Discrimination Complaint Statistics – Australian Human Rights Statistics

In 2011-12, the Commission recorded the highest number of complaints over the past ten years. This is in stark contrast to 2010-11, where the Commission recorded a drop in the number of complaints made for the first time in six years. The number of complaints rose from 2152 in 2010-11 to 2610 in 2011-12.

The pattern of complaints received in 2011-12, however, varied little to those from 2010-11. Thirty-seven per cent were made under the Disability Discrimination Act, 19% under the Sex Discrimination Act, 18% under the Racial Discrimination Act, 18% under the Australian Human Rights Commission Act and 8% under the Age Discrimination Act. Only the number of complaints under the Australian Human Rights Commission Act increased in 2011-12. The number of complaints under the Age Discrimination Act stayed consistent whilst the complaints under each other Act slightly declined from the previous year, highlighting that age discrimination is gradually becoming a more significant issue.

When it comes to employment, however, complaints of sec discrimination are the most common. In 2011-12, 85% of all complaints made under the Sex Discrimination Act were employment related. Employment related complaints made up 65% of all age discrimination complaints, 46% of race discrimination complaints, and 31% of disability complaints.

Discrimination Case Law

Asnicar v Mondo Consulting Pty Ltd [2004] NSW Administrative Disputes Tribunal

- A female employee of a small NSW business of only 6 employees complained to her manager that she was sexually harassed by her male manager.
- Her employer acted promptly to remedy the situation including developing a sexual harassment policy, training staff and engaging a professional to investigate and mediate the complaint.
- However, the Tribunal found the company vicariously liable for sexual harassment and said that although the company acted promptly to resolve the complaint it did not take 'all reasonable steps' to prevent the conduct occurring in the first place.

Lesson: Actions an employer takes **following** a complaint are not enough to avoid liability for unlawful discrimination. Adequate measures and procedures must **already** be in place to prevent unlawful behaviours occurring.

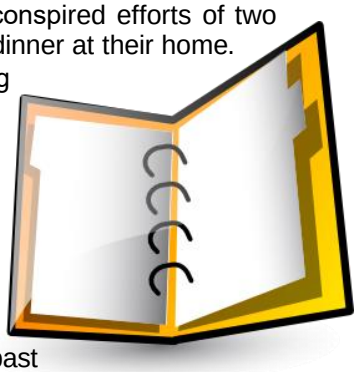
Caton v Richmond Club Limited [2003] NSW Administrative Disputes Tribunal

- A large NSW club was found vicariously liable for sexual harassment that a female employee endured from her male supervisor.
- The Tribunal noted that although the employer had various policies in place and an employee handbook that included Anti-Discrimination legislation, this was no comprehensive enough and did not adequately cover behaviours that were not acceptable in the workplace.
- The Tribunal also noted that although senior management took 'reasonable steps' once they were made aware of the complaint, middle management had no prior knowledge of the male supervisors tendency to harass female employees, and did not think it was their duty to monitor or manage his behaviour.
- The Tribunal found that the "Club should have properly trained…its staff, particularly its managers, in their responsibilities and obligations concerning discrimination and harassment matters and their prevention in the workplace. The Club's failure to do so means it has failed to take all reasonable steps to prevent…sexual harassment of the complainant".
- The female employee was awarded $15,000

Lesson: Managers and supervisors must be trained to recognise unlawful conduct and respond to it appropriately

Lee v Smith & Ors [2007] Federal Magistrates Court

- The employer was found vicariously liable for the sexual assault of a female employee which took place outside working hours at a co-workers private residence.
- The rape followed an ongoing period of sex discrimination and sexual harassment in the workplace which included propositions for sex, displays of pornographic material, sexual innuendo and messages and unwanted physical contact.
- Following her rape, the employee made an internal complaint and was subjected to verbal abuse, bullying, intimidation and threats.
- The court held that the rape was 'the culmination of the earlier incidents of sexual harassment directly in the workplace' and would not have occurred 'but for' the numerous and conspired efforts of two other employees to arrange for the employee and the perpetrator to attend dinner at their home.
- The court noted the gross failures in the department's grievance handling procedures following the employee's complaint and the failure to offer the employee equity and diversity training during her employment were factors in finding the employer liable for the conduct.
- The court commented that has the employee received such training she may have been better equipped to deal with and report the earlier incidents of sexual harassment, which may have prevented the eventual rape.
- The employee was awarded $100,000 plus interest and costs for pain, suffering and humiliation, $232,163 in special damages, $20,259 for past medical expenses, $5,000 for future medical expenses and $30,000 for future loss of income.



Lesson: Suitable discrimination and harassment policies must be regularly reviewed and communicated to employees in writing and, where necessary, through appropriate training. Reporting procedures must also be clear, consistent and documented.

Ilian v Australian Broadcasting Corporation [2006] Federal Magistrates Court

- A female employee of the ABC took an extended period of maternity leave. After two years and four months of leave she returned to work.
- However, she was not allowed to return to the position she had held before she went on leave, and was instead placed in a lower level position and was required to perform more menial duties.
- The court found that the employer's usual practice was to allow employees to return to their previous duties following extended leave, but it treated this employee less favourably than other employees because she took extended maternity leave.
- The court held that the taking of maternity leave is a characteristic which applies generally to women who are pregnant, and as a result the employer directly discriminated against the employee because of her pregnancies and the taking of maternity leave.

Lesson: Direct discrimination against an employee based on pregnancy is a breach of the *Sex Discrimination Act.*

Farmer v Dorena Pty Ltd [2002] NSW Administrative Disputes Tribunal

- The applicant alleged that the managing director of an employment agency discriminated against her on the ground of her transgender status by failing to put forward her name for a position.
- The applicant was informed by the respondent that the client wanted a female for the position. When the applicant indicated that she was female, the respondent told her 'they wanted a woman – a vanilla woman'.
- The Tribunal found that the respondents failure to submit the applicants application, combined with his insensitive approach and reference to a 'vanilla woman' demonstrated that he had treated her less favourably than he would have treated a person who was not transgender in the same or similar position.
- The applicant was awarded $6,000 for humiliation and stress.

Lesson: Equal employment opportunity means treating people on the basis of individual merit rather than irrelevant personal characteristics.

Poniatowska v Hickinbotham [2009] Federal Magistrates Court

- A female employee alleged that her co-worker sent her persistent emails and SMS text messages asking her for sexual favours, even though she responded to the first email by saying that she didn't want to receive such requests from him. She also complained that another co-worker sent her an MMS photograph showing an act of oral sex by a woman on a man, with the text message 'u have 2 b better'.
- The court found that a reasonable person, having regard to all the circumstances, would have anticipated that the female employee would be offended and humiliated by the conduct.
- The court held that the employee had been sexually harassed in the course of her employment, and that the employer treated her less favourably than it would have treated a male employee who made a complaint of discrimination, therefore discriminating against the employee on the basis of her sex.
- The employee was awarded $90,000 for her pain and suffering, $200,000 for past loss of income, $140,000 for future loss of earning capacity, $3,000 for future medical expenses and $30,000 in interest.

Lesson: Once female employees are on the job, they should be treated fairly and equally regardless of their sex.

Maxworthy v Shaw [2010] Federal Magistrates Court

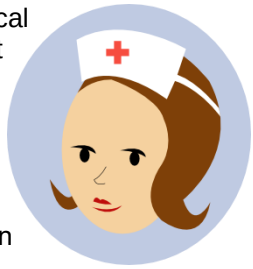
- A part-time female employee of a take-away food outlet suffered from Crohn's disease and some other physical disabilities, and needed to wear a colostomy bag.
- After the business changed hands, the new owner required her to work longer hours and drive a mobile food van.
- When the employee claimed that she could not work all the extra hours because of her childcare/family responsibilities (she was a single mother with four children) the employers placed pressure on her to work longer hours, ignored her requests to adjust her hours and clarify her employment position, and made an insulting comment about her colostomy bag. The employer advertised her job without telling her whether she was still employed, and then claimed she had abandoned her employment when she took sick leave.

- The court found that the employers and discriminated against the employee on the basis of both her disability and her sex.
- The employee was awarded total damages of over $63,000.

Lesson: Even small businesses need to find ways to assist employees to balance their work and family responsibilities. It is unacceptable to state that 'this is the job, take it or leave it'.

Duncan v Kembla Watertech Pty Ltd [2011] NSW Administrative Disputes Tribunal

- The applicant claimed that she was offered a job with the employer, but that the job offer was withdrawn before she commenced employment because she 'failed' a pre-employment medical examination, and the employer claimed its job offer was subject to passing that examination.
- The applicant's disabilities included obesity and a past knee injury, and the examination had indicated that she would not be capable of performing the inherent requirements of the job.
- The job description including resolving customer complaints onsite, which could include 'traversing sites which are often difficult to negotiate due to uneven terrain and disturbed ground conditions'.

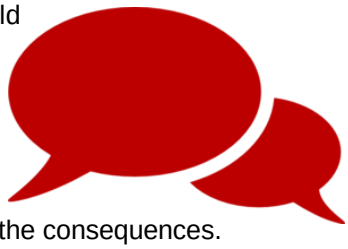


- The Tribunal examined the evidence and concluded that the applicant could not have been able to perform these requirements of the job, and that they were inherent requirements of it. Therefore, the employer did not discriminate on the grounds of disability by withdrawing the job offer.

Lesson: An employer can successfully defend its decision if it relies on objective evidence.

Barry v Futter [2011] NSW Administrative Disputes Tribunal

- A transsexual man claimed that some abusive comments made about him by a co-worker at his place of employment amounted to transgender vilification. The two employees had some previous abusive exchanges but the co-worker had also made comments to another employee that were relayed to the transsexual man.
- The Tribunal discussed whether opinions expressed in private conversations of this nature could amount to a 'public act' (and thus become unlawful vilification). The Tribunal held that the definition did not include private conversations, even if they occurred in a public place such as an open workplace. A single conversation with one other employee was regarded as a private conversation. The co-worker was not informing the public in general what she thought about another employee.



Lesson: Comments made in private will not generally make an employer liable for the consequences.