carried out by police, and the courts are wary of interfering in the way in which they exercise their discretion.² Peaceful demonstration is seen as an 'important part of the democratic process'³ and may not lead to conviction,⁴ nor generally may it amount to obstruction of police if it merely involves a possible tort.⁵ However, if the protest is such as to amount to disorderly behaviour⁶ or a breach of decorum⁷ the result may be conviction under the relevant legislation.⁸

Notes

- 1 See [80-2200]-[80-2225]. See also *Brown v Tasmania* (2017) 349 ALR 398 ; 91 ALJR 1089; [2017] HCA 43; BC201708656.
- 2 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118   at 136 ; [1968] 2 WLR 893  per Lord Denning MR; *Innes v Weate* [1984] Tas R 14 ; (1984) 12 A Crim R 45.
- 3 *Wright v McQualter* (1970) 17 FLR 305  at 319, 329 per Kerr J, SC(ACT) (demonstrations against the Vietnam war outside the United States Embassy, police commended for their restrained and properly planned and supervised action, involving 'selective law enforcement').
- 4 *Forbutt v Blake* (1981) 51 FLR 465 , SC(ACT); *Connolly v Willis* [1984] 1 NSWLR 373 . Compare *Commissioner of Police v Willis* (unreported, SC(NSW), 22 April 1983); *Commissioner of Police v Allen* (1984) 14 A Crim R 244  (noted that granting an order does not prohibit the march but has the effect of removing the protection conferred for approved marches under the (NSW) Public Assemblies Act 1976 (repealed) s 6).
- 5 *Innes v Weate* [1984] Tas R 14 ; (1984) 12 A Crim R 45 (laying hands, from a protest dinghy, on a Hydro-Electric Commission barge in the Franklin River despite a police order to desist not considered an offence, although the protestor was left hanging on the barge and had to be pulled aboard by the police officer).
- 6 *Hughes v Fingleton* (1977) 17 SASR 433  (protest flag waved close to the Queen).
- 7 *Campbell v Samuels* (1980) 23 SASR 389  (protest against the Prime Minister).
- 8 In the examples in notes 6 and 7 above, see, for example, the (SA) *Summary Offences Act 1953* s 7.

[80-2235] Parliamentary precincts

The paragraph below is current to **07 March 2018**

Since the establishment of the new and permanent Parliament House, special legislation has placed the precincts (defined as the Parliamentary buildings and a limited area beyond them)¹ under the control of the presiding officers, who have power to take any action they consider necessary for their control and management.² Where either House orders the arrest or detention of a person pursuant to the exercise of its powers, privileges and immunities, this may be done by the Australian Federal Police under arrangements between the presiding officers and the Minister responsible for the police.³ Similar legislation exists in other jurisdictions.⁴

Notes

- 1 (CTH) [Parliamentary Precincts Act 1988](#) s 4, Sch 1.
- 2 Ibid s 6.
- 3 Ibid s 8. The (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) applies to Parliament House: (CTH) [Parliamentary Precincts Act 1988](#) s 11. See further [80-2240].
- 4 (ACT) [Legislative Assembly Precincts Act 2001](#)
(NT) [Legislative Assembly \(Powers and Privileges\) Act 1992](#)
(NSW) [Parliamentary Precincts Act 1997](#)
(QLD) [Parliamentary Service Act 1988](#)
(TAS) [Parliament House Act 1962](#)
(VIC) [Parliamentary Precincts Act 2001](#).

[80-2240] Commonwealth places

The paragraph below is current to **07 March 2018**

The Commonwealth has legislated to adopt, for Commonwealth land and buildings, whatever legislation is operative in the relevant State or Territory and is applicable according to its tenor to Commonwealth premises.¹ The applied legislation would include State and Territory legislation relevant to the holding of assemblies or processions, except to the extent that it is excluded by the Commonwealth's own public order legislation.² The (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) regulates assemblies of three or more persons assembled for a common purpose on Commonwealth premises, including listed Territories,³ and protects diplomatic and consular premises and officers, and the personnel of international organisations.⁴ Conduct of an assembly is an absolute **liability** offence where it gives rise to a reasonable apprehension of unlawful violence to persons or damage to property occurring, or where unlawful violence or damage to property does occur.⁵ Where an assembly involves twelve or more persons, and violence occurs or is reasonably apprehended, a senior police officer may give a direction that the assembly disperse forthwith, and offences are committed if dispersal does not occur within 15 minutes.⁶ Similar provisions apply to assemblies related to consular or diplomatic persons or premises.⁷

Notes

- 1 (CTH) [Commonwealth Places \(Application of Laws\) Act 1970](#) s 4(1).
- 2 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) s 4(1) (applies in the Australian Capital Territory and in the territories of Jervis Bay, Christmas Island and the Cocos (Keeling) Islands). The Act also applies to Parliament House, Canberra: (CTH) [Parliamentary Precincts Act 1988](#) s 11. As to the power of the Commonwealth over external territories generally see CONSTITUTIONAL LAW [90-1950]-[90-1960], DEPENDENCIES [155-5].
- 3 (CTH) [Public Order \(Protection of Persons and Property\) Act 1971](#) ss 4(1) (definition of 'assembly'), 6 (assemblies involving violence or apprehension of violence).
- 4 Ibid ss 4(1), 14.

(C) Freedom of Assembly

- 5 Ibid s 6, 6(1A) (absolute liability).
- 6 Ibid s 8.
- 7 Ibid Pt III.

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(4) MINORITY AND CULTURAL RIGHTS

Halsbury's Laws of Australia

Last updated: 07 March 2018

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#)

(4) MINORITY AND CULTURAL RIGHTS

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[80-2255] Minority and cultural rights

The paragraph below is current to **07 March 2018**

Article 27 of the International Covenant on Civil and Political Rights (the 'ICCPR') provides self-standing protection for minorities. It requires states with ethnic, religious or linguistic minorities not to deny to persons belonging to those minorities the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.¹ Equivalent provision for children is made in the Convention on the Rights of the Child.² The right is not confined to citizens or permanent residents and therefore applies equally to temporary migrant workers. The right to use a particular language has some overlap with freedom of expression (which is not limited to minorities) but does not extend to a right to a language of choice in court proceedings.³ The United Nations Human Rights Committee recognises that positive measures may be needed to protect minority rights, which are directed at ensuring the survival and continued development of their cultural, religious and social identity, thus enriching the fabric of society as a whole.⁴ Article 27 of the ICCPR is reflected in each of the Australian Capital Territory and Victorian human rights charters but the Victorian charter goes further in explicitly acknowledging the distinct cultural rights of Aboriginal persons.⁵ Although minority rights are closely related to discrimination guarantees (particularly in relation to race or religious belief or activity), the latter differ principally in their application to all individuals whether or not they belong to a minority.⁶ Cultural, religious and linguistic rights enjoyed by minorities are also often directly connected to the land of Indigenous people, warranting protection of their property rights.⁷

The United Nations Declaration on the Rights of Indigenous Peoples affirms the right of Indigenous people and individuals not to be subjected to forced assimilation or destruction of their culture, the right to belong to an Indigenous community or nation in accordance with their traditions and customs, the right not to be forcibly removed from their lands or territories, the right to practise and revitalise their cultural traditions and customs, the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies, the right to revitalise their histories, languages, oral traditions, philosophies, writing systems and literatures, and the right to the dignity and diversity of their cultures,

(4) MINORITY AND CULTURAL RIGHTS

traditions, histories and aspirations.⁸ The Aboriginal and Torres Strait Islander Social Justice Commissioner is responsible for the functions of the Australian Human Rights Commission relating to the enjoyment and exercise of human rights by Aboriginal people and Torres Strait Islanders⁹ and for reporting under the (CTH) [Native Title Act 1993](#) regarding the operation of the that Act and its effect on the enjoyment of human rights of Aboriginal people and Torres Strait Islanders.¹⁰

Notes

- 1 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 27.
- 2 (INT) Convention on the Rights of the Child (New York, 20 November 1989; GA Res 44/725; Aust TS 1991 No 4; 1977 UNTS 3; 28 ILM 1448 (1989); 29 ILM 1340 (1990)) art 30 (note also *ibid* art 17).
- 3 As to the right to have free interpreter assistance see [\[80-1660\]](#).
- 4 United Nations Human Rights Committee *General Comment No 23: The rights of minorities (Art 27)* CCPR/C/21/Rev 1/Add 5 (1994) at [6.2], [9]. See also *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#).
- 5 (ACT) [Human Rights Act 2004](#) s 27
(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 19. *Ibid* s 19(2) states 'Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community:

- (1) to enjoy their identity and culture;
- (2) to maintain and use their language;
- (3) to maintain their kinship ties; and
- (4) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs'.

For the significance of charter-listed rights see [\[80-27\]](#), [\[80-28\]](#).

- 6 As to discrimination on the ground of race see [\[80-330\]](#)-[\[80-345\]](#). As to clubs and voluntary associations see [\[80-570\]](#)-[\[80-585\]](#). Additional cultural rights are found in (INT) International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966; GA Res 2106 (XX); Aust TS 1975 No 40; 660 UNTS 195) art 5(d)(vi) (the right to equal participation in cultural activities). For recognition of the importance of protection of minorities see for example *Fardon v A-G (Qld)* (2004) 223 CLR 575 ; [210 ALR 50](#); [\[2004\] HCA 46](#); [BC200406384](#) at [\[143\]](#) per Kirby J (citing *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116  at 124; [1943] ALR 193; (1943) 17 ALJ 134; [BC4300032](#) per Latham CJ).
- 7 *Wurridjal v Commonwealth* (2009) 237 CLR 309 ; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[269\]](#) per Kirby J. See also *Gerhardy v Brown* (1985) 159 CLR 70 ; [57 ALR 472](#); 59 ALJR 311; [BC8501115](#); *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [\(2010\) 265 ALR 536](#) ; 237 FLR 369; [\[2010\] QCA 037](#); [BC201001015](#); *Morton v Queensland Police Service* [\(2010\) 271 ALR 112](#) ; 240 FLR 269; [\[2010\] QCA 160](#); [BC201004400](#). As to protection of property see [\[80-1311\]](#).
- 8 (INT) United Nations Declaration on the Rights of Indigenous Peoples 2007 Preamble (GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007)) (opposed by Australia at vote on adoption but endorsed 3 April 2009) arts 5, 8, 9, 10, 11, 12, 13, 15.
- 9 (CTH) [Australian Human Rights Commission Act 1986](#) s 46C(1). See further [\[80-120\]](#).
- 10 (CTH) [Native Title Act 1993](#) s 209.

(5) RIGHT TO SELF-DETERMINATION

Halsbury's Laws of Australia

Last updated: 07 March 2018

Justin Carter LLB(Hons) BIntBus BBusSt GradDipLegPrac

[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > [III POLITICAL RIGHTS](#)

(5) RIGHT TO SELF-DETERMINATION

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[80-2271] Self-determination

The paragraph below is current to **07 March 2018**

Article 1 of the International Covenant on Civil and Political Rights (the 'ICCPR') recognises that all people have the right of self-determination.¹ This is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.² A similar right is found in article 1 of the International Covenant on Economic, Social and Cultural Rights³ and articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples.⁴ Positive action required by states to facilitate realisation of the right to self-determination requires them to refrain from interfering in the internal affairs of other states and thereby adversely affecting the exercise of the right to self-determination.⁵ The ICCPR draws a distinction between the right to self-determination (belonging to people) and minority rights under article 27 of the ICCPR (conferred on individuals which may be the subject of individual petitions under the First Optional Protocol).⁶

Notes

- 1** (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 1 reads:

- (1) 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(5) RIGHT TO SELF-DETERMINATION

- (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'
- 2 United Nations Human Rights Committee *CCPR General Comment No 12: The right to self-determination of peoples* (Art 1) UN Doc. HRI/GEN/1/Rev 6 at 134 (2003) at [1]. See also *Secretary, Department of Human Services v Sanding* [2011] VSC 42; [BC201100569](#) at [23] per Bell J (noting the decision making principles applicable to Aboriginal children which give recognition to the distinct and cultural attributes of Aboriginal people, to the principle of 'Aboriginal self-management and self-determination' (under (VIC) Children, Youth and Families Act 2005 s 12(1)) and to the importance of maintaining a child's Aboriginal identity).
- 3 (INT) International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966; Aust TS 1976 No 5; 993 UNTS 3). As to the provisions of the ICESCR see [\[80-2155\] note 1](#).
- 4 (INT) United Nations Declaration on the Rights of Indigenous Peoples 2007(GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007)) (opposed by Australia at vote on adoption but endorsed 3 April 2009).
- 5 Ibid art 6. See also (INT) United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res 2625, UN GAOR, 25th Sess, Supp No 28, UN Doc. A/8028 (1970) 121).
- 6 United Nations Human Rights Committee *General Comment No 23: The rights of minorities* (Art 27) CCPR/C/21/Rev 1/Add 5 (1994) at [3.1], [3.2]. As to minority and cultural rights see [\[80-2255\]](#).

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(1) DEROGATION OF RIGHTS IN PEACETIME

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[Halsbury's Laws of Australia](#) > [80 — Civil and Political Rights](#) > IV DEROGATION OF POWERS

IV DEROGATION OF POWERS

(1) DEROGATION OF RIGHTS IN PEACETIME

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[80-2295] Derogation of rights in international law

The paragraph below is current to **07 March 2018**

In Australia, there are legislative provisions that permit the executive government to take special action during peacetime emergencies that may affect civil and political rights.¹ Article 4 of the International Covenant on Civil and Political Rights (the 'ICCPR') allows for temporary derogation, in time of officially proclaimed public emergency which threaten the life of the nation, from some but not all of the rights recognised in the ICCPR.² Any derogation must be limited to the extent strictly necessary and be effected without discrimination on several listed grounds.³ The non-derogable rights are those relating to:

- (1) life;⁴
- (2) freedom from **torture** and cruel, inhuman or degrading treatment or punishment;⁵
- (3) slavery and forced labour;⁶
- (4) imprisonment merely on contractual grounds;⁷
- (5) retrospective criminal offences;⁸
- (6) recognition as a person before the law;⁹ and
- (7) freedom of thought, conscience and religion.¹⁰

(1) DEROGATION OF RIGHTS IN PEACETIME

When depending on the right of derogation, a State must immediately notify other States and the United Nations Secretary-General of the provisions affected, the reason for derogation.¹¹ The Australian Capital Territory and Victorian human rights charters do not make similar provision for non-derogation but include broad limitation provisions.¹² Under the European Convention, a state may take measures in times of war or other public emergency threatening the life of the nation, to the extent strictly required by the exigencies of the situation, provided those measures are consistent with its other obligations under international law.¹³ Where there is express or implied flexibility allowed for in the application of a human right, European jurisprudence allows for a 'margin of appreciation' to be given to the state, subject to court scrutiny in determining whether those conditions for the exercise of the exceptional right of derogation had been fulfilled.¹⁴

Notes

- 1 As to such provisions (which do not include powers relating to national security that have been introduced during times of major war) see [80-2300]-[80-2325].
- 2 (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 4(1). To date Australia has not sought to rely on art 4.
- 3 Ibid art 4 provides that:

- (1) 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the Covenant may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
- (2) No derogation from certain articles of the Convention may be made.
- (3) Any State Party to the Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the Covenant, through the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made through the Secretary-General when such derogation is terminated.'

"The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 *HRQ* 3, at [39]-[40], under the heading "Public Emergency which Threatens the Life of the Nation", states: '39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

- (a) affects the whole of the population and either the whole or part of the territory of the State; and
- (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.'

Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under *ibid* art 4, and economic difficulties per se cannot justify derogation measures (*ibid* arts 40, 41).

In July 2001, the United Nations Human Rights Committee adopted *General Comment No 29: States of Emergency (article 4)*, CCPR/C/21/Rev 1/Add 11, 31/08/2001, (available at <http://www.ohchr.org>) concerning (INT) International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 4, in

(1) DEROGATION OF RIGHTS IN PEACETIME

which it clarified the scope of non-derogable rights and identified elements which cannot be subject to lawful derogation.

4 Ibid art 6. Generally see [\[80-885\]-\[80-935\]](#).

5 Ibid art 7. Generally see [\[80-1345\]-\[80-1390\]](#).

6 Ibid art 8. Generally see [\[80-1375\]](#). See also ibid art 8(3)(c)(i) (forced labour in sentencing).

7 Ibid art 11. Generally see [\[80-1060\]](#).

8 Ibid art 15. Generally see [\[80-1685\]](#).

9 Ibid art 16. Generally see [\[80-200\]](#).

10 Ibid art 18. Generally see [\[80-1445\]-\[80-1535\]](#).

11 Ibid art 4(3).

12 (ACT) [Human Rights Act 2004](#) s 28

(VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s 7.

13 (INT) European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; 213 UNTS 221) art 15.

For other such agreements see further FOREIGN RELATIONS [\[215-630\]-\[215-680\]](#).

14 See *Lawless v Republic of Ireland (No 3)* (1961) 1 EHRR 15; *Brogan v United Kingdom* (1988) 11 EHRR 117; *Brannigan v United Kingdom* (1993) 17 EHRR 539; *Fretté v France* (2002) 38 EHRR 438.

[80-2300] Commonwealth law

The paragraph below is current to **07 March 2018**

Under the (CC) Commonwealth Constitution, the Commonwealth is required to protect every State against domestic violence, provided the executive government of the State so requests.¹ If domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may, without a summons from the State, interfere to restore order.²

The procedures for such intervention have been codified by statute.³ In the run up to the 2000 Sydney Olympics, the (CTH) [Defence Act 1903](#) was amended to provide the Commonwealth with power to **act** unilaterally, regardless of whether there is a request by any State or Territory government, where three authorising Ministers are satisfied 'domestic violence' is occurring or is likely to occur that would affect 'Commonwealth interests', and the State or Territory is not, or is unlikely to be, able to protect such Commonwealth interests.⁴ The powers of the Commonwealth were further expanded in 2005 in response to terrorism fears to provide four additional call-out mechanisms covering threats to critical infrastructure, incidents offshore and in the air, as well as a special expedited call-out provision.⁵

The Chief of the Defence Force is able to utilise the Defence Force in such manner as is reasonable and necessary, for the purpose for which they were called out, and must comply with any directions given by the Minister.⁶ The Reserve Forces are not to be called out or utilised in connection with an industrial dispute, although section 51G of the (CTH) [Defence Act 1903](#) provides that the Chief of the Defence Force can restrict any protest, dissent, assembly or industrial action where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property.⁷ A member of the Defence Force who is being utilised in accordance with these provisions is given specific special powers by the legislation to free hostages, detain suspects, control the movement of persons or of means of transport, evacuate persons, 'search persons or locations or things', 'seize any dangerous thing, or other thing related to the domestic violence', or do anything incidental to any of these actions.⁸ Ministerial

(1) DEROGATION OF RIGHTS IN PEACETIME

authorisation is required for such actions unless the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists.⁹

Amendments were rejected which would have required the military to obtain judicial warrants before searching homes, limited the right to shoot to kill a fleeing person, or allowed soldiers to claim conscientious objection to deployment against civilians.¹⁰ Furthermore, an unprecedented 'superior orders' defence has been introduced for criminal offences committed by members of the Defence Forces.¹¹ While the relevant Minister or Ministers must 'have regard to Australia's international obligations' before authorising the use of the powers, thereby bringing in obligations under human rights treaties,¹² many commentators remain concerned at the failure of the legislation adequately to define 'domestic violence' or 'critical infrastructure', the blurring of the distinction between the role of the police and the military, the provision for the use of lethal force to protect property, and the immunity granted for defence forces personally from state and territory laws.¹³

Notes

- 1 (CC) Commonwealth Constitution s 119 ('the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'). This also applies to the Territories: see CONSTITUTIONAL LAW [\[90-260\]](#).
- 2 *R v Sharkey* (1949) 79 CLR 121  at 151; [1949] ALR 828; (1949) 23 ALJ 435 per Dixon J. Dixon J noted (at CLR) 150) that this included where the functions of the Commonwealth, or the security of its organs of government, are involved; otherwise, law and order is primarily the concern of the State. As to the defence force and the defence power see CONSTITUTIONAL LAW [\[90-1390\]](#)-[\[90-1425\]](#).
- 3 See (CTH) [Defence Act 1903](#) Pt III Div 4, Pt IIIAAA Div 1; (CTH) [Defence Regulation 2016](#) Pt 12 (the Chief of the Defence Force must utilise the Defence Force in a way that is reasonable and necessary to protect the State or Territory: *ibid* reg 69(2)). See also notes 5-13 below and generally DEFENCE [\[150-90\]](#).
- 4 (CTH) [Defence Act 1903](#) ss [51A](#), [51AA](#) and [51AB](#). However, an order about utilising the Defence Force to protect a State against domestic violence can still only be made on application of a State Government: *ibid* s 51B.
- 5 (CTH) [Defence Legislation Amendment \(Aid to Civilian Authorities\) Act 2006](#).
- 6 (CTH) [Defence Act 1903](#) ss [51D](#), [51E](#), as restricted by *ibid* s 51T. See also (CTH) [Defence Regulation 2016](#) reg 69. As to the calling out of the defence forces generally see DEFENCE [\[150-162\]](#), [\[150-163\]](#). As to the different forces see DEFENCE [\[150-10\]](#).

The call out powers have been used three times since Federation to authorise military aid to civilian authorities:

- (1) the Victorian Police Strike in the 1920s;
 - (2) the Commonwealth Heads of Government (the 'CHOGM') Regional Meeting in Bowral in February 1978 after the explosion outside the CHOGM Meeting at the Sydney Hilton; and
 - (3) the Territory of Papua New Guinea in 1970: Head M, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions' (2001) *Federal Law Review* 11.
- 7 (CTH) [Defence Act 1903](#) ss [51A\(2\)](#), [51AA\(3\)](#), [51B\(2\)](#), [51C\(2\)](#), [51G](#).
 - 8 *Ibid* s 51I(1).
 - 9 *Ibid* s 51I(2)-(3).
 - 10 See Head M, 'The Military Call-Out Legislation — Some Legal and Constitutional Questions', (2001) *Federal Law Review* 11. For further reading see Lee H P, *Emergency Powers* (1984) Sydney, Law Book Co, 1984 ISBN 0455202729.
 - 11 (CTH) [Defence Act 1903](#) s 51WB(2) makes it a defence to a criminal act done by a member of the Defence Force where:

(1) DEROGATION OF RIGHTS IN PEACETIME

- (1) the criminal act was done by the member under an order of a superior; and
- (2) the member was under a legal obligation to obey the order; and
- (3) the order was not manifestly unlawful; and
- (4) the member had no reason to believe that circumstances had changed in a material respect since the order was given; and
- (5) the member had no reason to believe that the order was based on a mistake as to a material fact; and
- (6) the action taken was reasonable and necessary to give effect to the order.

12 Ibid ss 51SC, 51ST(8).

13 See submissions made to Legal and Constitutional Legislation Committee, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (February 2006) by the Human Rights and Equal Opportunity Commission, and the Gilbert + Tobin Centre of Public Law, especially with respect to potential breaches of the right to life, available at <http://www.hreoc.gov.au>.

[80-2305] Commonwealth defence power

The paragraph below is current to **07 March 2018**

The Commonwealth defence power¹ will expand in time of war to allow many legislative actions that would not be within power in time of peace.² Thus, it has allowed regulations relating to prices, including averment provisions,³ prohibition of advertisements at Christmas and Easter,⁴ and a requirement that a State Premier keep open certain bars.⁵ The limitation on acquisition except on just terms will, however, continue to bind the Commonwealth under national security regulations, as will the doctrine of the separation of judicial power.⁶ Regulations relating to holiday pay may not bind State employees,⁷ and the Crown in right of a State may not be bound by national security regulations relating to landlord and tenant.⁸

Notes

- 1** (CC) Commonwealth Constitution s 51(vi). Generally see CONSTITUTIONAL LAW [\[90-1390\]-\[90-1425\]](#). See also DEFENCE [\[150-255\]](#).
- 2** *Hume v Higgins* (1949) 78 CLR 116 ; [1949] ALR 273; (1949) 23 ALJ 38; [BC4900060](#) (sales of land); *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 ; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#) (allegedly subversive organisations); *Dawson v Commonwealth* (1946) 73 CLR 157 ; [1946] ALR 461; (1946) 20 ALJ 257; [BC4600015](#) (land dealings). As to the expansion of the defence power in time of war see CONSTITUTIONAL LAW [\[90-1410\]](#).
- 3** *Ex parte Mackaness and Avery Pty Ltd; Re Royce* (1943) 43 SR (NSW) 239 ; 60 WN (NSW) 153.
- 4** *Ferguson v Commonwealth* (1943) 66 CLR 432 ; [1943] ALR 342; (1943) 17 ALJ 66; [BC4300016](#).
- 5** *De Mestre v Chisholm* (1944) 69 CLR 51 ; [1944] ALR 183; (1944) 18 ALJ 28; [BC4400029](#).
- 6** *Minister for the Army v Dalziel* (1944) 68 CLR 261 ; [1944] ALR 89; (1944) 17 ALJ 405; *Queensland v Congoo* (2015) 256 CLR 239 ; [320 ALR 1](#); [2015] HCA 17; [BC201503712](#) (impact of such exercises of power on native title rights and interests).

(1) DEROGATION OF RIGHTS IN PEACETIME

7 *Pidoto v Victoria* (1943) 68 CLR 87 ; [1944] ALR 1; (1943) 17 ALJ 341.

8 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338 ; [1944] ALR 349; (1944) 18 ALJ 208.

[80-2310] Other Commonwealth legislation

The paragraph below is current to **07 March 2018**

The Commonwealth has enacted specific legislation relating to the prevention of strikes, lockouts and boycotts if these are considered likely to prejudice trade and commerce with other countries or among the States,¹ or if they hinder the provision of public services of the Commonwealth.² The Criminal Code was also significantly amended in 2005 pursuant to a reference of power by the States, defence head of power and the implied protection of the nation power, to enable the Australian Federal Police to deal with terrorism and related activities.³

Notes

1 (CTH) [Crimes Act 1914](#) s 30J. As to states of emergency in other jurisdictions see [80-2315].

2 Ibid s 30K. For the meaning of 'boycott' see *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 ; [1928] ALR 297; (1928) 2 ALJ 178; [BC2800016](#). See also *Howell v Doyle & Donegan* [1952] VLR 128 ; [1952] ALR 337.

3 See [\[80-1120\] note 1](#), [80-2325].

[80-2315] State general emergency legislation

The paragraph below is current to **07 March 2018**

In Queensland, the Governor in Council, when any circumstances exist or are likely to exist that imperil peace, safety, welfare or order, may declare a state of emergency and give such directions and prescribe such matters deemed necessary or expedient.¹ The declaration may extend for 3 months and is renewable.² Any person not complying with any of the provisions is liable to penalty.³

In Victoria, the Governor may declare a state of emergency and take action and issue regulations when public safety or order are imperilled by any persons or body of persons.⁴ Industrial conscription is not permitted,⁵ and the right to strike is protected in certain cases,⁶ but the Governor may make regulations for securing the essentials of life.⁷ There is no remedy against the Crown except compensation for property used or taken,⁸ but the powers under the legislation are to be in aid of, and not in derogation of, any powers exercisable apart from the legislation.⁹ The proclamation declaring the state of emergency must immediately be communicated to parliament, and if not sitting, the parliament must be summoned.¹⁰

In the Australian Capital Territory, the Chief Minister may declare a state of emergency when satisfied that an emergency has happened, is happening or is likely to happen.¹¹ An emergency is defined as an actual or imminent event that requires a significant and coordinated response.¹² Examples of emergencies and emergency risks given in the legislation include:¹³

(1) DEROGATION OF RIGHTS IN PEACETIME

- (1) a terrorist attack;
- (2) flood, storm, bushfire or urban fire emergency;
- (3) a chemical or hazardous material incident;
- (4) a disease or epidemic emergency; and
- (5) an aircraft accident.

The **Act** does not authorise the taking of measures directed at ending an industrial dispute, or dealing with a riot or other civil disturbance.¹⁴ When an emergency is declared, the Chief Minister must appoint a controller who has the power, with respect to the emergency area, to:¹⁵

- (1) direct the movement of people, animals or vehicles;
- (2) direct property owners in or near the area to place their property under the control of the controller;
- (3) direct persons to provide the controller with information and documents reasonably needed;
- (4) take possession of premises and things;
- (5) excavate land, and form tunnels or construct earthworks, barriers or temporary structures in or near the emergency area
- (6) control, use, close off or block a drainage facility in or near the emergency area; and
- (7) coordinate and maintain the distribution of essential services.

This power can be exercised despite any other Territory law.¹⁶ A person who suffers loss because of an **act** or omission of the controller is entitled to be paid reasonable compensation.¹⁷

Similar executive emergency powers are provided by legislation in each of the other States and Territories.¹⁸ Among the national contingency plans to answer requests for assistance from States and Territories in the event of disaster is the Commonwealth Government Disaster Response Plan issued by Emergency Management Australia.¹⁹

Notes

- 1 (QLD) [State Transport Act 1938](#) s 2(1). See also *Dean v A-G (Qld)* [1971] Qd R 391 .
- 2 (QLD) [State Transport Act 1938](#) s 2(2).
- 3 Ibid s 3.
- 4 (VIC) [Public Safety Preservation Act 1958](#) ss 3-5.

(1) DEROGATION OF RIGHTS IN PEACETIME

- 5 Ibid s 7. See also (VIC) [Charter of Human Rights and Responsibilities Act 2006](#) s [11\(3\)\(b\)](#) (forced or compulsory labour does not include work or service required because of an emergency threatening the Victorian community or a part of the Victorian community).
- 6 (VIC) [Public Safety Preservation Act 1958](#) s 8.
- 7 Ibid s 5.
- 8 Ibid s 10.
- 9 Ibid s 11.
- 10 Ibid s 3(3). See also the relevant provisions of (VIC) [Emergency Management Act 1986](#), which gives power to the Premier to declare a 'state of disaster' where there is an emergency that constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria: *ibid* s 23. Emergency is broadly defined: *ibid* s 4. The Premier must report to Parliament as soon as practicable after the declaration: *ibid* s 23(7). The 'co-ordinator in chief' in such circumstances 'is responsible for directing and co-ordinating the activities of all government agencies, and the allocation of all available resources of the Government,' (*ibid* s 24(1)), can take possession and make use of any person's property considered necessary for responding to the disaster, and can control entry and movement within and evacuation from the relevant area: *ibid* s 24(2). Compensation is available under *ibid* s 24(5).
- 11 (ACT) [Emergencies Act 2004](#) s 156(1).
- 12 Ibid Dictionary. Non-exhaustive examples of emergency risks given in the Dictionary include fire, flood, storm or earthquake, an accident or explosion, an epidemic or animal disease, and a shortage of electricity, gas or water.
- 13 Ibid s 148.
- 14 Ibid s 150(3). Note also (ACT) [Human Rights Act 2004](#) s 26(3)(b) (forced or compulsory labour does not include work or service required because of an emergency or calamity threatening the life or well-being of the community).
- 15 (ACT) [Emergencies Act 2004](#) s 160A(2).
- 16 Ibid s 160A(3).
- 17 Ibid s 169(1).
- 18 (NT) [Emergency Management Act 2013](#)
(NSW) [State Emergency and Rescue Management Act 1989](#)
(SA) [Emergency Management Act 2004](#). Note that a declaration of a major emergency cannot remain in force for more than 14 days: *ibid* s 23(2)(b)
(TAS) [Emergency Management Act 2006](#)
(WA) [Emergency Management Act 2005](#).
- 19 Commonwealth Government Disaster Response Plan (COMDISPLAN), January 2014. A copy of the Commonwealth Government Disaster Response Plan (COMDISPLAN) is available at <http://www.ag.gov.au>.

[80-2318] Terrorism-related emergency legislation

The paragraph below is current to **07 March 2018**

'Authorisations' may be made which give substantial powers aimed at assisting in preventing a terrorist attack or minimising arising risks, finding and preserving evidence and apprehending responsible persons. For instance, legislation in all jurisdictions provides for the declaration of special areas where there is a risk of occurrence of a terrorist **act**. Within such areas, police officers may request personal information from any person, stop and detain without warrant for the purposes of conducting a search, and stop and search vehicles.¹

These laws were further bolstered to provide for preventative detention and control orders consistent with an agreement reached by the Council of Australian Governments (the 'COAG') in September 2005.² Furthermore, leaders agreed to develop a protocol to ensure effective coordination and communication 'in the unlikely event of an emergency of greater magnitude'.³ A National Emergency Protocol (the

(1) DEROGATION OF RIGHTS IN PEACETIME

'Protocol') was subsequently agreed to by the COAG in February 2006. The Protocol provides for the coordination of communications both between the leaders and with the public during an imminent or actual emergency of national significance, recognising that States and Territories have primary responsibility for the management of emergencies within their jurisdictions. The Protocol notes that a 'national emergency' may include responding to natural or human-caused threats such as a disease outbreak, severe weather or environmental emergency.⁴

Notes

1 (ACT) [Terrorism \(Extraordinary Temporary Powers\) Act 2006](#)

(NT) [Terrorism \(Emergency Powers\) Act 2003](#) Pt 2 Div 1 (giving of authorisations), Div 2 (powers given by authorisations)

(NSW) [Terrorism \(Police Powers\) Act 2002](#)

(SA) [Terrorism \(Police Powers\) Act 2005](#)

(VIC) [Terrorism \(Community Protection\) Act 2003](#)

(WA) Terrorism (Extraordinary Powers) [Act 2005](#).

2 See [80-2325]. The validity of the power to make interim control orders in (CTH) Criminal Code Div 104 was upheld in *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[145\]-\[148\]](#) per Gummow and Crennan JJ (Gleeson CJ agreeing) (the protection of the public from a 'terrorist **act**' was within the defence power of (CC) Commonwealth Constitution s 51(vi)), at [94]-[103], [651] per Gummow and Crennan JJ (Heydon J agreeing) (rejecting the view that making of an interim control was dominated by legislative policy to the point that there was an impermissible limitation of the judicial power to apply objectively determinable criteria).

3 See Council of Australian Governments' Special Meeting on Counter-Terrorism, 27 September 2005, available at <http://www.coag.gov.au>.

4 See Council of Australian Governments' Communique, 10 February 2006, Attachment H, available at <http://www.coag.gov.au>.

[80-2320] State and Territory essential service legislation

The paragraph below is current to **07 March 2018**

Various jurisdictions have enacted legislation to cover the provision of essential services and in the Northern Territory, the provision of essential goods.¹

The definition of 'essential services' varies between jurisdictions.² There are wide powers of direction conferred on the relevant Minister or Governor in Council.³ There are various forms of protection for persons **acting** under the legislation⁴ and different jurisdictions permit or deny compensation for actions under the legislation.⁵

There are also provisions in essential services legislation regarding industrial actions. For example, in New South Wales, if industrial action disrupts an essential service that is subject to a proclamation or order, an employer who is adversely affected by the disruption has the right to stand down any employee from duty for any period,⁶ and industrial organisations may be liable to suspension or cancellation of registration, amendment of the organisations rules and the appointment of a receiver for the recovery of penalties imposed on the organisation.⁷ In Victoria, strikes in an essential service may only be held and continued by secret ballot⁸ and lock outs in essential services are illegal.⁹

(1) DEROGATION OF RIGHTS IN PEACETIME

There are limitations on the duration of proclamations in relation to the provision of essential services.¹⁰

In Western Australia, the Governor may by regulation override other legislation, including Acts,¹¹ but the power is limited in operation to the parts of the State affected.¹²

Notes

- 1** (NT) [Essential Goods and Services Act 1981](#) (declaration of shortage)
(NSW) [Essential Services Act 1988](#); (NSW) [State Emergency Service Act 1989](#)
(QLD) [State Transport Act 1938](#)
(SA) [Essential Services Act 1981](#) (disruption of essential service)
(VIC) [Essential Services Act 1958](#)
(WA) [Fuel, Energy and Power Resources Act 1972](#).
There are no equivalent provisions in the Australian Capital Territory.
As to emergency services generally see POLICE AND EMERGENCY SERVICES [\[320-1000\]-\[320-1600\]](#).
- 2** (NT) [Essential Goods and Services Act 1981](#) s 2 (definitions of 'goods' and 'service')
(NSW) [Essential Services Act 1988](#) s 4
(QLD) [State Transport Act 1938](#) s 2(4)
(SA) [Essential Services Act 1981](#) s 2
(VIC) [Essential Services Act 1958](#) s 3. See also (VIC) [Public Safety Preservation Act 1958](#) s 5.
There are no equivalent provisions in the other jurisdictions.
- 3** (NT) [Essential Goods and Services Act 1981](#) s 7
(NSW) [Essential Services Act 1988](#) s 11
(SA) [Essential Services Act 1981](#) ss 4, 5, 6 (powers conferred on the Minister)
(VIC) [Essential Services Act 1958](#) s 5 (power conferred on the Minister). See also (VIC) [Public Safety Preservation Act 1958](#) ss 4, 5 (power conferred on the Governor in Council).
There are no equivalent provisions in the other jurisdictions.
- 4** (NT) [Essential Goods and Services Act 1981](#) ss 8, 9, 15
(NSW) [Essential Services Act 1988](#) s 27
(SA) [Essential Services Act 1981](#) s 10C.
There are no equivalent provisions in the other jurisdictions.
- 5** See, for example:
(NSW) [Essential Services Act 1988](#) s 27
(VIC) [Public Safety Preservation Act 1958](#) s 10 (compensation only for property used or taken).
Compare the following provisions which allow for compensation:
(NT) [Essential Goods and Services Act 1981](#) s 11
(VIC) [Essential Services Act 1958](#) s 9

(1) DEROGATION OF RIGHTS IN PEACETIME

- (WA) [Fuel, Energy and Power Resources Act 1972](#) s 56.
- 6 (NSW) [Essential Services Act 1988](#) s 16.
- 7 Ibid ss 17-26.
- 8 (VIC) [Essential Services Act 1958](#) ss 11, 12.
- 9 Ibid s 13.
- 10 (NT) [Essential Goods and Services Act 1981](#) s 5(3) (declaration for 1 month or shorter)
- (NSW) [Essential Services Act 1988](#) s 8 (no more than 30 days)
- (QLD) [State Transport Act 1938](#) s 2(2) (not exceeding 3 months, but may be extended for a further 3 months)
- (SA) [Essential Services Act 1981](#) s 3 (7 day limit on a declaration, with extensions only up to 14 days in total, after which a resolution of both Houses is necessary): *ibid* s 3(2)(a)
- (VIC) [Essential Services Act 1958](#) s 4 (proclamation in force for no more than 1 month). See also (VIC) [Public Safety Preservation Act 1958](#) s 3(2) (proclamation in force for no more than 1 month).
- There are no equivalent provisions in the other jurisdictions.
- 11 (WA) [Fuel, Energy and Power Resources Act 1972](#) s 41.
- 12 Ibid s 45.

[80-2325] Anti-terrorism legislation and derogation

The paragraph below is current to **07 March 2018**

The United Nations ('UN') High Commissioner for Human Rights issued several statements identifying criteria for protecting human rights while States implement measures against terrorism in light of UN Security Resolution 1373 (28 September 2001) which calls on States to bring to justice those involved in terrorist **acts** and to establish such **acts** as serious criminal offences. Similar criteria were adopted by the UN Security Council's Counter Terrorism Committee, and continue to be developed by the UN Human Rights Council. These criteria require that any restrictions for public security purposes shall:¹

- (1) be prescribed by law;
- (2) be necessary for public security or public order;
- (3) not impair the essence of the right;
- (4) be necessary in a democratic society;
- (5) conform to the principle of proportionality;
- (6) be appropriate to achieve their aim;
- (7) be the least intrusive means to achieve the aim of the measures;
- (8) respect the principle of non-discrimination; and
- (9) not be arbitrarily applied.

In September 2005, the Council of Australian Governments (the 'COAG') agreed that counter-terrorism laws would be strengthened in each jurisdiction to provide, *inter alia*, for preventative detention for up to

(1) DEROGATION OF RIGHTS IN PEACETIME

14 days, and enhanced stop, question and search powers.² The COAG agreed that these laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse (such as parliamentary and judicial review), and be exercised in a way that is evidence-based, intelligence-led and proportionate. Legislation has since been enacted at all levels of government.³ Critics have argued that measures such as preventative detention orders and control orders passed as part of the package of anti-terrorism measures agreed to by the COAG amount to a derogation or suspension of rights such as liberty of person and freedom of movement and association without the declaration of a 'public emergency that threatens the life of the nation' that might justify a formal derogation.⁴

The (CTH) [Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Act 2014](#) created broad anti-terrorism powers including the right to cancel the visas, suspend the passports or remove the family assistance payments of individuals who might prejudice the security of Australia or a foreign country.⁵

Notes

- 1 See the numerous resolutions adopted by the UN General Assembly, the UN Security Council, and the UN Commission on Human Rights (now the UN Human Rights Council). In resolution 1456 (2003) available at <http://www.ohchr.org>, the Security Council declared that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.' See also Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism* Fact sheet 32EN, July 2008.
- 2 The Council of Australian Governments' Communiqué, Special Meeting on Counter-Terrorism, 27 September 2005, available at <http://www.coag.gov.au>.
- 3 Generally see [\[80-1120\]](#), [\[80-1125\]](#), [\[80-1172\]](#), [\[80-1630\]](#). Recent parliamentary inquiries and other relevant reviews include the (CTH) National Security Legislation Amendment Bill 2010 and (CTH) Parliamentary Joint Committee on Law Enforcement Bill 2010; Inquiry into the (CTH) National Security Legislation Monitor Bill 2009; Inquiry into the (CTH) Independent Reviewer of Terrorism Laws Bill 2008 (No 2); The Clarke Inquiry on the Case of Dr Mohamed Haneef; Review of the power to proscribe terrorist organisations available at <http://www.aph.gov.au>.
- 4 See, for example, Gilbert & Tobin Centre for Public Law, *Submission made to the International Commission of Jurists Eminent Jurist Panel Inquiry into Australia's Counter-Terrorism Laws*, 10 March 2006. For criticism by the House of Lords of the use in the United Kingdom of control orders see *Secretary of State for the Home Department v AF* [\[2010\] 2 AC 269](#) ; [\[2009\] 3 All ER 643](#); [\[2009\] 3 WLR 74](#) ; [\[2009\] UKHL 28](#).
- 5 (CTH) [Counter-Terrorism Legislation Amendment \(Foreign Fighters\) Act 2014](#) Schs 1-7.

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