

State of the Nation 1996

A Report on people of non-English speaking backgrounds

Race Discrimination Commissioner, 1996

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Foreword

This year it is a case of “and now for something completely different”. The fourth report in this series, the *State of the Nation 1996* report on people of non-English speaking backgrounds, focuses solely on the complaints mechanisms in the *Racial Discrimination Act* (RDA) and how they are used by people of non-English speaking backgrounds. Of course, my delegates and I investigate and conciliate all complaints lodged under the RDA, including those made by Indigenous Australians. However, issues affecting Indigenous Australians are reported by my colleague, Michael Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner, in his annual report.

Why have we departed from the usual this year? There are a number of reasons. Throughout 1996 we have seen significant change and most regrettably we have seen the emergence of a deplorable new wave of public racial hatred targeted specifically at Asian Australians. Among other things, this has led to a vastly increased need for information about the legal remedies available to counter such behaviour. It is also a fact that in the recent public discussion of racism, a skewed picture of the complaint handling mechanisms has been drawn by the attention given to those complaints under the RDA where conciliation has been unsuccessful or which involve the very few recalcitrant respondents. Further, it has been clear for some time that insufficient information is distributed about the many cases which are successfully resolved by the Commission. None of the cases discussed in this report forms part of the unprecedented number of complaints lodged in recent times alleging serious acts of public racial hatred. The case studies all involve finalised complaints. However, they should inform the reader about how the new complaints will be dealt with in the coming months.

Last year, we commenced a comprehensive review of the RDA in an attempt to gauge whether the Act is achieving its objects. As part of the review, we have been conducting community consultations throughout 1996. The feedback from non-English speaking background communities, and from Asian communities in particular, indicates that many people are experiencing racism on a daily basis. While not all would choose to seek legal remedies to redress the discrimination, some do not lodge complaints because they either do not know of the Act’s existence or they do not sufficiently understand its operation. Many who choose to make complaints have indicated that they encounter a range of difficulties. What is needed is more information which is clear, concise and avoids excessive legalism. It is also apparent from the so called “race debate” occurring at present that the broader community might benefit from having the Act explained simply and clearly. To these ends, this report begins with a plain English explanation of the RDA’s complaints mechanisms and a brief discussion of some of the issues particularly facing people of non-English speaking backgrounds. While we have attempted to be as accurate as possible, it is inevitable that some of the finer legal technicalities are lost in describing the law in simple English. By placing a discussion of the RDA first, we hope that the case studies which follow will be more meaningful. The subsequent discussion of complaints trends is not comprehensive and is meant merely to give a preliminary overview of some of the areas emerging from the review of the RDA. A full report on the review of the Act will be available in 1997.

To a large degree the case studies outlined in this report have been chosen randomly and do not purport to be representative of all RDA complaints received from people of non-English speaking backgrounds. They are complaints which have been received and finalised in the past two years. We have tried wherever possible to include at least one example relating to the specific areas covered by the Act, such as employment, the provision of goods and services and housing and accommodation. They are presented to give a flavour of the breadth of complaints we receive and an indication of the variety of results being achieved in the conciliation process. We do, of course, include some examples of cases which my delegates or I have declined for lacking in substance or for some other reason. Confidentiality provisions in the RDA prevent us from revealing the names or other information which may identify the parties in complaints which have not been referred to public hearing. For those wishing to read further, citations are given for the cases which were successful at public hearing.

The remainder of this report briefly describes some patterns or trends in complaints. We are painfully aware of the inadequacies here. Data collection has been a source of disquiet for some years and we are anxiously awaiting the implementation of new data systems which are being trialed this month. The future looks brighter at least in this area.

Complaint handling staff have an unenviable task. It is well known that, in the past few years, the Commission has experienced difficulties with a large backlog and has had limited resources to meet it. In the face of these significant difficulties, the positive results which have been achieved are even more noteworthy. Credit must be given to the many staff who work indefatigably towards these good outcomes.

Finally, legislative redress is not the only means by which to counter racism in our country, but it is an essential foundation. It plays a vital role in indicating that racial discrimination is unacceptable in our society. This report describes how the Act is being used by Australians of non-English speaking backgrounds and it identifies some areas where change seems warranted to ensure that the Act becomes a more effective and accessible means of challenging racial discrimination in the future.

Part 1: The Racial Discrimination Act

“It’s a very difficult piece of legislation to just pick up and understand. It’s difficult using it or recommending changes to it, when you are not clear what it actually says or does...but once it’s explained, you can see how it could really help.”

Response by a Western Australian community worker during the consultations for the RDA Review.

The recent consultations for the review of the *Racial Discrimination Act 1975 (Cth)* (RDA) indicated that many people do not have a good grasp of the contents of the Act because it is a difficult piece of legislation to understand at a glance. The *Community Consultation Guide*, which was distributed as part of the review, has been enthusiastically received by many community representatives and workers for its simple explanation of the substance and operations of the RDA.

As *State of the Nation 1996* is about the complaints processes, extracts from the *Community Consultation Guide* have been reproduced here. Information has been added to give as full an explanation as possible of the coverage of the major provisions of the RDA, and the dispute resolution processes which the Act provides. There is also information on how to lodge a complaint.

What is the RDA?

The *Racial Discrimination Act* was the first piece of anti-discrimination legislation enacted by the Commonwealth Government. It incorporates Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) - see Appendix 1. The key sections of the RDA which are discussed in this report are contained in Appendix 2.

The RDA is a powerful and important statement about equal treatment for all people in Australian society. It makes racial discrimination unlawful in all areas of public life, and it gives rights to equality before the law to people of all races, colours, national and ethnic origins - see Article 5 of CERD. The *Racial Hatred Act 1995* (Cth), which commenced on 13 October 1995, expanded the RDA to make it unlawful to do public acts which are based on racial hatred. Complaints about offensive or abusive behaviour based on racial hatred are now accepted by the Commission.

What is unlawful discrimination under the RDA?

Discrimination involves a practice or act which makes a distinction between people or groups, and which advantages some and disadvantages others. The RDA does not cover all discriminatory acts and practices in society. It does, however, protect against discrimination in the exercise of rights and freedoms in public life contained in Article 5 of CERD, and further details specific areas in which discrimination is unlawful (see the discussion of sections 11-16 below).

The RDA covers both *direct* and *indirect* racial discrimination. People seeking to effectively use the RDA must understand these two types of discrimination, and be able to recognise them.

Direct discrimination

Direct racial discrimination occurs when a person receives less favourable treatment on the grounds of that person's race, colour, descent, national or ethnic origin, than another person in the same position would receive.

Section 9(1) is the main section of the RDA which makes racial discrimination unlawful. It is an extremely broad section. While all other anti-discrimination laws in Australia list specific areas where racial discrimination is unlawful, **section 9(1) of the RDA makes direct and indirect racial discrimination unlawful in *all* areas of public life contained in Article 5 of CERD.**

Section 9(1) states that:

“It is unlawful for a person to
do any act involving a distinction, exclusion, restriction or preference
which is
based on race, colour, descent or national or ethnic origin
and which
has the purpose or effect of nullifying or impairing
the
recognition, enjoyment or exercise on an equal footing
of any
human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”

Examples of direct racial discrimination are as follows:

- A professional woman of Chinese background is rejected for a position even though she is the most suitable applicant, because the interview panel is concerned she will not “fit” into the workplace.
- A worker of Bosnian background is repeatedly overlooked for training opportunities, despite having experience and qualifications equivalent to his co-workers.
- A rental agency is enthusiastic during a phone interview with a woman of Somali background, but when they see her in person, they refuse her application because the landlord does not want “blacks” on the premises.
- A job applicant gets encouragement when she makes a telephone enquiry about a vacant position. However, when she goes for the interview wearing the hijab, she is told that the vacancy has been filled. Later, an Australian-born friend, with similar qualifications and experience, goes for the interview (not wearing the hijab) and discovers that the vacancy is still open.
- A married couple of Chinese background seek emergency housing. They answer an advertisement for caravans available for hire, but the proprietor of the business refuses to rent a caravan to them or any other “yellow coloured” persons under any circumstances whatsoever.
- Staff in a hospital take no steps to fully inform a male patient of non-English speaking background of the reasons for a medical procedure he is to undergo, because they believe that he is unable to understand what they are saying to him.
- A defendant from a non-English speaking background with extremely poor English skills is refused the services of an interpreter in a courtroom.

Indirect discrimination

The prohibition of indirect discrimination covers acts or policies which appear to be neutral’ or ‘fair’ on the surface because they treat everyone in the same way, but which in practice have an adverse affect on a higher proportion of people of one racial or ethnic group. Indirect discrimination is often not easily recognised or understood and it is sometimes difficult to prove.

Section 9(1A) sets out the elements of indirect discrimination, and contains a definition which is very legalistic.

Section 9(1A) states that indirect discrimination occurs where:

A person requires another person to

comply with a term, condition or requirement

which is

not reasonable having regard to the circumstances of the case;

and

the other person does not or cannot comply with the term, condition or requirement;

and

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 in the political, economic, social, cultural or any other field of public life.

In simple terms, section 9(1A) says that indirect discrimination occurs where:

- there is **a term or condition or requirement with which all people must comply**; and
- the **person who lodges the complaint cannot comply** with the term etc; and
- the term etc **is unreasonable in all the circumstances**; and
- the requirement **impacts on the rights of more people from the same ethnic or racial background** as the person who lodges the complaint, than on other racial or ethnic groups.

Examples of indirect racial discrimination are:

- An employer advertises a position with a requirement that all applicants pass a test in English. This requirement affects more people of non-English speaking backgrounds than those of an English-speaking background. The standard of English in the test is not necessary for the work and is unreasonable in the circumstances.
- An employer requires all applicants for a position to be of a minimum height and/or weight. This requirement excludes more people of Asian background than people of other backgrounds, because Asians generally are of smaller build. It is shown that the requirement is unreasonable in the circumstances because the duties of the position can be performed by persons of lesser height and weight than the stated minimum.
- A school requires all students to wear caps as part of the school uniform. A Sikh student is refused enrolment in the school because he has to wear a turban, and cannot wear the cap. It is shown that the wearing of the cap is unreasonable in the circumstances, and affects Sikh students more than those from other ethnic groups.

Instances of indirect discrimination are widespread in Australia, and occur in areas such as employment, education and training, health services and justice. However, the RDA has rarely been used to challenge indirect discrimination, and the full potential of section 9(1A) is yet to be tapped.

The under-utilisation of section 9(1A) may be due, in part, to the technical nature of the requirements which it sets out. People of non-English speaking backgrounds may have great difficulty in gathering the information needed to show they are more adversely affected by certain conditions than people of other backgrounds. In addition, recent case law has provided a more onerous legal test for establishing that a condition is not reasonable. Further, access to legal services seems absolutely essential but it is not easy for people of non-English speaking backgrounds to obtain the legal representation appropriate to their needs.

It is important to remember that **the RDA covers all racial groups against discrimination**. This means that groups who are often the victims of racial discrimination can also be complained about under the RDA if their behaviour is unlawful.

Specific areas of racial discrimination: sections 11-16

Section 9(1) of the RDA covers acts of racial discrimination in all areas of public life, such as in:

- treatment before tribunals and all other organs administering justice;
- education and training;
- public health, medical care, social security and social services; and
- participation in cultural activities, including sport.

In addition to this general section, the RDA also lists specific areas where racial discrimination is unlawful. These specific areas are set out in sections 11-16 below. It should be noted that sections 11, 12, 13 and 15 *also* make it unlawful to discriminate against a person **on the basis of the race of a friend or associate of that person.**

Sections 11-16 say it is unlawful for a person to treat another person less favourably because of their race, colour or national or ethnic origin in the following areas:

- ***access to public places and facilities (section 11)***
examples: when seeking access to parks, libraries, government offices, hotels, places of worship and entertainment centres.
- ***land, housing and other accommodation (section 12)***
examples: when buying a house or land, or when renting a flat or a house.
- ***provision of goods and services (section 13)***
examples: when buying something, using banks, seeking assistance from government departments, lawyers, doctors and hospitals, or attending restaurants, pubs or entertainment venues.
- ***joining trade unions (section 14)***
- ***employment (section 15)***
examples: when seeking employment, training, promotion, equal pay or conditions of employment.
- ***advertising (section 16)***
example: advertisements should not indicate an intention to discriminate.

Case studies of the application of some of these areas are in Part 3 of this report.

Vicarious liability - Section 18A

The recent consultations for the review of the RDA revealed that many community representatives and intermediaries are not aware that a person or organisation can be held responsible for the behaviour of its employees or agents. This principle is called **vicarious liability** and it is applied in many other areas of the law. In any of the areas of public life in which racial discrimination is prohibited, organisations or persons can also be vicariously liable for the actions of their employees or agents.

Under the RDA, vicarious liability does not apply where the organisations or persons can show that they took all reasonable steps to prevent the employee or agent from engaging in the alleged racial

discrimination or harassment. “Reasonable steps” require the taking of positive action to prevent the discrimination or harassment from occurring, and may include training and education, remedial measures such as the appointment of harassment contact officers, and the establishment of effective complaints procedures. It is unlikely that an employer who is merely ignorant of the situation can use the defence.

For example:

A woman of Ghanaian origin wishes to complain about the actions of workers on a construction site which is adjacent to her accommodation. She alleges that the following has occurred:

- when a construction worker asked his supervisor whether he should use some noisy construction equipment, the supervisor said loudly “don’t worry ‘bout it mate, you’ll only wake up the darkies”;
- when she inquired from the workers about whether the use of “rock breaking equipment” was “absolutely necessary” at 7:15 in the morning, and commented that the construction workers would probably have more consideration if the neighbours were “white”, one of the workers replied that, “the nigger’s got a chip on the shoulder”;
- some men at the house overheard the workers talking loudly about the sexual behaviour of “dark women”.

In her complaint, the woman can take action against the employer. If she does not have the names of the individual workers, she might be able to provide information to identify them. Under the vicarious liability provisions, the employer is liable for the acts of employees, unless the employer took “all reasonable steps” to prevent the employees from doing those acts.

The racial hatred provisions

The *Racial Hatred Act 1995* added new sections (18C-18F) to the RDA. The sections only apply to public acts that occur on or after 13 October 1995, and make offensive or abusive behaviour based on racial hatred unlawful.

Offensive or abusive behaviour which is unlawful under the RDA can include **public acts based on the race, colour, national or ethnic origin** of a person or group of people which are *reasonably likely in all the circumstances* to **offend, insult, humiliate or intimidate**.

In these sections, a public act can involve any of the following:

- **communication of words, sounds, images or writing to the public;**
examples: distributing fliers, publications and posters; television and radio broadcasts; creating web sites on the Internet.
- **an act in a public place (a place where the general public or a section of the general public have a right to access or are invited to enter);**
examples: a road, footpath, alley way, shop, pub, park, public transport, restaurant, theatre, workplace
- **an act in the sight or hearing of people in a public place.**

While there is no case law on the issue, it is unlikely that the complainant needs to show that a member of the public saw or heard the offensive or abusive act.

An act of racial hatred can be verbal or written. Unlawful offensive behaviour *might* include:

- writing racist graffiti in a public place
- making racist speeches at a public rally
- placing racist posters or stickers in a public place
- racist abuse in a public place
- offensive racist comments in a publication.

Examples of acts which might be unlawful:

- A woman of Vietnamese origin is called a “slanty-eyed nip” by her neighbour and is asked to keep her “filthy yellow children” at home.
 1. If this happens on the footpath? - the act has occurred in a public place, to which the general public has access as of right, and is therefore covered by the RDA.
 2. If it happens in the front yard? - the act is still covered by the RDA, as it happens in the sight or hearing of people in a public place, such as the footpath.
 3. If it happens “over the backyard fence” and a third neighbour heard it?
 - (a) if the third neighbour was also in his or her backyard, the act is not done “in the sight or hearing” of a person “in a public place” and would not be unlawful.
 - (b) if the third person was in a park which is adjacent to the two houses, then the act occurred “in the sight or hearing” of a person in a public place, and is covered.
- A man of German origin is the caretaker for a block of units in which he resides. A woman leases Unit 1, which is opposite the caretaker’s unit. Over 11 months, the caretaker has spoken to the woman on a number of occasions in relation to breaches of rules, regulations and laws. The woman has become resentful, defiant and even aggressive. The caretaker notices that a picture of Hitler, with the word “NAZI” on it, has been posted just inside the front door of Unit 1. This is directly in his line of vision. The woman leaves her front door and screen door open, revealing the poster of Hitler to the caretaker and to all passers-by in the passage way between units.

Is this a public act?

The woman’s unit itself is not a public place. However, the door was kept open to display the poster. Everyone passing or entering Unit 1, or anyone in the hallway, would have a completely unobstructed view of the Hitler poster and the words. Because the public might be able to access the hallway by invitation, and therefore see the poster and the words printed upon it, the act may be considered to be a public act and unlawful under the RDA.

Exemptions from the racial hatred provisions

In balancing the protection against racial vilification and harassment with the right to freedom of expression, the RDA contains some exemptions which permit the following acts if they are done “reasonably and in good faith”:

- **an artistic work or performance such as a play in which racist attitudes are expressed by a character;**

For example, a woman of Jewish background attends a production of the Merchant of Venice, which contains the character of Shylock. She finds offensive the stereotyped portrayal of Jews as greedy and malevolent. As this play was written nearly four hundred years ago, and the production was made in good faith, it is probably not “reasonably likely to offend” and in any event is covered by this exemption.

- **a statement, publication, discussion or debate held for a genuine academic, artistic, scientific or other purpose in the public interest;**

For example, debate on Australia’s immigration intake, Indigenous affairs and other matters of public interest, is exempt.

- **a fair and accurate report on a matter of public interest;**

For example, a fair report in the media of an act of racial incitement or racially offensive conduct is exempt. The exemption enables the media to convey details of a public act of racial vilification, or any other event in the public interest, to the general public without exposing themselves to the risk of breaching the RDA. To be fair, the report must be free of editorial embellishment or comment that could itself amount to racial vilification.

- **a fair comment on any event or matter of public interest if the comment is an expression of a person’s genuine belief.**

At first glance, this exemption appears to provide a defence for the most extreme racists, who are truly convinced of the truth of their beliefs. However, ‘fair comment’ has a technical meaning in both the laws of defamation and of contempt, and it is anticipated that these standards will apply to the RDA. It is worth noting that the defence of ‘fair comment’ in the law of defamation has both an objective test (the comment is one that a fair minded person could make upon the facts) and a subjective test (the comment is the honest opinion of the commentator).

Special measures

A common theme of discussion during the recent RDA Review consultations was the cultural diversity of Australia’s population and how that diversity was not reflected in the cultural make-up of many workplaces. Some groups wished to know more about the special measures provisions in **section 8** of the RDA which might permit certain policies or programs identified for a certain race or ethnic group *even though they might be discriminatory*.

Special measures are policies or actions by organisations or governments which recognise that the past or present disadvantage suffered by certain racial or ethnic groups has affected their access to equality of opportunity and their enjoyment of basic human rights. The measures are designed to secure the advancement of these racial and ethnic groups by giving them a particular protection or benefit which will assist them to achieve and enjoy the same basic rights and freedoms to the same extent as other people in the population.

Sometimes a person or organisation contacts the Commission for advice on whether a policy or program is a special measure and thus does not breach the RDA. However, the RDA does not currently provide a mechanism for granting an exemption in circumstances where the relevant conduct does not appear to breach the Act.

It is important to note that the group for whom the application of ‘special measures’ policies or programs is most likely to be permitted are the Indigenous people of Australia. This is because of the acknowledged historical disadvantages suffered by the Indigenous community and their continuing disadvantage in most areas of public life, such as in employment.

However, while there are also some non-English speaking background communities whose unemployment rates are much higher than the majority of the population, others are considerably better off. This means **it is unlikely the Race Discrimination Commissioner would find that ‘special measures’ programs targeting all people of non-English speaking backgrounds would satisfy the requirements of the special measures provision.** By drawing on such a large group, it may be difficult to establish that the relevant measure is necessary.

When a complaint is lodged by persons alleging they have not been able to obtain benefits marked for people of specified ethnic backgrounds, the organisation giving the benefits may respond that the benefits are ‘special measures’ set out in a policy or program. In considering whether the policy or program is a special measure, the Commissioner will look at the following questions:

- Does the policy or program confer a benefit on some or all members of a particular group?
- Is membership of the group based on race, colour, descent or national or ethnic origin?
- Is the sole purpose of the policy or program to ensure the advancement of members of the group in order that they may enjoy and exercise human rights and fundamental freedoms equally with others in the population?
- Is the policy or program necessary to ensure the advancement of members of the group?
Gerhardy v Brown (1985) 159 CLR 70, 133

Where “yes” is the answer to each of these questions, the Commissioner may form the view that the policy or program is a special measure and is permitted by section 8 of the RDA.

An example of a policy or program which the Race Discrimination Commissioner might consider would satisfy the above criteria is as follows:

- A government agency advertises a position for a liaison officer. The agency states that the position is designated for applicants of Vietnamese background. This may be permitted as a special measure as it can be statistically demonstrated that people of Vietnamese background in Australia have currently and historically had a higher than average unemployment rate and a lower employment participation rate in the government sector than the majority of the population.

However, it is important to note that the organisation could always advertise for a person who had a high proficiency in written and spoken Vietnamese, and had a sound knowledge of the Vietnamese community, if these skills were integral to the position. With the emphasis on the necessary skills required to perform the work, there can be little argument regarding discrimination under the RDA.

Part 2: Complaint Processes

Who can make a complaint?

A complaint can only be made by an ‘aggrieved’ person or a trade union to which the aggrieved person belongs - see section 22 of the RDA.

An aggrieved person is someone with a ‘real and material interest’ in the subject matter of the complaint, and has closer proximity to it than other members of the community. Therefore, members of the general public cannot usually lodge complaints where they merely witness racial discrimination or acts of racial hatred. In some instances, incorporated organisations can be aggrieved persons.

A friend or advocate cannot make a complaint on behalf of an aggrieved person unless he/she is also an aggrieved person. Public interest groups cannot make complaints under the RDA unless they are incorporated and their objects and role are such that they can be categorised themselves as aggrieved persons (although they can assist people with drafting complaints and represent them if requested).

People who have first lodged a complaint under State/Territory anti-discrimination legislation *cannot then lodge* a complaint making identical allegations with the Human Rights and Equal Opportunity Commission.

The aggrieved person who lodges a complaint is referred to as the *complainant*.

The person complained about is referred to as the *respondent*.

Examples of people who are or are not “aggrieved persons” include:

- A man of Anglo-Australian origin receives a flier in the mail from the “Stop Immigration Party”. It is about Vietnamese immigration and he finds it utterly offensive. Because he is a member of the general public and has no other interest in the matter, he is not an “aggrieved person”.
- A woman of Vietnamese origin whose English language skills are poor is sacked from her job. She thinks her Vietnamese background is the reason for the sacking, and wants to make a complaint. She has an Anglo-Australian friend who wants to lodge the complaint on her behalf. The friend cannot make the complaint, as he is not an aggrieved person, although he can help her draft the complaint.
- A Migrant Resource Centre (MRC) makes a complaint on behalf of some Ethiopian clients who allege they have been victims of acts of racial hatred. The MRC is unlikely to be an “aggrieved person”. The MRC should find one or more Ethiopians willing to be the aggrieved person(s), who may then be assisted by the MRC in drafting a complaint. If a whole ethnic community group is offended, a particular aggrieved person or persons still needs to be named.
- An Anglo-Australian man takes exception to a job advertisement which seeks a person of non-English speaking background to direct a television program. The man has no interest in applying for the job so he is not an aggrieved person, and cannot make a complaint.

Representative complaints

Section 25L sets out the conditions for representative complaints under **Section 22(1A)**. A representative complaint requires a class of people complaining:

- against the same person; and
- about the same, similar or related circumstances; and
- the complaints gives rise to a substantial common issue of law or fact (each complaint within the class has common facts or raises a common legal issue).

Representative complaints have the advantage of removing the focus of a complaint away from just one person. They may also be taken more seriously by the people complained about in some cases. However, few representative complaints have been made under the RDA because people discriminated against, and their advocates, have found the legal requirements difficult to follow.

Making complaints

Section 22 of the RDA requires all complaints to be in writing. Complaints are best lodged **within the twelve months after the alleged discriminatory acts.** Complaints lodged after that time period may be accepted, but it should be noted that the Commissioner has discretion not to inquire into complaints lodged after twelve months have elapsed.

If it is asked to do so by people unable to write in the English language, the Commission can direct people to translation and interpreter services. If what appears to be a complaint is made to the Commission and it is written in a language other than English, the Commission will have it translated. Many complaints are difficult to investigate because insufficient information is provided by complainants. Appendix 3 indicates the type of relevant information that assists the Commissioner to effectively investigate complaints.

A person can make a complaint at any office or agency of the Commission - see the final appendix for the contact details.

The investigation process

A diagram which provides an overview of the complaint handling processes in the RDA is contained in Appendix 4.

When a complaint is lodged and it appears to be covered by the RDA, the Race Discrimination Commissioner will investigate it.

As part of the investigation process, the respondent and the complainant are often required to supply the Commission with further information in relation to the complaint. Section 24B of the RDA gives the Commissioner the power to serve a notice requiring the production of documents or the provision of information. It is an offence under the Act not to comply with such a notice. The penalty for an individual is up to \$1,000 and for a body corporate up to \$5,000.

The aim of the investigation is to uncover evidence which will help in determining whether or not there is substance to the allegations made. Investigation can include interviewing witnesses, inspecting premises and documents, or looking at the procedures and work practices of an organisation.

The Commissioner has an obligation to assess whether an inquiry should proceed or be discontinued at any time. If the respondent denies the allegations and provides evidence that race was not at issue

or that there was no discrimination, the Commissioner may decide to decline the complaint because it lacks substance.

The conciliation process

Conciliation is a process where an independent person (a conciliator) works with the respondent and the complainant, and helps them try to reach a solution which is satisfactory to both of them.

The nature of the conciliation process is not defined by the RDA. It can involve the conciliator communicating with both the complainant and respondent through letters, telephone conferencing, and/or personal visits. Conciliation can sometimes involve the respondent and the complainant attending a conference to discuss the matter with each other. This conference is facilitated by the conciliator. Anything said or done in the interests of conciliation is confidential.

The settlements which are agreed upon by the parties during conciliation are varied. For example, a payment of damages for loss of wages and benefits might be made in one case while, in another, a respondent organisation might agree to commence a review of workplace practices and initiate anti-discrimination training for all staff.

The conciliation process can be extremely simple. Often complainants only seek an apology which is provided as soon as the respondent is contacted.

What happens if a complaint is declined?

Under the RDA, complaints may be declined for a number of reasons - see section 24(2). The Commissioner may decide that the act complained about is not unlawful under the RDA. The Commissioner may also decline a complaint where more than twelve months have passed since the alleged discriminatory act occurred, or because the Commissioner is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

Where the Commissioner declines a complaint as not unlawful, the complainant has the right to request that the complaint be referred to the Commission for a public hearing. In the other instances where a complaint is declined, the complainant may request a review of the decision. This review is undertaken by the President of the Human Rights and Equal Opportunity Commission.

The public hearing

Where the conciliation process fails, or the Commissioner believes that a complaint cannot be settled by conciliation, the matter may be referred to the Commission for a public hearing.

A public hearing will usually involve documents being produced, and witnesses giving evidence and being questioned under oath. The public hearing is less formal than a court and is not restricted by the formal rules of evidence. At any stage during the hearing, the hearing Commissioner can adjourn the matter to allow for further negotiations between the respondent and the complainant with a view to reaching a settlement.

If a complaint is considered proven by the hearing Commissioner, a determination is made which states that the respondent was involved in discriminatory conduct and should not do so again. The determination may also require the respondent to do some reasonable act to make up any loss suffered by the complainant. The Commission is not limited in the orders it can make and they can

range from making a formal apology to the payment of damages and compensation. Appendix 5 contains a list of cases which were successful at public hearing.

If a respondent refuses to comply with a determination, the complainant will have to pursue the matter in the Federal Court.

Changes to the public hearing function

At some time in 1997, it is anticipated that the Human Rights and Equal Opportunity Commission will cease holding public hearings. After this change, the investigation and conciliation of complaints will still be conducted by the Commission, but all public hearings will be conducted by the Federal Court.

The decision to discontinue public hearings was not made by the Commission. This change in the future handling of complaints which proceed beyond conciliation is the result of the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1. The *Brandy* case held that previous provisions which enabled the Commission's determinations to be enforced as an order of the Federal Court were constitutionally invalid. In the wake of that decision, the current interim arrangements for public hearings and enforcement were adopted.

Part 3: Case Studies

Since the RDA came into force in 1975, its complaints provisions have been used successfully by many complainants. However, some people do not lodge complaints because they are not sure whether the unfavourable treatment which they have suffered is covered by the legislation. By way of contrast, many people lodge complaints which are declined because the reason for the allegedly discriminatory actions is not actually related to race, colour or national or ethnic origin.

The following case studies are presented to give insight into the types of complaints which the Commission receives and to assist people to recognise whether a complaint might come under the RDA. **It should be noted that these case studies are not an exhaustive list of examples.** They are presented only to illustrate some of the types of complaints received, and the sorts of outcomes which can be achieved under the RDA.

Each case study explains the reason for the complaint, the nature of the evidence presented, the respondent's reply and the outcome. There are also case studies of complaints which were declined by the Commissioner.

The case studies have been selected from complaints made to the Commission by people of non-English speaking backgrounds over the past two years. While the Commission also accepts complaints from Indigenous people, complaints under the RDA lodged by these groups are not listed here.

These case studies have been provided from cases in the central office of the Commission, its regional offices and from its delegates in state agencies.

Complaints against employers

Many people attending the recent review consultations expressed hesitation about complaining against employers or fellow employees. Some people were concerned about victimisation after complaints were made (pages 52-54 of this chapter address that issue). Many expressed the view that

bringing complaints against employers or employees would not result in satisfactory outcomes. Others felt that complaints against employers such as government agencies or departments would not be treated fairly by the Commission because it is a federal government body. In response to this last concern, it should be noted that 69% of complaints in the past 5 years were lodged against government agencies or departments. Of those complaints found to have substance, the overwhelming majority has been conciliated.

Case Study 1 - Employment complaint

Racial discrimination in employment - vicarious liability - complainant alleged unfair work practices were applied to her because of her race - complaint conciliated.

Complaint: A woman of South African background who worked for a government agency, alleged that she was subjected by her supervisor to ongoing criticism and undermining and to unfair rostering compared with other staff. She also alleged that she had not been permitted to leave work early to collect her son and had been treated unfairly when she tried to have these matters addressed internally. Both her supervisor and employer were respondents to the complaint.

Evidence: The woman did not have any direct evidence or witnesses to support her allegations. However, one staff member who was interviewed did feel that the woman may have been treated less favourably because of her race.

Response: The employer denied that the woman had been unfairly treated because of her race and claimed that some of the problems raised in the complaint had been settled internally. For example, the woman had been given the holiday leave she requested. The employer also claimed that the woman may have compared herself to staff with more skills and experience when she complained about the rostering. However, the employer did accept that there had been problems with both the management style and interpersonal communication of the supervisor, and outlined a series of steps which had been taken to address these problems for the woman and other staff.

Outcome: During the conciliation process, both the woman and the employer made it clear that they wanted to maintain a good working relationship. Both parties wanted to establish a way in which the woman and her supervisor could work together comfortably.

The complaint was conciliated on the following basis:

- Both the employer and the supervisor apologised to the woman for any hurt, distress and humiliation she felt she had suffered as a result of her work circumstances.
- The employer agreed to:
 - (i) Continue to monitor the management style of the supervisor. This monitoring would include the supervisor entering into a Performance Agreement.
 - (ii) Promote and be committed to the principles of human rights and equal opportunity legislation. In particular, the employer agreed to adhere to its legal responsibilities under the legislation.
 - (iii) Provide appropriate support to the complainant by using either internal or external resources, if similar problems arose in the future.

Case Study 2 - Employment complaint

Racial discrimination in employment - vicarious liability - complainant alleged that management had failed to discipline a supervisor who had racially harassed her with ethnic jokes - apology and compensation.

Complaint: The complainant, a woman of Irish background, alleged that a newly appointed male supervisor had indicated that he was dissatisfied with her role in the office structure and had taken steps to downgrade her position. The woman alleged that when she resisted these changes, the supervisor began a campaign of disparaging remarks about her ethnic origins, including a continuous stream of 'Irish jokes' in the company newsletter, the publication of which was part of his duties.

The complainant alleged that senior management was well aware of the racial jokes and comments and, despite her complaints, nothing had been done to discipline the supervisor. The woman was eventually retrenched from her position because of 'office restructuring'.

Response: When contacted by the Commission and requested to comment on the allegations, the employer fully acknowledged that the woman had been discriminated against and that it had failed to discipline the supervisor.

Outcome: The employer gave the woman good references and a written apology. It also gave her financial compensation of \$10,000.

Case Study 3 - Employment complaint

Racial discrimination in employment - vicarious liability - racial abuse in the workplace - complainant alleged that management failed to handle the matter satisfactorily - apology and compensation.

Complaint: A man of Maori background who worked in the health industry alleged that two co-workers had made derogatory comments about him, including calling him "the black man", "a big black c...", and describing his car as a "boong car". Further, the co-workers had drawn to a client's attention the fact that the man was black, and they had stated, "you people do not have a language". The man claimed that this was a particularly hurtful comment as it shamed his tradition and brought back painful memories of how his parents were treated.

The man alleged that he reported the matter to management who initially appeared to show concern but advised him not to involve the union. This intimidated and threatened him, and eventually he felt stressed and paranoid, and took sick leave. The man did acknowledge that management had tried to work out a roster so that he would not be working with the two co-workers. However, this roster would have significantly reduced his working hours. Although both co-workers subsequently resigned, the man was not happy with the way the matter was handled by management.

Response: The respondent company claimed that as soon as the problem was made known, it was handled in a quick and professional manner by restructuring the work roster. The company felt that as the two co-workers had left, there was no longer any problem. The company advised that it was reviewing its policy on equal opportunity, and was also upgrading its education program.

Response: During the course of investigation it was revealed that there was a series of ongoing industrial issues in the workplace. These issues had impacted upon workplace relationships and had the potential to affect the resolution of the complaint.

Outcome: The matter was finally conciliated on the following terms:

- The company paid compensation of \$750 and legal expenses of \$400 to the complainant.
- The company gave the complainant an additional two weeks annual leave which he had been forced to take while the problem was being resolved.
- The company made a commitment to treat the man fairly and equitably in a manner consistent with the treatment of all other employees.
- The company apologised to the man for the behaviour to which he was subjected.

Case Study 4 - Employment complaint

Racial discrimination in employment - complainant alleged racial discrimination and harassment in the workplace - complainant further alleged that the employer educational institution failed to address initial complaints made by him properly - complaint conciliated and compensation paid.

Complaint: A man of Malaysian origin employed at an educational institution alleged that he and his wife had been subjected to numerous incidents of discrimination and harassment by other staff over an eleven month period. His allegations included:

- being sent articles on the mental and genetic disorders of black people;
- receiving intimidating and racially abusive telephone calls;
- being advised that he was not an appropriate representative for the institution with the inference that a ‘white Australian’ would be a more appropriate representative;
- seeing an enlarged blackened image of his face with the words “no entry” above it, placed on the door to one of the institution’s offices;
- being referred to by particular staff as a “black bastards”; and
- having religious books removed from his office and sacred objects thrown into a box by one staff member.

The complainant further alleged that after formally invoking internal procedures through the Equal Employment Officer of the institution, his complaints were not dealt with appropriately in relation to conflicting advice, confidentiality, time delays and non-enforcement of decisions.

Response: The respondent institution claimed it had approached and handled the complaint efficiently, and had paid due attention to the seriousness of the allegations. It claimed that its findings had supported the complainant in general, although there were reservations as to full circumstances of the events.

Outcome: Following lengthy investigation and conciliation, the institution paid the man \$12,000 in compensation and the matter was settled.

Case Study 5 - Employment complaint

Racial discrimination in employment - derogatory comments regarding accent and qualifications - complainant alleged denial of promotion and training opportunities by employer - training program implemented and compensation.

Complaint: A man of Chilean background employed in a service industry alleged that he had been denied promotion and ongoing employment opportunities. He alleged that during an interview for a senior position, members of the selection panel had made derogatory comments about his accent. The man also alleged that the selection panel had referred to his overseas qualifications and suggested they were “not of the same standard as Australian or some other countries”. Finally, the man alleged that the respondent company had declined repeated applications he made for further training.

Response: The respondent company claimed the man had been refused further training because he was a junior staff member, and the training program was designed for senior staff. The company also claimed that it had interviewed the members of the selection panel and has established that improper procedures had been followed. The company claimed it had reprimanded the staff involved.

Outcome: Following lengthy conciliation between the man and the respondent company, the company agreed to pay the man \$7,000 for humiliation and potential lost employment opportunities. The company also agreed to implement, with the assistance of the complainant, a training and development scheme which included regular feedback to management and reviews of selection procedures.

Case Study 6 - Employment complaint

Discrimination in employment - alleged racial harassment, including threats of physical violence, over a period of eight years - complainant suffered depression, stress, economic loss - acknowledgement that complaints had not been acted upon - financial compensation for pain and suffering.

Complaint: A man of east European background alleged that he had suffered racial harassment and threats of physical violence over a period of eight years while working for a government organisation. The man alleged that he was repeatedly referred to as a “wog” in verbal attacks containing obscene and racist language. The man further alleged that despite making complaints through internal channels, no action was ever taken. He also alleged that he had been physically assaulted and threatened, and that these incidents were racially motivated.

Response: The organisation claimed that many of the man’s complaints had been investigated, but not thoroughly. The organisation acknowledged that the complaints could have been handled in a more timely manner.

Outcome: The respondent organisation acknowledged that the complainant had made internal complaints, and agreed to make a payment of \$18,000 for pain and suffering arising from racial discrimination in the workplace.

Complaints which are declined under the RDA

The Commissioner often declines a complaint because the person complaining does not present enough evidence to show that one of the reasons that he or she was discriminated against is related to race, colour, descent or national or ethnic origin.

Following are four case studies of complaints which were declined either as “lacking in substance” or because they did not reveal an act that is unlawful under the RDA. Case Study 8 was referred for review by the President.

Case Study 7 - Declined complaint

Racial discrimination in employment - complainant alleged hostility from management after he had complained about workplace safety and facilities - complaint declined as lacking in substance.

Complaint: The complainant was a male of north-eastern European background. He alleged that senior colleagues failed to co-operate with him in the performance of his job. He further alleged that the employer failed to supply him with the facilities and equipment required to perform his job. He advised that there was no problem in the workplace until he had raised questions about safety and facilities. While there was no evidence that the employer was unhappy with the man’s work performance, the man alleged that his qualifications and ethnicity were questioned by senior colleagues.

Evidence: During investigation by the conciliator, the man revealed that senior management had asked him what nationality he was, but that no other reference was made to his race. He inferred from this that his race and qualifications were an issue for senior management. He could not specify how or if he had been treated less fairly in any other way *because of his race*.

Outcome: The complainant was asked to provide more evidence if he wished the Commission to pursue the complaint. Although further information was supplied, it did not relate to the complainant’s race. The complaint was declined.

Note: This complaint could also have been declined for the following reasons:

- The events which were the subject of the complaint occurred nearly four years before the date of the initial complaint. As discussed earlier, normally a complaint will only be accepted within twelve (12) months of the act which is the subject of the complaint. However, in some cases there are intervening events, or the discrimination is ongoing, or the result of the discrimination emerges much later. Where these sorts of factors prevent the complainant from lodging the complaint earlier, the Commissioner has a discretion to accept the complaint for investigation.

Case Study 8 - Declined complaint

Racial discrimination in employment - complainant alleged unfair treatment by supervisor - complainant also alleged organisational bias - complaint declined as lacking in substance - complaint reviewed by President - decision to decline upheld.

Complaint: A woman of Brazilian background alleged that her supervisor, a man of Portuguese background, had treated her unfairly and eventually recommended that her employment be terminated because of the difference in their ethnic backgrounds. She also alleged that management had failed to address her complaints of organisational bias properly and had terminated her employment unfairly. Her allegation of bias was based on the fact that her work had been independently assessed by persons of Portuguese origin whom she saw as having the same political and cultural bias as her supervisor.

Response: The respondent organisation claimed that the woman's employment had been terminated because of unsatisfactory work performance. It further claimed that the difficulties experienced by the woman stemmed from personal and professional differences with the supervisor and organisation. It claimed it took appropriate steps by organising dispute resolution meetings, by giving her additional preparation time for her finished products and by having her work independently assessed. The organisation alleged that the assessor was not Portuguese, but rather a Portuguese speaking person of Tamaras origin. The organisation claimed that the woman was advised on several occasions that her work was unsatisfactory but she had failed to improve its quality.

Evidence: Investigation of the complaint involved extensive documentation being supplied to the Commission from both the woman and the respondent employer. The supervisor could not be contacted for a response as he had left the organisation after the complainant left, and was not contactable as he was overseas.

Outcome: After carefully assessing the complaint and the evidence presented, the Commissioner declined the complaint as lacking in substance. The Commissioner decided that the problems between the complainant, the supervisor and organisation were based on personal and professional conflict and not on the woman's racial background.

The complainant then asked that the decision of the Commissioner be reviewed by the President.

Review of the Commissioner's decision by the President: After review, the President requested the Commissioner to conduct further inquiry into the complaint in the form of a statement from the supervisor.

When the supervisor was located on his return from overseas, he was supplied with a copy of the relevant details and asked to provide a response. The supervisor denied that the difficulties between himself and the woman complainant were based on race. He further claimed that the people whom he employed to replace her were of Brazilian origin. The complainant was supplied with the statement of the supervisor and advised that there was no new evidence in the statement to suggest that race was a ground for her complaint. She was asked to provide any further evidence she believed relevant to refute the denial of the supervisor. No further evidence was supplied.

The Commissioner declined the complaint.

Case Study 9 - Declined complaint

Racial discrimination in the provision of government benefits - complainant alleged differential treatment on the basis of citizenship - complaint declined as not unlawful.

Complaint: A woman resident in Australia but a citizen of the United States of America alleged that she was subjected to differential treatment by a government agency, on the basis of her citizenship. The woman alleged that the application of different regulations to non-citizens was discriminatory.

Response: The respondent agency advised that the basis upon which the different regulations were applied was indeed the citizenship status of the individual, and not her race. The agency claimed it had sought advice from the Attorney-General's Department which advised that such differentiation was not in breach of the RDA.

Outcome: The Commissioner declined the complaint as "not unlawful" for the following reason: Section 9 of the RDA lists "race, colour, descent or national or ethnic origin" as the grounds under which a complaint of racial discrimination may be brought. These grounds are derived from Article 1

of CERD, upon which the RDA is based. Because Section 9 does not cover “citizenship” as a ground under which a distinction might be unlawful, the application of different regulations on the grounds of citizenship was clearly not unlawful.

Case Study 10 - Declined complaint

Racial hatred - racist bumper sticker - complainant alleged that the message on a bumper sticker was offensive - event occurred before the racial hatred legislation came into operation - complaint declined as not unlawful.-

Complaint: A man of French background alleged that he was outraged and offended by bumper stickers he had seen on several cars. They read, “Phuck the French”. The complaint requested the Commission to take some action on the matter.

Response: The incident to which the complainant referred had occurred in September 1995. The racial hatred amendments did not become law in Australia until 13 October 1995. Any complaints made about incidents which happened *before* 13 October 1995 are not covered by the legislation. Even if the incident had occurred after the relevant date, the complainant had not supplied the Commission with any information identifying a respondent.

Outcome: The Commissioner declined the complaint as “not unlawful” because the event occurred before the racial hatred amendment became law.

Complaints of victimisation under the RDA

Many people wishing to bring complaints against employers, organisations or individuals, fear victimisation following the complaint. Under Section 27(2) of the RDA, victimisation includes threats to dismiss employees, actions which adversely affect a person’s employment, or intimidation, where an employee has or proposes to lodge a complaint.

Victimisation of any person involved in the complaints process can be both a criminal and civil offence under the RDA. The Commission is conscious of the potential stress involved in bringing a complaint against an employer, organisation or individual, and treats allegations of victimisation seriously.

Case Study 11 - Victimisation complaint

Racial discrimination in employment - complainant alleged less favourable treatment in pay rates based on race - complaint not conciliated - complainant subsequently terminated from employment - further complaint of alleged victimisation lodged - both complaints conciliated - compensation paid.

Complaint: The complainant, a woman of Vietnamese background, alleged that while employed at a commercial pathology laboratory, she was treated less favourably than other employees in her salary and benefits because of her race. She also alleged that she had been given the nickname “Mrs Wong” by her employer, and that this supported her claim of racial discrimination.

Response: The respondent company denied that the woman was paid less because of her race, and provided some evidence that her salary level, as with all employees, was based on ability and performance levels. The company did admit to the use of the nickname “Mrs Wong”, but claimed that it was not meant to be offensive. However, the company did apologise for the distress caused to the complainant.

Outcome: During conciliation of the matter, the company refused to offer anything more than an apology in settlement of the complaint. The complainant was not satisfied with this offer and the conciliation process broke down. Shortly after, the company advised the complainant by letter that her employment was terminated because of poor work performance.

Following the termination of her employment, the woman lodged a new complaint with the Commission, in which she alleged that she had been victimised by the company because she had complained. Although the company may have had a defence to the original complaint regarding unequal pay, the circumstances of the termination suggested that the woman's original complaint may have been a factor in the decision to terminate her employment. On this basis, it appeared the complaint of victimisation might have succeeded at hearing.

After lengthy negotiation between the complainant and the respondent company, *both* complaints were conciliated. While still denying the allegations in the complaint, the company paid the woman \$10,000 in compensation for stress, mental anguish and humiliation.

Complaints which go to public hearing

Case Study 12 - Public hearing

Racial discrimination in employment - complainant alleged racial harassment - respondent denied allegations - conciliation unsuccessful - matter referred for hearing - complaint upheld

Complaint: A complaint of racial discrimination was made by a woman of Ugandan background. She was employed as a librarian with a large Commonwealth organisation and alleged that she was subjected to a campaign of racial harassment which was evidenced by criticism of her communication skills and competence. She also alleged that she was subjected to unfair deadlines and tasks, unwarranted criticism and personal abuse in front of library staff and users. She alleged both direct discrimination and indirect discrimination.

Response: The respondent organisation claimed that the complaint was frivolous, vexatious, misconceived and lacking in substance.

Outcome: The matter was not conciliated and was referred to a public hearing.

The Hearing Commissioner's decision: The hearing lasted six days and involved the evidence of twelve witnesses, including other employees, supervisors, the woman's current employer and a linguistics expert.

The Commissioner found that apart from short term assistance from two other staff, the complainant was required to run the library without any assistance. The evidence revealed that during this period, minimal assistance was provided in the form of clerical support, rather than more senior supervision. This was found to be clearly unfair, having regard to the fact that the woman needed assistance in the more professional aspects of librarianship.

The organisation presented evidence in the form of probationary reports which referred to the woman's poor written communication skills and management in certain areas. However, other employees gave evidence that the woman's work was of a high operational quality, and her new employer gave evidence that her written skills were more than satisfactory.

The evidence also revealed that in response to the probation reports, the complainant and her manager agreed that she should attend appropriate training to improve her written communication skills. Despite this, a formal request to attend a six month course in communication skills and report writing at Monash University was denied to her by the organisation, and she was advised that the organisation would not support the course as she was expected to have those skills. A senior manager in the organisation noted:

"I am particularly concerned that a professional member of staff should be needing to spend official time in attending courses to address gaps in what I would consider to be her essential tools of trade."

Evidence was also given by the complainant's manager that she was instructed to keep notes on the performance of the complainant, and it was the manager's understanding that the notes were to substantiate any case for annulment. The manager only recorded negative comments made by staff, and not the positive ones. These latter comments were made by staff who told the manager that they had no problems with the complainant's communication. The notes were clearly unfair to the complainant, presented an unbalanced picture of her ability to comply with the usual requirements for a librarian, and suggested that unreasonable conditions had been applied to her.

The Commissioner found there was an undeniable element of unfairness in the woman's situation because she had been employed on the basis that she would have management supervision. During the course of her employment the demands upon her developed to such an extent that she was found wanting in relation to managerial tasks never originally required of her. Additionally, the Commissioner found that the evidence demonstrated a lack of understanding of EEO principles with respect to employees whose primary language was not English. The managers both stated in evidence that the EEO policies were not taken into consideration when discussing the complainant's situation.

The Commissioner found in favour of the complainant and awarded her \$10,500 damages.

Case Name: *Ssali v CSIRO*

Case Study 13 - Public hearing

Racial discrimination in employment - complainant alleged racial and sexual harassment, sex discrimination and racial discrimination - conciliation unsuccessful - matter referred for hearing - complaint upheld

Complaint: A woman of Greek background working as a packer in a meatworks alleged that she was subjected to racial abuse and was isolated from the workforce. She also alleged that she was subjected to sex discrimination in that her application to be trained in another section of the meatworks was refused on the basis that male workers in that area refused to train women. In addition, she alleged that her supervisor (one of the respondents) had sexually harassed her. Finally, while engaged in a heated exchange with the supervisor, the woman swore at him and was terminated from her employment on the basis of that incident.

Outcome: All endeavours to settle the matter by way of conciliation failed. The matter was referred to a public hearing.

The Hearing Commissioner's decision: The hearing lasted two days and involved evidence from workers at the meatworks. It was revealed that the superintendent of the woman's work area was aware of racially derogatory comments being made about her by other workers. The superintendent was also aware of an understanding between workers in the area to which the complainant wished to move, that no women would be trained there.

Evidence was heard about rumours and comments in the workplace regarding the woman's sexual behaviour. The source of the rumours was not established and the comments were not able to be proven.

In relation to the argument which led to the woman's dismissal, the evidence presented by the complainant and the respondents was contradictory. The complainant alleged that she had been threatened with the comment, "F... you woman! I'll bring you to your knees", and in response had sworn at the supervisor. The supervisor claimed that he had asked the complainant to work overtime, had been sworn at, and had warned the complainant that he would send her to 'the room', at which time he was sworn at again.

On the evidence presented and the credibility of certain witnesses, the hearing Commissioner found that the woman had been subjected to "deplorable" conditions in the work place and, as a result of the continuing discrimination, her health was severely impaired. Although there was little evidence of economic loss, the hearing Commissioner found that the unlawful conduct, which ultimately resulted in the termination of the woman's employment, was "the culmination of a history of discrimination on the ground of both her sex and her race".

The complainant was awarded \$22,000 damages for extreme pain, suffering and humiliation in relation to both complaints of sex and race discrimination.

At the time of printing, the respondent had still not made the payment of compensation awarded to the complainant. An action for enforcement of the award has been brought by the complainant in the Federal Court.

It should be noted that the majority of respondents comply with the determinations of the Commission at this stage and only a small minority are taken to the Federal Court for enforcement.

Case Name: *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd*

Complaints involving denial of goods and services

Complaints of racial discrimination in the provision of goods and services form the second highest percentage of complaints received at the Commission from non-English speaking background people. The most common providers of goods and services complained about are shops, banks or hotels. However, this area also includes such places as schools and may cover services such as are provided by interpreters.

Case Study 14 - Goods and services complaint

Note: While this complaint is a goods and services matter, it raises the fundamental issue of the right to equality before the law. It is reproduced here because the issue of interpreter services also arises in areas which are not legal in nature.

Racial discrimination in the provision of goods and services - complainant alleged she was refused access to interpreters on several occasions in court - complainant also alleged that there was no information available at the court in relation to interpreter services - respondent implemented requested service counter procedures and agreed to supply requested information in relation to interpreter services.

Complaint: A woman of Thai background alleged that she had been refused an interpreter on several occasions in court. She alleged that when she had requested interpreter services, she was told

that the court did not provide interpreters and that she would have to provide her own at her expense. She also alleged that there was no written information available at the court to explain how she could get an interpreter.

Response: After receiving a letter of inquiry from the Commission, the respondent government department replied immediately. The department agreed to act on all the complainant's requests, and to supply the relevant courts with the information requested by her.

Outcome: The respondent and complainant agreed to the following:

- When a person asks counter staff about the supply of an interpreter for court appearances, the staff will provide the relevant information about interpreter services provided by the Ethnic Affairs Commission.
- The department will instruct all staff to make use of, and refer to, a language assistance kit in the performance of duties.
- The department will obtain copies of the Ethnic Affairs Service Guide and have these available for persons appearing before the court.
- The respondent would make available, where appropriate, the relevant court's information pamphlet in the Thai language, or refer people to the relevant place to obtain the information.

Case Study 15 - Goods and services complaint

Racial discrimination in the provision of goods and services - vicarious liability - complainant alleged employee refused him access to toilets and made degrading comments based on race - respondent company dismissed employee and apologised to complainant.

Complaint: A male of Indian background, alleged that an employee of a service station refused him access to toilet facilities. The man claimed that the employee had told him there were no toilets on the premises. The man then pointed out that he had seen the toilets and asked the employee why he had lied to him. He alleged that the employee replied, "Because you people do not know how to use them". When the man asked the employee for his name, he alleged that he was sworn at.

Response: The respondent company claimed that it had received a letter of complaint from the man but had not replied as the letter had been misplaced. After being contacted by the Commission, the company advised that as soon as the matter had come to their attention, they had dismissed the employee from his position. The employee claimed that he had never refused access to any other customers, and his refusal was just a "heated comment" which had nothing to do with the characteristics of the complainant.

Outcome: In addition to dismissing the employee, the respondent company made a written apology to the complainant and his wife for any inconvenience or degradation which they had suffered.

Case Study 16 - Goods and services complaint

Racial discrimination in the provision of goods and services - education - complainant alleged school failed to act on complaint of racial harassment - respondent school claimed complaint was dealt with - complaint conciliated.

Complaint: Parents of a secondary school student lodged a complaint against the Vice Principal of a college. The father of the student was of east-European background and the mother of Filipino background. They alleged that other students had racially harassed their daughter and her friend.

The parents alleged that insulting comments were made about the colour of their daughter's skin, including a suggestion that in order to look that way, a person would have to sit in a microwave. They further alleged that when the daughter and friend complained to the school Vice Principal, he allegedly ignored them. It was claimed the daughter and friend then went to seek an apology from the alleged harassers who refused to apologise. A fight ensued in the college grounds. The daughter was injured, the case was reported to the police and charges were laid. The parents alleged that the Vice Principal did not take the original complaint of harassment seriously, and that subsequent events would not have occurred if he had.

Response: The respondent department conducted an investigation and the parents were provided with a copy of the report which showed that neither the Vice Principal nor the school had ignored the matter. The report revealed that a number of teachers had taken action and all of the students involved had been counselled.

Outcome: It appeared that a communication breakdown between the parents and the school staff had led to a misunderstanding about the school's action. The parents accepted that appropriate steps had been taken, and subsequently decided that no further action was required.

Case Study 17 - Goods and services complaint

Racial discrimination in the supply of goods and services - complainant alleged that an employee harassed her son because he did not speak English - employee disciplined and apologies made.

Complaint: A woman of non-English speaking background alleged that her son had been repeatedly harassed by an employee of a store while she was shopping. She alleged that her son had been discriminated against because he was of non-English speaking background and did not speak English. She further alleged that she had been forced to leave the store because of the stress she felt at the treatment of her son.

Response: When contacted by the Commission, the respondent store investigated the allegations and found that the employee's general behaviour towards customers was unacceptable.

Outcome: The respondent store implemented disciplinary procedures against the employee and made a written apology to the complainant.

Racial Hatred Complaints

Case Study 18 - Racial hatred complaint

Racial hatred - allegation of verbal abuse combined with physically threatening behaviour - both company and individual respondent apologised - compensation and staff guidelines set in place.

Complaint: A man of non-English speaking background alleged that he had been verbally abused and was in fear of his physical safety following an incident involving a driver from a commercial company. The man alleged that during a traffic altercation the respondent yelled at him several times, "You f...ing stupid abo' c...!".

Response: The respondent company co-operated with the Commission, investigating the complaint and acknowledging that the driver involved had admitted the entire incident. The employee claimed that the comments had been made in the heat of the moment, although he acknowledged that this was no excuse.

Outcome: Both the respondent company and the driver made written apologies to the complainant. The company and the driver also made separate payments of \$250 to the complainant. In addition, the company produced a set of written guidelines for all staff, and held meetings with drivers to address their responsibilities under the RDA and the racial hatred provisions.

Case Study 19 - Racial hatred complaint

Racial hatred - complainant offended by comments attributed to respondent by a newspaper which reported him to have said that “Asians” are not good for the tourism industry - respondent claimed comments were not accurately reported and made in the public interest - complainant accepted response.

Complaint: A man of Chinese background alleged that he was offended by comments attributed to a local businessman by a newspaper. The comments suggested that locals did not like queuing behind long lines of “Asians”, and that “Asians’ were easy to identify because of visible physical differences.

Response: The respondent claimed that the comments as reported were in no way a true representation of what he had said in a lengthy interview. The respondent claimed that he had no objection to ‘Asian’ tourists in Australia, and that his comments were made in the public interest and in the context of broader observations about the marketing of tourism in Australia. He did not believe he had said anything in the interview which was offensive. However, he acknowledged that the reporting of the comments may have upset the complainant.

Outcome: After receiving the respondent’s reasons, the complainant contacted the Commission and advised that he was happy with the explanation given by the respondent. The inquiry was discontinued and the complaint closed.

Case Study 20 - Racial hatred complaint

Racial hatred - complainant alleged offensive comment made by delicatessen owner - respondent, also of non-English speaking background, denied making comment - complaint conciliated with donation to charity

Complaint: A woman of West Indian background alleged that she had been offended by an abusive comment made by the owner of a delicatessen. The woman alleged that following a dispute over a lunch order, the owner had yelled, “people like you belong in the jungle”. There were other people in the store but no witnesses were identified.

Response: The respondent acknowledged that the dispute had occurred but claimed that she had merely responded to the aggression of the complainant. The respondent further claimed that abusive comments had been made by both parties. She initially refused to make an apology or pay compensation to the complainant.

Outcome: While no liability was accepted, the matter was conciliated by the respondent owner making a fifty dollar donation to a charity nominated by both parties.

Case Study 21 - Racial hatred complaint

Racial hatred - complainant alleged offensive comment made over the back fence - not a public place - complaint declined as not unlawful.

Complaint: A woman of South-Sea Islander background alleged that her neighbour had made a racially abusive comment over the back fence. The woman alleged that she was in her back yard when the neighbour, standing in his own back yard called her a “black bitch”. The woman alleged that she was insulted and offended by the comments.

Response: In order to satisfy the requirements of the legislation, the Commissioner had to decide whether the comment was made in a “public place” and whether the words had been “communicated to the public”.

Outcome: The Commissioner decided that because the alleged comment was not made in a “public place” nor within sight or hearing of people in a public place it did not come within the coverage of the RDA. The complaint was declined as not unlawful.

Case Study 22 - Racial hatred complaint

Racial hatred - complainant offended by comments in newspaper - allegedly gratuitous and derogatory references to ethnicity - complaint conciliated with newspaper paying all legal expenses and publishing an apology.

Complaint: The complainant alleged that a metropolitan newspaper published an article containing derogatory and offensive references to the ethnicity of two prominent community members from an ethno-religious background, without even mentioning the ethnicity of other people who were discussed. The reference to ethnicity was also gratuitous, as it was wholly irrelevant to the subject matter of the article. After a complaint was made directly to the newspaper, a further article emphasised the original offence by quoting a portion of the letter, and by making another offensive reference to ethnicity. The complainants then lodged a complaint with the Commission under the racial hatred provisions.

Response: Upon receipt of an investigatory letter from the Race Discrimination Commissioner the newspaper management entered into direct negotiations with the aggrieved parties.

Outcome: The negotiations resulted in the publication of a retraction and an unreserved apology in the aforementioned newspaper. The newspaper also agreed to pay all legal expenses incurred during the complaint handling process.

Part 4: Overview of Complaints and Trends

In her paper “Revisiting Race” in *Racial Discrimination Act 1975: A Review*, Margaret Thornton points out that

the constraints of legal form limit the effectiveness of anti-discrimination legislation as a mechanism for dealing with racism. In the individual complaint-based model, the responsibility rests with a particular complainant to recognise an act of racism about which he or she can complain to the Human Rights and Equal Opportunity Commission. (p83)

It is clear that the individual complaints-based model has a limited capacity to deal with systemic racial discrimination. However, within this model, the dispute resolution mechanisms adopted by the RDA allow complainants and respondents to resolve their disputes through a process which is inexpensive, flexible and confidential. If courts were the first 'port of call' for complainants, anecdotal evidence suggests that many complainants would not use the complaints mechanisms at all. However, it is true that from time to time people say to the Commission that the informal nature of the dispute resolution process makes its anti-discrimination jurisdiction somehow less important and less serious than other areas of law which offer immediate access to public courts. It is not clear where the resolution of this dilemma lies. So, for the present, conciliation will remain the Commission's complaint solving process of choice.

The statistical information in this part provides a simple overview of trends for non-English speaking background complainants in the RDA complaints process.

Statistics

At June 1996, 11,869 complaints had been lodged under the RDA since it commenced operation in 1975. Data collection in the 21 years of the RDA's operation has been uneven and less than adequate for current requirements. Comprehensive data across a range of factors including complainant and respondent ethnicity data, area of complaints and types of resolutions have not been collected systematically. Different methods of counting complaints also exist between state agencies handling complaints on the Commission's behalf. Although total numbers of conciliated cases under the RDA are known, data pertaining to specific outcomes for people of non-English speaking backgrounds are not easily accessed. However, a new database and recording procedures have been installed at HREOC and these will enable more precise analyses of complaints information in the future.

A precise gender breakdown of non-English speaking background race complainants is not available, but from data on hand, the ratio of male complainants to female complainants overall in the RDA is 2:1. It may be reasonable to assume a similar gender ratio in race complainants of non-English speaking background.

Tables 1 and 2 below provide information on the number of complaints received in each year from July 1991 to June 1996. The complainant data is divided into the following categories, Aboriginal and Torres Strait Islander (ATSI), non-English speaking backgrounds (NESB) and English speaking background (ESB) as well as a category for those who did not state their ethnicity.

Table 1

Complaints received under the RDA between July 1991 and June 1996					
Year to June	ATSI	NESB	ESB	Not stated	Total
1991	121	135	79	17	352 ¹
1992	109	130	55	42	336 ²
1993	83	228 ³	53	6	370
1994	103	158	75	123 ⁴	458
1995	124	273	117	193	707
1996	110	250	90	133	583

Table 2

Total complaints received under the RDA between July 1991 & June 1996					
	ATSI	NESB	ESB	Not Stated	Grand Total
Totals	650	1174	469	514	2806
%	23.2%	41.8%	16.7%	18.3%	100%

Table 3 shows the ethnicity of complainants in the 1995/96 period. 250 complaints (or 42.8 percent) were lodged by complainants from non-English speaking backgrounds.

Table 3

RDA Ethnicity of Complainants (1995-1996)									
Category	Central	Qld	NT	Tas	ACT	Vic	SA	WA	Total
ATSI	14	7	9	4	3	22	43	8	110
NESB	57	2	4	4	7	121	52	3	250
ESB	41	4	2	1	1	24	9	8	90
Not disclosed	85	15	0	0	0	27	6	0	133
TOTAL	197	28	15	9	11	194	110	19	583

The average number of complaints received annually from non-English speaking background people for the period 1991 to 1996 is 196. This number may be considered to be quite low, and some reasons for this may be:

¹ The rise in both ATSI and NESB complaints compared to the previous year can be attributed to the *National Inquiry into Racist Violence* and to important amendments to the RDA made on 22 December 1990. The latter refers to the inclusion of indirect discrimination and vicarious liability and the removal of the provision of dominant reason; this meant that it was no longer necessary to show that race, colour, ethnicity or national origin was the dominant reason for the discrimination.

² The slight fall in both ATSI and NESB complaints may be attributed to the end of the *National Inquiry into Racist Violence*.

³ The increase in non-English speaking background complaints could be attributed to the Gulf War and the harassment faced by Arabic speaking and Muslim communities in Australia.

⁴ The high number of 'Not Stated' entries makes any conclusions for this year difficult to draw.

- Education and training programs, supported by media coverage of racial harassment where the victims are people of non-English speaking backgrounds, have been successful in lessening overt discrimination against those people.
- Some people are afraid to approach a government body to complain about racially motivated discriminatory acts for fear of reprisals. It could be, of course, that this reason and the one above have operated simultaneously to keep RDA complaint numbers steady, except where events such as the *National Inquiry into Racist Violence* (1991 -1992), the Mabo debate (1993-1994) and the the Gulf War (1992-1993) caused complaint numbers to rise and then fall.
- Until 1990, race had to be shown to be the *dominant* reason for discriminatory acts (it now simply has to be one of the reasons for an act).
- The RDA Review has shown that despite the efforts made to educate the public, there is still a lack of information about the RDA even among community representatives. People cannot use legislation if they do not know about it.
- The confidentiality requirement for conciliation may assist the parties to reach settlement. However, it also means that information about areas of discrimination which might be helpful for other respondents and complainants, and for addressing systemic discrimination, cannot be made available to the public.
- State legislation was enacted in Queensland and the Northern Territory in 1991 and 1992 respectively so some complaints on racial grounds may have been made under the state/territory jurisdiction.
- Some victims of race discrimination may simply prefer not to seek legal remedies.

Quality of complaints

The kind and quality of RDA complaints are of concern because many which go to hearing are dismissed. A high proportion of these are dismissed following a *no case* submission by the respondent. In these instances the evidence of the complainant has been heard in its entirety, and the decision to dismiss made on the basis that the complaints were found to be misconceived, lacking in substance or relating to an act that is not unlawful.

Confidentiality

The issue of confidentiality in the conciliation process presents itself as a double edged sword. Confidentiality is critical in encouraging both complainants and respondents to participate in the conciliation process. It encourages complainants to lodge complaints where they would otherwise be deterred, especially where sensitive or private information must be disclosed for the purposes of the complaint. The assurance of confidentiality also encourages participation by respondents because they are protected from adverse publicity, and they are guaranteed that what they did or said in conciliation cannot be used later. Confidentiality can also be critical in preserving a relationship between parties where they are in a continuing relationship such as employment.

However, confidentiality prevents scrutiny of the process of conciliation and its outcomes. Without public details of previous complaints, it is difficult for prospective complaints to assess the merits of their complaints. Publicising a case where there has been a decision can be a forceful means of community education and can also have a significant deterrent effect on potential respondents. By

keeping the details of outcomes confidential, the possibility of community education through publicity, discussion and debate is significantly reduced. As public awareness is crucial to the effective operation of anti-discrimination laws, this is a critical issue for the Commission. The release of this Report is a means by which the Commission seeks to “lift the veil” on conciliation - it seeks to raise public awareness of RDA complaint outcomes by providing examples of past complaints from which all identifying material has been removed.

The significant advantages of confidentiality may be undermined by the parties themselves. On several occasions, both complainants and respondents have publicly given out information about a complaint which was in the process of being conciliated. While the RDA prevents the Commission or any member of staff from disclosing information about details of complaints under the RDA, it does not prevent any public disclosure of the matter by the parties. The Commission is extremely concerned that the conciliation process is often placed in jeopardy by one party revealing information publicly before a settlement is reached. There is clearly a need for a statutory prohibition against disclosure to be placed upon the parties to a complaint, in order to preserve the benefits of a confidential conciliation process.

Burden of proof

Currently the burden of proof under the RDA rests on complainants. From research undertaken internally, it appears that RDA complainants often have problems in finding evidence to show that the act of which they complained was racially motivated. Typically, they may have no direct evidence that the act was motivated by racial discrimination and since they can see no other reason which they accept as valid for the behaviour, the only possible basis they advance is discrimination on the ground of their race. Some complainants are not easily persuaded that this approach can only result in their complaints being unsuccessful.

It is very significant to note that with many of these types of cases, race may never be mentioned between the parties although it may be fundamental to the perception of the complainant by the respondent, a perception of which the complainant is very aware. In this way the behaviour may not be overt, but the racist attitude may be intensely felt. This, however, is always difficult to prove.

The burden of proof on complainants disadvantaged by structural or indirect discrimination, is particularly heavy. The requirements are set out in Part 1 of this report. As set out there, assistance is generally needed for complainants to find the evidence they need - sometimes in the forms of documents held by the respondent, or population statistics held by government agencies - to support their allegations of discrimination.

Work environment

Employment complaints represent the largest number of complaints received - an average of 51.5% of all race complaints in the period 1991 to 1996. There are many incidences of racial discrimination and harassment in the workplace. Management often condones such racism by failing to act. The condoning of such harassment allows the creation of an environment in which the complainant's conditions of work are less favourable than others because of his/her ethnicity or racial background. What some employers do not yet fully appreciate is that this amounts to unlawful behaviour and the employers are liable under the RDA's vicarious liability provisions when they may not be personally responsible for the behaviour.

In two cases listed here where complaints were upheld and relatively high awards or damages of \$10,000 and \$11,000 were made, the workplace environment was found to be racist and intolerant of those workers who did not conform to the prevailing norms.

The Race Discrimination Commissioner has developed an Employment Draft Code of Practice which will be circulated for comment to employers, employer bodies, unions and other relevant bodies before being finalised. The code aims to assist all the above understand their rights and responsibilities under the RDA and it gives guidelines for best practice.

Hearing outcomes

Many complaints have been satisfactorily resolved with an apology, and an assurance that the discriminatory acts will not be repeated. In other instances, significant settlements have been made, and they include financial compensation, job reinstatement, the implementation of training procedures and grievance mechanisms, and the development of non-discriminatory work practices.

It is noteworthy also, but somehow disturbing, that public apologies are ordered much more frequently in race discrimination cases which go to the hearing stage than in sex discrimination cases. In several cases an apology only was awarded where compensation was sought for a small amount. Some have argued that this tendency can be seen as an indication that race cases are somehow less worthy than other complaints with regard to adequate compensation for pain and suffering.

Future directions

The Commission's Race Discrimination Unit is in the final stages of collating information and submissions received during the RDA Review process. The scope of the Review is very broad, and it addresses 'big picture' issues such as systemic discrimination, collective rights, special measures, the cultural appropriateness of the current legislative regime, effective remedies and enforcement, the conciliation framework and ways to enhance dispute resolution processes. It will also examine in detail the substantive provisions of the RDA.

Concerns from non-English speaking background groups raised so far in the community consultations about the RDA include:

- the need for a plain English version of the RDA;
- the removal of the requirement that complaints be written;
- allowing a friend or advocate to lodge a complaint on behalf of an aggrieved person;
- a shift in the burden of proof from complainants to respondents;
- the inclusion of criminal sanctions for offensive behaviour motivated by racial hatred; and
- the inclusion of ethno-religious background as a ground of complaint.

This list is by no means exhaustive, but it highlights areas nominated by people of non-English speaking backgrounds (as well as Aboriginal and Torres Strait Islander peoples) who have attended the community consultations so far. Also highlighted consistently at the consultations were access and equity issues for people of non-English speaking backgrounds wishing to complain under the RDA. There was general dissatisfaction with the perceived lack of ethnic/racial diversity in

Commission and state agency staff handling complaints as the delegate of the Commissioner. It was argued if staff were more representative of diversity in the community, there would be a higher likelihood that they would have bi-lingual skills and an understanding of cross cultural issues which in turn would make complaint handling procedures more accessible.

This has clear implications for recruitment and training of enquiries and complaints staff across the Human Rights and Equal Opportunity Commission and state agencies.

Other issues warranting continuing attention in the future include the high level of complaints in the area of employment which has been discussed in Part 4 of this report. Feedback on the draft Employment Code of Practice produced by the Race Discrimination Commissioner will be vital in setting future directions for the use of the RDA by employers, employees, unions and others wanting to understand their rights and responsibilities regarding race discrimination in the workplace.

A public information and education program about the racial hatred provisions was conducted by the Race Discrimination Commissioner between June and November 1996. This area also demands ongoing attention as the Australian population in general grapples with equal treatment for all its members, regardless of their race, colour, descent or national or ethnic origin.

The RDA currently states that any act which satisfies the requirements of a “special measure” is exempt from the prohibition of racial discrimination in Part II of the Act. The Race Discrimination Commissioner believes that the RDA should be amended to bring it in line with the equivalent “special measures” provision in the *Sex Discrimination Act 1984* (Cth), thereby declaring that “special measures” are non-discriminatory rather than an exception to the prohibition of racial discrimination.

Recommendations

The recommendations that follow are based on discussions in this report and preliminary feedback from the RDA Review process contained in Part 4.

It is recommended that the following sections of the RDA be amended so that they may conform to the corresponding provisions in the more recently enacted *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth).

1. Aggrieved persons

- a) Section 22 of the *Racial Discrimination Act 1975*(Cth) currently does not allow complaints to be made by a representative on behalf of an aggrieved person, unless that representative is a person also aggrieved by the act. People with poor English skills or those who are newly arrived in the country and unfamiliar with Australian systems and procedures may be vulnerable to race discrimination but lacking in the confidence and skills to proceed with a complaint themselves.

It is recommended that section 22 of the *Racial Discrimination Act 1975* (Cth) be amended to allow a person to make a complaint on behalf of, and with the consent of, an aggrieved person even though they are not themselves aggrieved.

2. Part II of the RDA

- i) Section 8(1) of the *Racial Discrimination Act 1975*(Cth) currently states that any act which satisfies the requirements of a “special measure” is an exception from the prohibition of racial

discrimination in Part II - see the *Racial Discrimination Act 1975: A Review* for a full discussion.

It is recommended that section 8(1) be relocated as part of section 9, to bring it into line with the equivalent “special measures” provision in the *Sex Discrimination Act 1984* (Cth), thereby declaring that “special measures” are non-discriminatory rather than an exception to the prohibition of racial discrimination.

- ii) Part II of the *Racial Discrimination Act 1975*(Cth) currently lists a limited number of areas of operation of the Act, but provides no examples of the application of the Act in these areas.

It is recommended that Part II of the *Racial Discrimination Act 1975*(Cth) be amended to expand the specific areas of operation listed in conformity with the *Disability Discrimination Act 1992* (Cth), without detracting from the generality of section 9(1).

3. Confidentiality

- a) Section 27F of the *Racial Discrimination Act 1975* (Cth) currently makes it unlawful for members of the Commission to divulge any information in relation to a complaint, at any stage up to and including the finalisation of the conciliation process. However, no such prohibition is placed upon parties to a complaint, placing in jeopardy the confidential nature of the conciliation process.

It is recommended that section 27F of the *Racial Discrimination Act 1975*(Cth) be amended to make it an offence for a person who is a party to a complaint under the Act, to divulge any information in relation to that complaint, to any person, at any stage following the initiation of that complaint up to and including the finalisation of the conciliation process, unless there is agreement by both parties that certain information may be divulged.

Appendix 1: International Convention on the Elimination of All Forms of Racial Discrimination

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for the observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December

1960 (General Assembly resolution 1514 (XV) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII) solemnly affirms the necessity of speedily eliminating racial discrimination through the world in all its forms and manifestations and of securing understanding of the respect of the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among people and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

Part 1

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives of which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
 - (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

1. In compliance with the fundamental obligations laid down in Article 2 of this Convention, 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:
 - (a) The right to equal treatment before the tribunals and all other organs administering justice;
 - (b) The right to security of persons and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
 - (c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
 - (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
 - (e) Economic, social and cultural rights, in particular:

- (i) The rights of work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just a favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combatting prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Appendix 2: Racial Discrimination Act 1975

Part II - Prohibition of racial discrimination

Exceptions

8. (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10 (1) applies by virtue of subsection 10 (3).

(2) This Part does not apply to:

(a) any provision of a deed, will or other instrument, whether made before or after the commencement of this Part, that confers charitable benefits, or enables charitable benefits to be conferred, on persons of a particular race, colour or national or ethnic origin; or

(b) any act done in order to comply with such a provision.

(3) In this section, "charitable benefits" means benefits for purposes that are exclusively charitable according to the law in force in any State or Territory.

Racial discrimination to be unlawful

9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Where:

(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

(b) the other person does not or cannot comply with the term, condition or requirement; and

(c) 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 in the political, economic, social, cultural or any other field of public life; the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section.

Rights to equality before the law

10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic

origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Access to places and facilities

11. It is unlawful for a person:

(a) to refuse to allow another person access to or use of any place or vehicle that members of the public are, or a section of the public is, entitled or allowed to enter or use, or to refuse to allow another person access to or use of any such place or vehicle except on less favourable terms or conditions than those upon or subject to which he would otherwise allow access to or use of that place or vehicle;

(b) to refuse to allow another person use of any facilities in any such place or vehicle that are available to members of the public or to a section of the public, or to refuse to allow another person use of any such facilities except on less favourable terms or conditions than those upon or subject to which he would otherwise allow use of those facilities; or

(c) to require another person to leave or cease to use any such place or vehicle or any such facilities;

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

Land, housing and other accommodation

12. (1) It is unlawful for a person, whether as a principal or agent:

(a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;

(b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;

(c) to treat a second person who is seeking to acquire or has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;

(d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or

(e) to terminate any estate or interest in land of a second person or the right of a second person to occupy any land or any residential or business accommodation;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

(2) It is unlawful for a person, whether as a principal or agent, to impose or seek to impose on another person any term or condition that limits, by reference to race, colour or national or ethnic origin, the persons or class of persons who may be the licensees or invitees of the occupier of any land or residential or business accommodation.

(3) Nothing in this section renders unlawful an act in relation to accommodation in a dwelling-house or flat, being accommodation shared or to be shared, in whole or in part, with the person who did the act or a person on whose behalf the act was done or with a relative of either of those persons.

Provision of goods and services

13. It is unlawful for a person who supplies goods or services to the public or to any section of the public:

- (a) to refuse or fail on demand to supply those goods or services to another person; or
- (b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he would otherwise supply those goods or services;

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

Right to join trade unions

14. (1) Any provision of the rules or other document constituting, or governing the activities of, a trade union that prevents or hinders a person from joining that trade union by reason of the race, colour or national or ethnic origin of that person is invalid.

(2) It is unlawful for a person to prevent or hinder another person from joining a trade union by reason of the race, colour or national or ethnic origin of that other person.

Employment

15.(1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer:

- (a) to refuse or fail to employ a second person on work of any description which is available and for which that second person is qualified;
- (b) to refuse or fail to offer or afford a second person the same terms of employment, conditions of work and opportunities for training and promotion as are made available for other persons having the same qualifications and employed in the same circumstances on work of the same description; or
- (c) to dismiss a second person from his employment;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

(2) It is unlawful for a person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment less favourably than other persons in the same circumstances by reason of the race, colour or national or ethnic origin of the person so seeking employment or of any relative or associate of that person.

(3) It is unlawful for an organization of employers or employees, or a person acting or purporting to act on behalf of such an organization, to prevent, or to seek to prevent, another person from offering

for employment or from continuing in employment by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

(4) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(5) Nothing in this section renders unlawful an act in relation to employment, or an application for employment, in a dwelling-house or flat occupied by the person who did the act or a person on whose behalf the act was done or by a relative of either of those persons.

Advertisements

16. It is unlawful for a person to publish or display, or cause or permit to be published or displayed, an advertisement or notice that indicates, or could reasonably be understood as indicating, an intention to do an act that is unlawful by reason of a provision of this Part or an act that would, but for subsection 12 (3) or 15 (5), be unlawful by reason of section 12 or 15, as the case may be.

Acts done for two or more reasons

18. Where:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done for that reason.

Vicarious liability

18A. (1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by that person;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

Part IIA - Prohibition of offensive behaviour based on racial hatred

Reason for doing an act

18B. If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

Offensive behaviour because of race, colour or national or ethnic origin

18C. (1) It is unlawful for a person to do an act, otherwise than in private, if:

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

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

Note: Subsection (1) makes certain acts unlawful. Section 22 allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

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

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

(b) is done in a public place; or

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

(3) In this section:

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

Exemptions

18D. Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Vicarious liability

18E. (1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

Part III - Inquiries and civil proceedings

Complaints

22. (1) A complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of Part II or Part IIA may be lodged with the Commission by:

(a) a person aggrieved by the act, on that person's own behalf or on behalf of that person and another person or other persons aggrieved by the act;

(b) 2 or more persons aggrieved by the act, on their own behalf or on behalf of themselves and another person or other persons aggrieved by the act;

(c) a person or persons included in a class of persons aggrieved by the act, on behalf of the persons included in that class of persons; or

(d) a trade union of which a person or persons, or persons included in a class of persons, aggrieved by the act is a member or are members, on behalf of that person, those persons or persons included in that class of persons, as the case may be.

(1A) In the case of a representative complaint, this section has effect subject to section 25L.

(2) In this section, "trade union" means:

(a) an organisation of employees that is a registered organisation;

(b) a trade union within the meaning of any State Act or law of a Territory; or

(c) any other similar body.

Inquiries by Commissioner

24. (1) Where:

(a) a complaint relating to an alleged unlawful act is made to the Commission under section 22; or

(b) it appears to the Commission that a person has done an act that is unlawful by virtue of a provision of Part II or Part IIA;

the Commission shall notify the Commissioner accordingly and the Commissioner shall, subject to subsection (2), inquire into the act and endeavour, by conciliation, to effect a settlement of the matter to which the act relates.

(2) The Commissioner may decide not to inquire into an act, or, if the Commissioner has commenced to inquire into an act, decide not to continue to inquire into the act, if:

(a) the Commissioner is satisfied that the act is not unlawful by reason of a provision of Part II or Part IIA:

(b) the Commissioner is of the opinion that the person aggrieved by the act does not desire, or none of the persons aggrieved by the act desires, that the inquiry be made or continued;

(c) in a case where a complaint has been made to the Commission in relation to the act, a period of more than 12 months has elapsed since the act was done; or

(d) in a case where a complaint has been made to the Commission in relation to the act, the Commissioner is of the opinion that the complaint was frivolous, vexatious, misconceived or lacking in substance.

(3) Where the Commissioner decides not to inquire into, or not to continue to inquire into, an act in respect of which a complaint was made to the Commission, the Commissioner shall give notice in writing to the complainant or each of the complainants of that decision, of the reasons for that decision and of the rights of the complainant or each of the complainants under subsection (4). NB. Subsections 3A - 6 of section 24 have not been reproduced in this appendix.

Power to obtain documents

24B. (1) Where the Commissioner has reason to believe that a person is capable of furnishing information (in this subsection referred to as "relevant information") or producing documents (in this subsection referred to as "relevant documents") relevant to an inquiry under this Division, the Commissioner may, by notice in writing served on the person, require the person, at such place, and within such period or on such date and at such time, as are specified in the notice:

(a) to furnish to the Commissioner, by writing signed by the person or, in the case of a body corporate, by an officer of the body corporate, such relevant information (if any) as is specified in the notice; and

(b) to produce to the Commissioner such relevant documents (if any) as are specified in the notice.

(2) Where documents are produced to the Commissioner in accordance with a requirement under subsection (1), the Commissioner:

(a) may take possession of, and may make copies of, or take extracts from, the documents;

(b) may retain possession of the documents for such period as is necessary for the purposes of the inquiry to which the documents relate; and

(c) during that period shall permit a person who would be entitled to inspect any one or more of the documents if they were not in the possession of the Commissioner to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.

Directions to persons to attend compulsory conference

24C. (1) For the purpose of inquiring into an act, and endeavouring to settle the matter to which the act relates, in accordance with section 24, the Commissioner may, by notice in writing, direct the persons referred to in subsection (2) of this section to attend, at a time and place specified in the notice, a conference presided over by the Commissioner or a person appointed by the Commissioner.

(2) Directions under subsection (1) to attend a conference in relation to an act shall be given to:

(a) where a complaint was made to the Commission in relation to that act - the complainant, or all the complainants, as the case requires;

(b) the person who is alleged to have done the act; and

(c) any other person who, in the opinion of the Commissioner, is likely to be able to provide information relevant to the inquiry or whose presence at the conference is, in the opinion of the Commissioner, likely to be conducive to the settlement of the matter to which the act relates.

(3) A person who has been given a direction under subsection (1) to attend a conference is entitled to be paid by the Commonwealth a reasonable sum for the person's attendance at the conference.

(4) The Commissioner may, in a notice given to a person under subsection (1), require the person to produce such documents at the conference as are specified in the notice.

Conditions for making a representative complaint

25L (1) A representative complaint may be lodged under section 22 only if:

(a) the class members have complaints against the same person; and

(b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and

(c) all the complaints give rise to a substantial common issue of law or fact.

(2) A representative complaint under section 22 must:

(a) describe or otherwise identify the class members; and

(b) specify the nature of the complaints made on behalf of the class members; and

(c) specify the nature of the relief sought; and

(d) specify the questions of law or fact that are common to the complaints of the class members. In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are.

(3) A representative complaint may be lodged without the consent of class members.

Appendix 3: Complaints checklist

A complaint under the RDA should point to some link between a policy, or behaviour or action which is allegedly discriminatory and the race or ethnicity of the aggrieved person or people affected by it.

First, it is necessary to explain the area in which the discrimination has occurred. For example, it might be unfair treatment in employment because of a person's ethnicity and accent.

Where possible and relevant, the following information should be given:

- the name(s) and contact details of the person(s) or organisation(s) responsible for the discrimination;
- include, if relevant, details of the policy or procedures which are believed to be discriminatory;
- a description of **what** happened or what was said or done; if relevant give the name and contact details of anyone else seeing or hearing what was said or done;
- **where** the behaviour happened or is continuing to occur;
- **when** it happened;
- the reason **why** race, colour, descent or national or ethnic origin is at issue;
- an outline of any loss or harm experienced because of the policy or behaviour;
- details of any attempt to resolve the complaint in any other way and what happened as a result;
- details of what is sought to settle the complaint.

In alleging indirect discrimination, the complaint should include details of:

- the term or condition or requirement with which it is not possible to comply;
- **how** race, colour, descent or nation or ethnic origin relates to the inability to comply;
- **why** the term or condition or requirement is not reasonable.