Human Rights and Equal Opportunity Commission

Federal Discrimination Law 2005

Supplement 1 March 2005 – 1 May 2006*

*These updates and future updates are available at http://www.humanrights.gov.au/legal/publications.html

Introduction

This supplement to *Federal Discrimination Law 2005* covers significant cases that have been decided in the Federal unlawful discrimination jurisdiction between 1 March 2005 and 1 May 2006.

The supplement is designed to be read with the original publication and replaces earlier supplements. It follows the numbering and headings contained in *Federal Discrimination Law 2005*, with additional headings to cover any new matters of interest. It also updates the tables of damages provided in the original publication.

Please note that the publication of another edition of *Federal Discrimination Law* is not anticipated until 2007.

Chapter 2: The Age Discrimination Act

There are have been no developments in the case law under the ADA.

Chapter 3: The Racial Discrimination Act

3.1 Introduction to the RDA

3.1.3 Interaction between RDA, State and other Commonwealth Laws

In *Clark v Vanstone*,[1] Gray J held that it was necessary, by virtue of s 10 of the RDA (amongst other factors), to read down a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour'. His Honour held that the ATSIC Act and the Determination imposed a higher standard of behaviour on those holding office under the ATSIC Act than is imposed by the law on those elected or appointed to similar offices under other legislation. His Honour noted that some of the offices in ATSIC could only be held by Indigenous people and that there was a likelihood that others would also be held by Indigenous people. Further, Gray J noted that:

> [I]ndigenous people are much more likely to be found by courts to have committed criminal offences, particularly offences of the public order kind, than are non-indigenous people. In construing the word 'misbehaviour' in the context of the ATSIC Act, this is a factor which must be taken into consideration, lest indigenous people, significant numbers of whom will have had experience with the criminal justice system, be deprived of representation by those who have also had such experiences. The danger of disqualifying too high a proportion of indigenous people from being representatives, because of experiences with the criminal justice system, is also obvious.[2]

His Honour concluded that the imposition of a higher standard on office holders under the ATSIC Act than on those elected or appointed to similar offices was racially discriminatory and the relevant provisions should therefore be read down.

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[1] (2004) 211 ALR 412.
[2] Ibid 445 [99].

On appeal in *Vanstone v Clark*,[3] this aspect of the decision of Gray J was overturned. Weinberg J, with whom Black CJ agreed, noted that the Determination applied to a range of officers and positions held by both Indigenous and non-Indigenous persons. The Court agreed with the submission of the appellant that 'it is no answer to the structure and text of the Act to engage in speculation that holders of such officers were likely to be indigenous'.[4] Weinberg J stated:

> Had the 2002 Determination provided a different test for suspension or termination of indigenous persons from that applicable to non-indigenous persons, it would obviously trigger the operation of s 10, and result in an adjustment of rights, as a matter of construction, as contemplated by the section… However, that is not the case here. There is no inconsistency of treatment based upon race within either the Act, or the 2002 Determination.[5]

3.2 Racial Discrimination Defined

3.2.1 Grounds of Discrimination

(c) National origin

AB v New South Wales[6] involved a substantive determination of the issues that had first been litigated as an application for an interim injunction in *AB v New South Wales Minister for Education and Training*.[7] The applicant, a child, had been refused admission to a selective high school operated by the State of NSW. Admission was refused because the applicant is not an Australian citizen or permanent resident. This was alleged to discriminate against the applicant on the basis of his Romanian national origin. The case was argued as one of *indirect* discrimination (see 3.2.3 below).

His Honour considered the possible relevance of Article 1(3) of ICERD which provides:

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of the States' Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

Driver FM asked 'whether the requirement, based as it is on citizenship or residence, is protected by [Article 1(3)]'. His Honour concluded that it was not and that the Article was

> limited in its operation to legal provisions concerning the grant or refusal of nationality, citizenship or naturalisation, rather than conditions or requirements based upon the existence of nationality, citizenship or naturalisation. In any event, the limitation in Article 1 is silent on the question of residence.[8]

[3] [2005] FCAFC 189.
[4] Ibid [198].
[5] Ibid [199].
[6] [2005] FMCA 1113.
[7] [2003] FMCA 16.
[8] Ibid [44].

3.2.2 Direct Discrimination Under the RDA

(a) Causation and intention to discriminate

In *Baird v State of Queensland*,[9] the applicants claimed that between 1975 and 1986 they were employed on one or other of the Hope Vale and Wujal Wujal missions by the Queensland government ('the Government'). They further alleged that during this period they were paid at a level that was below that being paid by other persons employed by the Government to perform similar work and/or below relevant levels established by applicable industrial awards. The applicants are Indigenous people and claimed that the wage differentiation to which they were subjected constituted race discrimination, contrary to ss 9 and 15 (prohibiting discrimination in employment) of the RDA.

Wujal Wujal and Hopevale were 'reserves' for the purposes of the *Aborigines Act 1971* (Qld). During the period covered by the application, the Government had placed the reserves under the management of the Lutheran Church of Australia ('the Church') in accordance with that Act.[10]

The Government provided funding to the Church for the running of the missions by way of annual grant. The level of such funding was found to reflect, to some extent, the cost to government of managing reserves. Grants generally included amounts identified as being for wages payable to Indigenous residents, but once the grants were made the Church was able to decided how it was to be spent.

The Court rejected the application in relation to s 15 (discrimination in employment) on the basis that the Government did not employ the applicants. The Church was not a respondent to the litigation (initially it was named as a respondent but the applicant discontinued against it). The Court stated:

> No doubt the Government allowed and expected the Church to perform functions on the missions, which functions the Government would, itself, have performed in the absence of the Church. However, that does not lead to the conclusion that persons apparently employed by the Church… were employed by the Government. Nothing in [the relevant legislation] suggests that the Church or council was authorised to employ staff on behalf of the Government.[11]

The Court also rejected the applicant's argument that the calculation and payment of grants by the Government involved discrimination contrary to s 9. The applicants argued that this discrimination resulted from pay rates which differed from rates paid to Government employees and/or specified in awards being used to calculate the amounts to be paid to churches conducting missions on reserves.

The Court found that:

- There could be no doubt that Indigenous people in Queensland were, for some or all of the period in question, significantly disadvantaged and one such

[9] [2005] FCA 495. Note that an appeal from this decision was heard on 20 February 2006 and at the time of writing a decision by the Full Federal Court is reserved: QUD377/2005. The Human Rights and Equal Opportunity Commission was granted leave to intervene in those proceedings.
[10] Ibid [115]-[116].
[11] Ibid [119].

disadvantage was that wage levels paid on reserves were lower than levels prescribed by awards and therefore paid in the general community; and

- It is probable that the system of reserves established and maintained under the 1971 Act and the 1984 Act was a cause of such disadvantage: and
- The Government's apparent acceptance of the fact that the Church was not paying award wages on the missions also contributed; and
- Such acceptance was the natural consequence of the fact that the Government was paying below-award wages to Indigenous workers on the reserves which it administered.[12]

Nevertheless, the Court held that there was no 'particular act which offended against s 9'. The Court stated:

> No particular Cabinet decision or Government payment was specifically identified as being the subject matter of these proceedings. None was examined to see if it involved a discriminatory element or had a discriminatory purpose or effect. The failure to address particular acts is probably fatal to the applicants' claims under s 9. It is possible to identify from the evidence particular decisions which involved calculations using particular wage rates. It would be more difficult to demonstrate that each decision had a discriminatory purpose or effect. In any event, the case has not been conducted in that way. The Government has been content to deny that it employed the applicants and that it discriminated against them for reasons associated with race. As a result, this deficiency in the applicants' case was not clearly identified at the trial. Nonetheless, I do not understand the Government to concede that it is appropriate for me to approach the problem in a generic way, treating all of the payments as being contrary to s 9, subject only to my accepting the applicants' assertions of a history of wage discrimination by the Government in its funding of the missions, and the demonstrated shortfall in the applicants' wages as compared with those payable under relevant awards.[13]

Dowsett J further held that, even if he was to take such a 'generic' approach, he would still conclude that there was no breach of s 9. His Honour held that there was no discriminatory element to the payments:

> The applicants have established that the grants were not sufficient, themselves, to enable the Church to pay award wages, but there is no basis for asserting that the calculation of the grants involved any discriminatory element. Any discrimination arose from the discrepancy between the amounts paid to indigenous workers (which amounts were derived from the grants) on the one hand, and amounts paid to other workers (which amounts were unrelated to the grants) on the other. That discrimination was the result of numerous factors, unrelated to the acts upon which the applicants rely. For this reason that discrimination was not involved in those acts. In these proceedings the applicants complain of discrimination against them as employees, not that they failed to receive a fair share of public resources generally.[14]

His Honour also stated that the calculation and payment of grants were not 'based on' race:

> Calculation and payment of grants were incidents of Government funding of the missions. As I do not accept that such acts involved discriminatory elements, it is difficult to determine in the abstract whether, if they did so, such elements would have been so based. It is sufficient to say that it seems that any discrimination against the applicants was based on the fact that they resided and worked on the missions rather than on their race. The applicants argue that those living and working on missions were, almost inevitably, indigenous. There may be something in that argument, but it is not raised on the pleadings. It is not necessary to take it further.

[12] Ibid [135].
[13] Ibid [136].
[14] Ibid [138].

> If s 9 is to be engaged, the act (having the relevant discriminatory element) must also have had 'the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing' of an applicants' right to equal pay. It cannot be said that the payments made to the Church had the purpose or effect of depriving the applicants of their proper pay rates. The payments enabled the Church to pay them something. Had there been no grants, there would have been other funding arrangements and in particular, reductions in employment levels and greater reliance upon social security payments.[15]

Dowsett J further expressed the following view:

> Although they have not said so directly, the applicants' real complaint is not that the Government paid money to the Church, but that it did not pay enough. That raises the question of whether the word 'act' in s 9 includes an omission to act. There is nothing in RDA to support such an argument. Section 9 may be contrasted with s 15. The latter section clearly addresses omissions to act. In any event, such an argument would inevitably involve the assertion that the Government was obliged to make sufficient funds available to enable the Church to pay higher wages and could not make a partial contribution. Such a construction of the section is simply not available. It might also raise constitutional questions.[16]

Note, however, that the statement that the RDA does not support an argument that 'act' in s 9 includes an omissions to act is, with respect, incorrect. Section 3(3) of the RDA explicitly provides that an 'act' includes an omission to act.

His Honour also observed that the applicants did not allege that the Government was liable as a party to any conduct by the Church. His Honour went on to say: 'There seems to be no statutory basis for such a claim'.[17] His Honour does not appear to have been directed towards s 17 of the RDA (which was not pleaded by the applicants) which makes it unlawful for a person 'to assist or promote whether by financial assistance or otherwise' the doing of an act that is unlawful by reason of the a provision of Part II of the RDA (which includes ss 9 and 15).

(b) Drawing inference of racial discrimination

In *Meka v Shell Company Australia Ltd*,[18] the applicant was a foreign national whose application for employment was not considered by the respondent. This was found to have been, in part, by reason of administrative error in the office of the respondent. In fact, the applicant was not eligible for the position for which he applied as he did not meet other criteria (that he be a graduate with no more than three years experience).

In the absence of any direct evidence as to racial discrimination, the Court was asked to infer that this was the reason for the decision. However, counsel for the applicant had not cross-examined the witnesses for the respondent who had denied that the applicant's race was a factor in the decision. In those circumstances, the Court was not prepared to draw the inferences that the applicant sought to be drawn.[19]

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[15] Ibid [141]-[142].
[16] Ibid [144].
[17] Ibid [145].
[18] [2005] FMCA 250.
[19] Ibid [22]-[23].

3.2.3 Indirect Discrimination Under the RDA

(d) Not reasonable in the circumstances

In *AB v New South Wales*,[20] Driver FM held that the term, condition or requirement imposed upon the applicant that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent was not reasonable in the circumstances. His Honour stated:

> I accept that places at selective schools in New South Wales are a scarce commodity. Many more students apply than are selected. I also accept that it is reasonable to impose requirements to ensure that, as far as is practicable, persons entering a selective school are likely to complete their course of education. However, that purpose could, in my view, be achieved by a requirement that the student has applied for Australian permanent residency or citizenship. Making such an application demonstrates a commitment to live in Australia indefinitely sufficient to meet the expectation of completion of a course of secondary education.
>
> It is true that the fact that there is a reasonable alternative that might accommodate the interests of an aggrieved person does not, of itself, establish that a requirement or condition is unreasonable. The Court must objectively weigh the relevant factors, but these can include the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement or condition: *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 146 [115]. It is well known that the process of obtaining permanent residency and citizenship in Australia can be a lengthy one. Even where an application is refused, the process of review and appeal can take years. The present applicant has lived in this country for ten years and is seeking permanent residency. In my view, there is nothing in his circumstances which render it less likely that he would complete a course of education at Penrith Selective High School than if he had already been granted permanent residency or citizenship. The respondent's condition is unnecessarily restrictive and is disruptive to the educational expectations of both NSW residents, and those who may relocate to NSW from other States, which do not have selective public schools.[21]

Driver FM held, however, that the applicant had not made out his case of indirect discrimination: see 3.2.3(e) below.

(e) Ability to comply with a requirement or condition

In *AB v New South Wales*,[22] the applicant, a boy of Romanian national origin, complained that he could not comply with the requirement or condition that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent.

The Court found that it was appropriate to make a comparison between persons of Romanian national origin and persons of Australian or New Zealand national origin ('national origin' being a concept distinct from citizenship) in determining whether or not indirect discrimination had occurred. Driver FM held:

> There is nothing before me to persuade me that the broad class of persons born in Australia who might be considered persons of Australian national origin are better able to comply with

[20] [2005] FMCA 1113.
[21] Ibid [41]-[42].
[22] [2005] FMCA 1113.

> the respondent's requirement for citizenship or permanent residence than persons of Romanian national origin, whether they were born in Romania or in Australia.[23]

His Honour concluded that the applicant's claim failed on this 'question of evidence'.[24]

3.2.4 Interference with the Recognition, Enjoyment or Exercise of Human Rights of Fundamental Freedoms on an Equal Footing

In *AB v New South Wales*,[25] Driver FM accepted that Article 5 of ICERD 'establishes that the right to education and training is a fundamental right protected by [ICERD]'.

3.3 Exceptions: Special Measures

In the matter of *Vanstone v Clark*,[26] the Full Court considered whether or not a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour' were inconsistent with s 10 of the RDA (see 3.1.3 above). The Full Court also considered, in *obiter* comments, a suggestion by the appellant that the ATSIC Act, insofar as it prevented persons other than Aboriginal persons or Torres Strait Islanders from being appointed as Commissioners, constituted a 'special measure' under s 8 of the RDA and could therefore not be impugned as being racially discriminatory.

Weinberg J, with whom Black CJ agreed, held as follows:

> Section 31(1) of the ATSIC Act makes it a qualification for appointment as an ATSIC Commissioner that a person be an Aboriginal or Torres Strait Islander. Whether that section is a 'special measure' is of no consequence. The question is whether the 2002 Determination [relating to misbehaviour] is a 'special measure', and therefore immune from attack as being discriminatory. On no view can cl 5(1)(k) be described as a measure enacted 'for the sole purpose of securing adequate advancement of certain racial or ethnic groups'. Nor can it be characterised as a protective measure. It is not a measure designed to achieve 'substantive equality': *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 81 ALD 1 per Kenny J.
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> The Minister submitted that once it is conceded that s 31(1) is a 'special measure', any limits inherent in or attached to the office designated by that section are part of the special measure, and cannot be separately attacked as racially discriminatory. According to that submission the terms on which a Commissioner can be suspended from office, including the power to specify the meaning of misbehaviour, are part of the terms of that office. In my view, this submission cannot be accepted. It involves a strained, if not perverse, reading of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.[27]

[23] Ibid [56].
[24] Ibid [57].
[25] [2005] FMCA 1113.
[26] [2005] FCAFC 189.
[27] Ibid [208]-[209].

Chapter 4: The Sex Discrimination Act

4.1 Introduction to the SDA

4.1.2 Limited Application Provisions and Constitutionality

In *South Pacific Resort Hotels Pty Ltd v Trainor*,[28] the Full Federal Court upheld the decision of the Federal Magistrate at first instance[29] to the effect that the SDA applies generally to acts done in external Territories, such as Norfolk Island. Section 9(3) of the SDA provides that '[t]his Act has effect in relation to acts done within a Territory' and the Full Court found that this was unqualified in its terms and dealt with the application of the SDA generally: there is no additional requirement for an act done in a Territory to also fall within the scope of ss 9(5) to 9(20) of the SDA.[30]

The Full Court also rejected an argument that s 106 of the SDA, providing for vicarious liability, did not apply to the Territory of Norfolk Island as it was 'not one of the prescribed provisions of Part II or of the prescribed provisions of Div 3 of Part II' and therefore 'fell entirely outside the limits described in s 9.'[31] The Full Court held that s 9(3) provides that '[t]his Act' has effect in relation to acts done in a Territory and does not merely provide that 'the prescribed provisions' have effect in relation to acts done within a Territory.[32]

4.2 Direct Discrimination under the SDA

4.2.4 Direct Pregnancy Discrimination

(a) Generally

In *Dare v Hurley*,[33] the applicant alleged that she was dismissed from her employment either because she was pregnant or because of her request for maternity leave. The respondent contended that the applicant's employment was terminated because she had acted inappropriately by deleting documentation from the company's computer system, by installing password protection on documents contrary to company policy and by reporting in sick by means of an SMS message.

Driver FM considered that the appropriate hypothetical comparator for the purposes of s 7(1) of the SDA was an employee of the respondent subject to the same terms of employment: that is, one who had expressed a wish to take a period of unpaid leave; whose work performance was not assessed as unsatisfactory prior to the leave request; and who password protected two documents without instruction and reported in sick by means of an SMS message.[34] His Honour found that in dismissing the applicant, the respondent treated her less favourably than the hypothetical comparator would have been treated because of her need for maternity leave: a characteristic that

[28] [2005] FCAFC 130.
[29] *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374.
[30] [2005] FCAFC 130 [18]-[19] (Black CJ and Tamberlin J, Kiefel J agreeing).
[31] Ibid [22] (Black CJ and Tamberlin J, Kiefel J agreeing).
[32] Ibid.
[33] [2005] FMCA 844.
[34] Ibid [104].

appertains to women who are pregnant. His Honour held that the respondent acted unlawfully in dismissing the applicant in breach of s 7(1) and s 14(2)(c) of the SDA.[35]

In *Fenton v Hair & Beauty Gallery Pty Ltd*,[36] the applicant attended for work after an absence due to illness related to her pregnancy. Driver FM found that the applicant was discriminated against on the ground of pregnancy when she was sent home by her employer despite being 'fit, ready and able to work'. His Honour stated:

> The fact was that Ms Fenton had presented for work, was not sick and wanted to work. Ms Hunt had decided not to take the risk of permitting Ms Fenton to work because she did not want a repetition of the events of 18 December 2003 [on which day the applicant had been ill and had to leave work]. Ms Hunt's motives may have been benign (she was genuinely concerned for Ms Fenton's welfare) but Ms Fenton was treated less favourably than the hypothetical comparator would have been in the same circumstances. Ms Fenton was denied a week's salary that she was entitled to earn. A valued employee with Ms Fenton's skills and experience who was temporarily unfit for work but then presented for work fit at a time when her services were sorely needed, would not have been turned away. It was Ms Fenton's pregnancy that caused Ms Hunt to send Ms Fenton home because of her concern for her welfare. However, the decision should have been left for Ms Fenton. In sending Ms Fenton home and thereby depriving her of a week's salary, Ms Hunt discriminated against Ms Fenton by reason of her pregnancy contrary to s.7(1) and s.14(2)(b) of the SDA. Ms Hunt denied Ms Fenton access to paid employment for a week which was a benefit associated with her employment. Alternatively, the denial of paid employment was a detriment for the purposes of s.14(2)(d).[37]

(b) Relationship between Pregnancy and Sex Discrimination

In *Dare v Hurley*,[38] the applicant brought a claim under both s 5(1) and s 7(1) of the SDA. The applicant alleged that she was dismissed from her employment either because she was pregnant (s 7(1)) or because she was a woman who sought leave for the purposes of her confinement and the care of her expected baby (s 5(1)). Driver FM stated:

> …the matter can and should be resolved by reference to the pregnancy discrimination claim rather than the sex discrimination claim. I accept Mr Robinson's submission that s 7(1) of the SDA covers the field: *Human Rights and Equal Opportunity Commission v Mt Isa Mines Pty Ltd*.[39]

4.3 Indirect Discrimination under the SDA

4.3.1 Defining the 'condition, requirement or practice'

In *State of New South Wales v Amery & Ors*[40] (*'Amery'*) the respondents were employed by the NSW Department of Education as temporary teachers. They alleged that they had been indirectly discriminated against on the basis of their sex under sections 24(1)(b) and 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW) (ADA)

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[35] Ibid [116].
[36] [2006] FMCA 3.
[37] Ibid [97].
[38] [2005] FMCA 844.
[39] Ibid [104].
[40] [2006] HCA 14. For discussion of this decision, see Joanna Hemmingway, 'State of NSW v Amery', *Law Society Journal (NSW)*, June edition forthcoming, from which this summary is significantly drawn.

because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work.

Under the *Teaching Services Act 1980* (NSW) (the '*Teaching Act*'), the teaching service is divided into permanent employees and temporary employees and different conditions attach to those positions. Relevant in the present matter is the condition imposed on permanent employees that they be able to be transferred as and when required by the Department (a condition of 'deployability').

The dichotomy between permanent and temporary employees created by the *Teaching Act* is the basis of differential pay scales for each position adopted by the relevant industrial award, the Crown Employees (Teachers and Related Employees) Salaries and Conditions Award (the 'Award'). The Award provides 13 pay scales for permanent teachers and 5 for temporary teachers. The highest pay scale for temporary teachers is equivalent to level 8 of the permanent teachers scale.

The respondents alleged that the Department imposed a 'requirement or condition'[41] on them that they have permanent status to be able to access higher salary levels.

Different approaches were taken to this issue by members of the High Court.

Gleeson CJ held that, in identifying the requirement or condition, the conduct of the Department had to be differentiated from that of the Parliament in enacting the structure of the teaching service under the *Teaching Act* and the Industrial Relations Commission in imposing differential pay scales in the Award, as it was only the Department's conduct which was sought to be impugned by the respondents.[42] The question that therefore had to be answered was what was the relevant conduct of the Department in imposing the requirement of permanency? His Honour agreed with Beazley JA in the NSW Court of Appeal[43] that the relevant conduct of the Department was its practice of not paying above award wages to temporary teachers engaged in the same work as their permanent colleagues. His Honour said that it was in this sense that the Department 'required' the respondents to comply with a condition of having a permanent status in order to have access to the higher salary levels available to permanent teachers.[44]

Gummow, Hayne and Crennan JJ (Callinan J agreeing)[45] rejected the respondents characterisation of the requirement or condition on the basis that they had not properly identified the relevant 'employment' for the purposes of section 25(2)(a) of the ADA.[46] Their Honours held that 'employment' in s 25(2)(a) referred to the 'actual employment' engaged in by a complainant, stating that:

> [T]he term 'employment' may in certain situations, denote more than the mere engagement by one person of another in what is described as an employer-employee relationship. Often the notion of employment takes its content from the identification of the position to which a

[41] Note that the ADA definition of indirect discrimination refers to a 'requirement or condition' (s 24(1)(b)) and does not include a 'practice' as in s 5(2) of the SDA.
[42] [2006] HCA 14 [17], [25].
[43] *Amery & Ors v State of New South Wales (Director General NSW Department of Education and Training)* [2004] NSWCA 404.
[44] [2006] HCA 14, [17].
[45] Ibid [205].
[46] Ibid [69], [78].

> person has been appointed. In short, the presence of the word 'employment' in s 25(2)(a) prompts the question, 'employment as what?' [47]

Consequently, their Honours held that, having regard to the significantly different conditions which attach to permanent and temporary employees under the *Teaching Act*, the respondents were not employed as 'teachers' but as 'casual [or temporary] teachers'.[48] This rendered the alleged requirement or condition incongruous.[49]

Kirby J, dissenting, rejected the approach adopted by Gummow, Hayne and Crennan JJ as being 'narrow and antagonistic' and inconsistent with the beneficial and purposive approach required to be taken to remedial legislation such as the ADA.[50] In particular, his Honour suggested that their approach to the characterisation of the respondents employment gives 'considerable scope [to] employers to circumvent … [the ADA] … [A]ll that is required in order to do so is for an employer to adopt the simple expedient of defining narrowly the "employment" that is offered'.[51] His Honour held (deciding the matter under s 25(1)(c)) that the Department imposed a requirement or condition of permanent employment on the respondents in order to gain access to the higher salary levels.[52] This was on the basis that the terms on which the Department offered employment to the respondents for the purposes of s 25(1)(c) included the 'relevant terms specifically addressed to non-permanent casual supply teachers … [which] terms discriminated against the respondents'.[53]

4.3.3 Reasonableness

In *Amery*, the respondents were employed by the Department of Education as temporary teachers and alleged that they had been indirectly discriminated against on the basis of their sex under sections 24(1)(b) and 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW) ('ADA') because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work.

Gleeson CJ (Callinan and Heydon JJ agreeing)[54] was the only member of majority to consider the issue of reasonableness. His Honour stated that in the present context, the question of reasonableness was not about whether *teaching* work of a temporary teacher has the same value of a permanent teacher, but 'whether, having regard to their respective conditions of employment, it is reasonable to pay one less than the other.'[55]

In determining that question his Honour held that, having regard to the 'significantly different' incidents of employment for permanent and temporary teachers, and in particular the condition of 'deployability', it was reasonable for the Department to pay permanent teachers more than temporary teachers.[56] Furthermore, his Honour held that, were the Department to adopt the practice of paying above award wages, it

[47] Ibid [68].
[48] Ibid.
[49] Ibid [69].
[50] Ibid [138].
[51] Ibid [137].
[52] Ibid [142].
[53] Ibid.
[54] Ibid [203] (Callinan J) and [210] (Heydon J).
[55] Ibid [20].
[56] Ibid [19].

would be impracticable, as a matter of industrial reality to limit such payments to one particular class of teachers.[57]

Gleeson CJ also stated that, although compliance with an award does not provide a complete defence under the ADA, the industrial context in which the alleged unlawful conduct occurs may be a relevant circumstance in determining whether conduct is reasonable under s 24(1)(b).[58] It is noted that the ADA differs from the SDA in this regard, as under ss 40(1)(e) and (g) of the SDA, direct compliance with an award provides a complete defence.

4.6 Sexual Harassment

4.6.2 Unwelcome Conduct

In *San v Dirluck Pty Ltd*,[59] the applicant alleged she was sexually harassed during her employment at a butcher shop by her manager, Mr Lamb. Raphael FM found that the conduct of Mr Lamb which involved regularly greeting the applicant with the question 'How's your love life' and on one occasion stating 'I haven't seen an Asian come before' was conduct of a sexual nature and unwelcome. Relevantly, Raphael FM stated:

> I do not subscribe to the theory put forward by the respondents that because Ms San did not make many direct complaints to Mr Lamb and did on occasion answer him back that this indicated that she accepted the remarks as ordinary employee banter. Firstly… it appeared to be directed almost exclusively at Ms San and secondly I accepts Ms San's evidence and the submissions made on her behalf that she saw Mr Lamb, who was for a time the manager of the premises, as a person in a superior position to her to whom she would have, at least to some extent, to defer. It would not be easy for her to tell him that she found the remarks unwelcome. I accept that she took what steps she could personally by answering very shortly and then by responding positively to alleviate the situation.[60]

4.6.4 The 'Reasonable Person' Test

In *San v Dirluck Pty Ltd*,[61] the respondents' witnesses gave evidence of conduct by the applicant which indicated that she made racist and sexist remarks. Raphael FM stated:

> …the fact that Ms San may have made these remarks or acted in this way does not excuse any breaches of the Act by others. Her conduct could only go to consideration of whether the sexual remarks directed at her were likely to offend, humiliate or intimidate her.[62]

And further:

> …a reasonable person having heard the evidence of Ms San that she said to Mr Teasel '*what* the fuck is your problem' would not consider that she would have been offended when she was told to 'fuck off' by Mr Lamb. It might also be argued in those circumstances that the use of the word 'fuck' did not constitute conduct of a sexual nature. But the gravamen of the allegations against Mr Lamb is not the simple use of swear words in conversation but the

[57] Ibid [21], [24].
[58] Ibid [22].
[59] [2005] FMCA 750.
[60] Ibid [23].
[61] [2005] FMCA 750.
[62] Ibid [27].

> making of remarks of a sexual nature directed at the applicant consistently and almost exclusively.[63]

Raphael FM was satisfied that a reasonable person would have anticipated that the applicant would be offended, humiliated or intimidated by the conduct of the respondent, Mr Lamb. [64] Raphael FM was also satisfied that Mr Lamb's statement 'I haven't seen an Asian come before' constituted unwelcome conduct and such conduct could reasonably be anticipated to have offended the applicant.[65]

4.6.5 Sexual Harassment as a Form of Sex Discrimination

In *Frith v The Exchange Hotel*,[66] the applicant claimed that she was sexually harassed in the course of her employment with the Exchange Hotel by a director of the company, Mr Brindley. The applicant further claimed that the actions of the director amounted to sex discrimination within the meaning of s 14(2) of the SDA. Rimmer FM found that Mr Brindley had sexually harassed the applicant within the meaning of s 28A and 28B of the SDA and that such conduct amounted to sex discrimination within the meaning of s 14(2) of the SDA. Rimmer FM held the Exchange Hotel vicariously liable for the actions of Mr Brindley pursuant to s 106 of the SDA.[67]

In reaching his decision, Rimmer FM expressly disagreed with the reasoning of Branson J in *Leslie* on the issue of whether s 14 of the SDA applied in cases which involved the sexual harassment of one employee by another. His Honour stated:

> …it seems to me that the SDA *does* render unlawful discrimination by a fellow employee (in this case, Mr Brindley) on the ground of sex. Although it is true that Mr Brindley may not himself have discriminated against Ms Frith on the grounds of sex within the meaning and contemplation of section 14 (because, after all, he was not her employer in his personal capacity), the effect of section 106 is that the Exchange Hotel is deemed to have *also* done the relevant acts thereby triggering the provisions of section 14.[68]

4.8 Vicarious Liability

The decision in *Trainor v South Pacific Resort Hotels Pty Ltd* was upheld by the Full Federal Court on appeal in *South Pacific Resort Hotels Pty Ltd v Trainor*.[69] The Full Court cited with approval the decision of Branson J in *Leslie v Graham*,[70] in which an employer was found vicariously liable under s 106 of the SDA for sexual harassment that was found to have occurred in the early hours of morning in a serviced apartment that the complainant and another employee were sharing whilst attending a work-related conference. The Full Court concluded that the decision in *Leslie v Graham* could not be distinguished from the present matter in which an employee had been

[63] Ibid [33].
[64] Ibid.
[65] Ibid [34].
[66] [2005] FMCA 402.
[67] Ibid [57], [77], [82].
[68] Ibid [80]. Note Rimmer FM did not refer to the decision of Walters FM in *Hughes v Car Buyers Pty Limited* (2004) 210 ALR 645, 653 [42]-[43].
[69] [2005] FCAFC 130.
[70] [2002] FCA 32.

sexually harassed by a fellow employee while off-duty in staff accommodation quarters.[71]

Black CJ and Tamberlin JJ held:

> The expression 'in connection with' in its context in s 106(1) of the SDA is a broad one of practical application and, as in *Leslie v Graham*, the facts here point readily to the conclusion that Mr Anderson's conduct in the staff accommodation was 'in connection with' his employment within the meaning of s 106(1) of the SDA. The Federal Magistrate was correct in coming to the conclusion that he did.
>
> We would add that the expression chosen by the Parliament to impose vicarious liability for sexual harassment would seem, on its face, to be somewhat wider than the familiar expression 'in the course of' used with reference to employment in cases about vicarious liability at common law or in the distinctive context of workers compensation statutes. Nevertheless cases decided in these other fields can have, at best, only limited value in the quite different context of the SDA.

Kiefel J also held that vicarious liability in tort requires 'a much stronger connexion' between an employee's conduct and their employment than is required by the SDA. Her Honour cited with approval the decision of the Supreme Court of Canada in *Robichaud v The Queen*,[72] to the effect that analogies between discrimination legislation and tort law in determining liability are inappropriate 'for the reason that legislation of this type is directed to removing certain ani-social conditions'. Further, in tort law 'what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harassment, that is not really referable to what he or she was employed to do'.[73]

Kiefel J also referred to the decision of the UK Court of Appeal in *Jones v Tower Boot Co*,[74] a case that considered the vicarious liability of an employer for acts of an employee that were done 'in the course of employment' under the *Race Relations Act 1976* (UK). Waite LJ there recognised the need for a wide interpretation to be given to that expression (also used in the *Sex Discrimination Act 1975* (UK)) and observed that to construe the words in accordance with the common law doctrine of tortious liability of an employer would mean that the more heinous the act of discrimination, the less likely it would be that the employee would be liable.[75] Kiefel J concluded:

> In my view no narrow approach to the operation of s 106(1) is warranted. It is consonant with its purpose to read the words 'in connection with the employment of the employee' as requiring that the unlawful acts in question be in some way related to or associated with the employment. Once this is established it is for the employer to show that all reasonable steps were taken to prevent the conduct occurring, if they are to escape liability under s 106(2). In this way the aim of the Act, to eliminate sexual harassment in the workplace, might be achieved. This will require that employers take steps to ensure that it does not occur. The Act encourages that approach. Whilst I am not suggesting that the employer takes on proof about the steps taken at the outset, the operation of s 106(1) is wide and an employer must be vigilant of the possibility of such practices in the workplace.

[71] [2005] FCAFC 130, [38] (Black CJ and Tamberlin J with whom Kiefel J agreed).
[72] (1987) 40 DLR (4th) 577.
[73] [2005] FCAFC 130, [68], citing *Robichaud v The Queen* ibid 584.
[74] [1997] 2 All ER 406.
[75] Ibid 415, cited at [2005] FCAFC 130, [69].

Chapter 5: The Disability Discrimination Act

5.2 Disability Discrimination Defined

5.2.1 'Disability' Defined

In *Rana v Flinders University of South Australia*[76] ('*Rana*'), Lindsay FM stated that the decision in *Purvis* 'establishes beyond doubt… that no distinction is to be drawn between the disability and its manifestations for the purposes of establishing whether discrimination has occurred.'[77] The applicant in *Rana* claimed that he was excluded from courses at the respondent university was because of his mental illness. The respondent acknowledged that the applicant was excluded from one of the courses by reason of his behaviour, which included refusing to take part in group activity. Lindsay FM noted that:

> If I were satisfied that Mr Rana were discriminated against on account of his behaviour which behaviour was a manifestation or expression of his mental illness then that would amount to discrimination for the purposes of ss 4 and 5 of the [DDA].

However, the Court found that there was insufficient evidence that the behaviour that had caused the respondent to exclude the applicant was, in fact, a manifestation of a mental illness, rather than having some other cause.[78] In particular, the applicant had admitted to having refused to participate in group activity in a previous course undertaken at the university to be able to 'take the University on' in litigation in which allegations of discrimination because of his alleged mental illness could be agitated.[79]

5.2.2 Direct Discrimination under the DDA

(a) Issues of causation, intention and knowledge

(ii) Causation and intention

In *Ware v OAMPS Insurance Brokers Ltd*[80] (see 5.2.2(b) and 5.3.1(c) below), Driver FM, stated that, whilst it was not necessary for the applicant to establish that the respondent had intended less favourable treatment, 'motive may nevertheless be relevant to determine whether or not an act is done "because of" a disability'.[81] In relation to the demotion of the applicant, Driver FM stated:

> The question is why was [the applicant] demoted? Was it because of or by reason of his disabilities?
>
> [The applicant's] absences from the workplace provided Mr Cocker with what he regarded as sufficient cause for demotion but the real reason for the demotion was that Mr Cocker had exhausted his capacity to accommodate [the applicant's] condition. To my mind, this

[76] [2005] FMCA 1473.
[77] Ibid [52].
[78] Ibid [61].
[79] Ibid [46].
[80] [2005] FMCA 664.
[81] Ibid [112].

> establishes a sufficient causal link between the less favourable treatment and [the applicant's] disabilities.[82]

In relation to his dismissal, his Honour stated that:

> To the extent that the termination decision was based upon pre-existing concerns about [the applicant's] performance and behaviour, it was discriminatory. [The applicant's] performance and behaviour were influenced by his disabilities. … [The respondent] had accepted (grudgingly) that no summary dismissal action would be taken. [The applicant] would be given the chance to prove himself by reference to specified criteria. He was not given a reasonable opportunity to prove himself and he was not assessed against those criteria. The hypothetical comparator would have been judged against those criteria. [The applicant] was not judged against those criteria essentially because [the respondent] changed his mind. In dismissing [the applicant], [the respondent] recanted the consideration that he gave [the applicant] by reference to his disabilities. The dismissal was therefore because of those disabilities.[83]

In *Tyler v Kesser Torah College*,[84] Driver FM applied *Purvis* to a case in which a student with behavioural difficulties was temporarily excluded from the respondent school. His Honour found on the facts of that case that the action of excluding the student was taken in order to ensure compliance by the school with its duty of care, not because of the child's disability.[85]

In *Hollingdale v North Coast Area Health Service*,[86] the applicant was dismissed from her employment because of her refusal to attend work. Driver FM found that the respondent had dismissed the applicant not because of her disability, relevantly keratoconus, but because it believed that the applicant was a 'malingerer':

> Ms Hollingdale refused to attend work was because she claimed she was unfit for work because of her keratoconus. She had a medical certificate certifying that she was unfit for work. The Area Health Service refused to accept it. I find that the Area Health Service believed that Ms Hollingdale was malingering. No other conclusion is reasonably open on the evidence. It was because the Area Health Service believed that Ms Hollingdale was malingering, and therefore had no medical reason for non attendance at work, that she was dismissed. It necessarily follows that her keratoconus was not the reason for her dismissal. Rather, the reason was the belief of the Area Health Service that Ms Hollingdale had no medical condition which prevented her from working. An employer does not breach the DDA by dismissing a malingerer or someone who is believed to be one [footnote: *Forbes v Commonwealth* [2004] FCAFC 95].[87]

(b) The comparator under s 5 of the DDA

In *Ware v OAMPS Insurance Brokers Ltd*,[88] the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in his employment on the basis of his disability contrary to ss 15(2)(c) and 15(2)(d) of the DDA. The respondent claimed that its treatment of the applicant had been because of his poor work performance, not his disability.

Applying *Purvis*, Driver FM held that the proper comparator in this case was:

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[82] Ibid [112]-[113].
[83] Ibid [120].
[84] [2006] FMCA 1.
[85] Ibid [105].
[86] [2006] FMCA 5.
[87] Ibid [159].
[88] [2005] FMCA 664.

(a) an employee of OAMPS having a position and responsibilities equivalent of those of the applicant;

(b) who did not have Attention Deficit Disorder or depression; and

(c) who exhibited the same behaviours as the applicant, namely poor interpersonal relations, periodic alcohol abuse and periodic absences from the workplace, some serious neglect of duties and declining workplace performance, but with formerly high work ethic and a formerly good work history.[89]

Driver FM held that the respondent had treated the applicant less favourably by demoting and subsequently dismissing the applicant.[90] This was because the respondent had not demoted or dismissed the applicant with reference to the criteria it had indicated to the applicant by letter that his future performance would be assessed, but some other criteria (namely, his unauthorised absences from the workplace for which he subsequently granted sick leave).[91] His Honour held that, as the applicant's 'relaxed attitude to his attendance' had been 'tolerated' by the respondent for a long time and, given the culture of 'long lunches' also 'tolerated' by the respondent, if unauthorised absence was to 'the predominant consideration' for the future treatment of the applicant, that should have been made clear to the applicant in its letter to the respondent specifying the criteria against which his future performance would be assessed.[92]

Consequently, his Honour held that the applicant had been treated less favourably than the hypothetical comparator would have been in being demoted and subsequently dismissed, as the hypothetical comparator would have been assessed against the specified performance criteria:

> If the hypothetical comparator had had the same work restrictions placed on him … it is reasonable to suppose that those work restrictions would have reflected the concerns of OAMPS and that the hypothetical comparator's performance would have been judged against the criteria stipulated. In the case of [the applicant], the employer, having accepted his return to work on a restricted basis, having regard to his disabilities, treated him unfavourably by demoting him by reference to a factor to which no notice was given in the letter … setting out the conditions which [the applicant] must meet and the criteria against which his performance would be assessed. I find that the hypothetical comparator would not have been treated in that way.[93]
>
> …
>
> [As well, t]o the extent that the termination decision was based upon [the applicant's] absence from the workplace on 22 and 24 September 2003, this was less favourable treatment than the hypothetical comparator would have received in the same or similar circumstances because of [the applicant's] disabilities, for the same reasons I have found the demotion decision was discriminatory. The absences were properly explained after the event and a medical certificate was provided. The hypothetical comparator would not have been dismissed for two days absence for which sick leave was subsequently granted.[94]

[89] Ibid [100].
[90] Ibid [102]-[106].
[91] Ibid [110].
[92] Ibid.
[93] Ibid [111].
[94] Ibid [119].

In *Hollingdale v North Coast Area Health Service,*[95] Driver FM held that it was not discriminatory for the respondent to require the applicant to undergo a medical assessment, following a period of serious inappropriate behaviour caused by the applicant's bi-polar disorder. His Honour held that a hypothetical comparator, being an employee in a similar position and under the same employment conditions as the applicant who behaved in the same way but did not have bi-polar disorder,[96] would have been treated the same way:

> If such a hypothetical employee had exhibited the inappropriate behaviour of Ms Hollingdale to which a medical cause was suspected (as it was here) medical intervention would almost certainly have been sought. I have no reason to believe that the hypothetical comparator would have been treated any differently than Ms Hollingdale. It was untenable for the Area Health Service to have a mental health employee exhibiting behaviours which might stem from a mental disability and which adversely impacted upon other employees at the workplace.

(c) 'Accommodation' under s 5(2) of the DDA

In *Tyler v Kesser Torah College,*[97] a student with behavioural difficulties was temporarily excluded from the respondent school. The school's regular discipline policy was not applied to the student and the Court noted as follows:

> To that extent, Rabbi Spielman treated Joseph differently from how he would have treated a student without Joseph's disabilities. However, that fact by itself does not establish unlawful discrimination. The College had already decided in consultation with the Tylers that Joseph had special needs that required a special educational programme. These were special educational services for the purposes of s 5(2) of the DDA. The non application of the College's usual discipline policy to Joseph was an element of those special services. It follows, in my view, that the non application of the school's discipline policy to Joseph could not, of itself, be discriminatory for the purposes of s 5(1) of the DDA.[98]

5.2.3 Indirect Discrimination under the DDA

(b) Defining the 'requirement or condition'

In *Ferguson v Department of Further Education,*[99] the applicant, who is profoundly deaf, was enrolled in a Diploma of Engineering (Electronics) at the Tea Tree Bully campus of the Torrens Valley Institute of TAFE. The applicant claimed that the respondent had discriminated against him on the basis of his disability by requiring him to comply with the requirement or condition that he substantially attend his classes, undertake resource based learning and communicate with other students, lecturers and support officers with limited assistance from an Auslan interpreter.[100] Raphael FM dismissed the application on the basis that, even if the applicant had had the benefit of more assistance there was no evidence that it would have allowed him to complete the course any earlier as he claimed.[101]

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[95] [2006] FMCA 5.
[96] See ibid [140].
[97] [2006] FMCA 1.
[98] Ibid [104].
[99] [2005] FMCA 954.
[100] Ibid [30].
[101] Ibid [32], [35].

However, in the course of his reasoning, Raphael FM suggested that the failure of the respondent to assess the applicant's needs and to ensure that he received sufficient interpreting time to maintain progress at a rate commensurate with that of a non-disabled person of the applicant's intellectual capacity needs assessment, would have more accurately described the 'requirement or condition' imposed on the applicant:

> It may be that if the applicant had somehow incorporated the failure to provide the needs assessment as part of the actual requirement or condition rather than limiting the requirement or condition to attending his classes etc with only limited assistance from an Auslan interpreter a case might have been capable of being made out. An example of such a claim would have been:
>
> > *TAFE required Mr Ferguson to comply with the requirement or condition that he undertake his learning and complete his course within a reasonable time without the benefit of a needs assessment.*
>
> That seems to me to [be] a facially neutral requirement or condition which [the applicant] could have provided that a substantially higher proportion of persons without the disability were able to comply with. He could also have proved that it was not reasonable having regard to the circumstances of his case. [102]

In making those remarks his Honour referred to the comments of Tamberlin J in *Catholic Education Office v Clarke*[103] concerning the importance of the proper characterisation of the condition or requirement from the perspective of the person with the disability.[104]

(d) Reasonableness

In *Hurst and Devlin v Education Queensland,*[105] the requirement or condition said to have been imposed on the applicants by the respondent was that they receive their education in English (including in Signed English[106]) without the assistance of an Auslan[107] teacher or interpreter. In determining whether that requirement or condition was 'reasonable', Lander J followed the approach of Madgwick J in *Clarke* and stated that the 'question of reasonableness will always be considered in light of the objects of the Act'.[108] His Honour held that it was not unreasonable for Education Queensland not to have adopted a bilingual-bicultural program[109] in relation to the education of deaf students prior to 30 May 2002,[110] stating:

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[102] Ibid [33].
[103] [2004] FCAFC 197, [12]-[13].
[104] Ibid [34].
[105] [2005] FCA 405. Note that this decision is the subject of an appeal to the Full Court (QUD 187/2005, decision reserved) which was heard on 24 February 2006. The Human Rights and Equal Opportunity Commission was granted leave to intervene in that matter. For a discussion of the decision of Lander J, see Ben Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.
[106] Signed English is the reproduction of English language into signs. It has the same syntax and grammar as English and as such, is not a language separate from English: [2005] FCA 405, [127]-[128]. Signing in English, however, refers to the use of Auslan signs in English word order: ibid [129].
[107] Auslan is the native language of the deaf community in Australia. It is a visual-spatial language with its own complex grammatical and semantic system and does not have an oral or written component: ibid [125]-[126].
[108] Ibid [74]-[75].
[109] A bilingual-bicultural approach to the education of the deaf recognises Auslan and Signed English as distinct languages and students are instructed in Auslan as a first language and learn Signed English as a second language: ibid [466].
[110] Ibid [790].

> I am satisfied on the evidence … that Education Queensland has progressed cautiously but appropriately, towards the introduction of a bilingual-bicultural program and the use of Auslan as a method of communication for those programs.
>
> It must be accepted that an education system cannot change its method of education without first inquiring into the benefits of the suggested changes and the manner in which those changes might be implemented.
>
> It must be first satisfied that there are benefits in the suggested changes. It must be satisfied that it can implement those changes without disruption to those whom it is delivering its service.
>
> It was appropriate, in my opinion, for Education Queensland to take the time that it did in considering the benefits which would be associated with bilingual-bicultural program and the use of Auslan.
>
> I accept the respondent's argument that changes, as fundamental as those proposed in the bilingual-bicultural program, should be evolutionary rather than revolutionary. It is too dangerous to jettison a system of education and adopt a different system without being first sure that the adopted a different system without first sure that the adopted system is likely to offer increased benefits to the persons to whom the education is directed.[111]

However, Lander J found that 'Auslan will still be of assistance to those who are profoundly deaf even if delivered on a one-on-one basis';[112] though the Total Education Policy adopted by the respondent did not allow for Auslan as a method of communication.[113] Consequently, (without making any findings about the reasonableness of the Total Communication Policy), his Honour held that it was unreasonable for the respondent not to have assessed the applicants' needs prior to 30 May 2002 to determine whether they should be instructed in English or in Auslan, which assessment would have established that 'it would have been of benefit to both of [the applicants] to have been instructed in Auslan rather than in English'.[114]

(e) Inability to comply with a requirement or condition

In *Hurst and Devlin v Education Queensland*,[115] the respondent was found to have imposed a requirement or condition upon the applicants that they receive their education in English without the assistance of an Auslan teacher or interpreter. Lander J stated that whether the applicant had or could comply with the requirement or condition was a 'matter of fact'.[116] In relation to the first applicant, his Honour held that the evidence that the first applicant had fallen behind his hearing peers academically established that he could not comply with the requirement or condition imposed on him by the respondent, though the respondent's conduct was not the only reason he had fallen behind.[117]

However, his Honour held that the second applicant had not established that she could not comply with the requirement or condition that she be instructed in English as there was no evidence that she had fallen behind her hearing peers academically as a result of receiving her education in English.[118] While his Honour accepted that that may be

[111] Ibid [781]-[785].
[112] Ibid [793].
[113] Ibid [794].
[114] Ibid [795]-[797].
[115] [2005] FCA 405.
[116] Ibid [69].
[117] Ibid [805]-[806].
[118] Ibid [819].

as a result of the 'attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan', he stated that it was 'a matter on which the experts have not discriminated'.[119]

5.3 Areas of Discrimination

5.3.1 Employment (s 15)

(c) 'Benefits associated with employment' and 'any other detriment'

In *Ware v OAMPS Insurance Brokers Ltd*,[120] the applicant, who suffered from Attention Deficit Disorder and depression, claimed that respondent had directly discriminated against him in breach of s 15(2)(d) by:

- unilaterally changing the terms and conditions of his employment;
- the removal of his assistant;
- placing restrictions on his performance of duties;
- the setting of criteria against which his performance was to be judged, and not providing him with any opportunity to fulfil those criteria on any realistic, or fair timeframe; and
- demoting him.[121]

Driver FM found that, on the evidence, whilst the applicant's duties were unilaterally altered by the respondent, this did not constitute a detriment as the applicant had not objected to the change: on the contrary, he had expressed satisfaction with them and they had been a measure to 'better fit [the applicant's] duties with his capacity'.[122] However his Honour held that the removal of the applicant's assistant,[123] imposition of work restrictions[124] and his demotion were 'detriments' within the meaning of s 15(2)(d).

5.3.2 Education

Note that the defence of unjustifiable hardship now applies to the treatment of students after their admission. The DDA was amended to provide for this broader coverage of the unjustifiable hardship defence by the *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth) ('the Education Standards Act') which commenced operation on 1 March 2005.

That Act also made other amendments to s 22 of the DDA. Section 22 now provides as follows (amendments in bold):

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[119] Ibid [819]-[820]. For a critique of this finding of his Honour see, B Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.
[120] [2005] FMCA 664.
[121] Ibid [102].
[122] Ibid.
[123] Ibid [103].
[124] Ibid [104].

(1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

(2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability or a disability of any of the person's associates:

(a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or

(b) by accrediting curricula or training courses having such a content.

(3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.

(4) This section does not make it unlawful for an education provider to discriminate against a person or student as described in subsection (1), (2) or (2A) on the ground of the disability of the person or student or a disability of any associate of the person or student if avoidance of that discrimination would impose an unjustifiable hardship on the education provider concerned.

The Education Standards Act also inserted into s 4(1) of the DDA the following definition of 'education provider':

education provider means:

(a) an educational authority; or

(b) an educational institution; or

(c) an organisation whose purpose is to develop or accredit curricula or training courses used by other education providers referred to in paragraph (a) or (b).

Readers should also note the commencement of the Disability Standards for Education as of 18 August 2005. More information in relation to those Standards are available via the Attorney-General's Department website: http://www.ag.gov.au/

5.3.4 Provision of Goods, Services and Facilities

(a) Defining a 'service'

In *Rainsford v State of Victoria & Anor*,[125] the applicant appealed the decision of Raphael FM that in providing transport between prisons and cell accommodation, the first and second respondents had not provided the applicant with a service within the meaning of the DDA.

[125] [2005] FCAFC 163.

The Full Federal Court allowed the applicant's appeal, remitting the matter back to the Federal Magistrates Court to be determined according to law. In relation to the issue of whether the first and second respondents had provided the applicant with a service within the meaning of the DDA, Kenny J (with whom Hill and Finn JJ agreed) applied *Waters* and *IW* and stated that:

> The Federal Magistrate erroneously relied on a distinction that he drew between the provision of services pursuant to a statutory discretion and 'the situation … where no discretionary element exists'.[126]
>
> In addition to the management and security of prisons, the purposes of the Corrections Act 1986 (Vic) include provision for the welfare of offenders. The custodial regime that governs prisoners under this Act is compatible with the provision of services to them: see, for example, s 47. Indeed this proposition is fortified by the provision of the Prison Services Agreement to which counsel for Mr Rainsford referred on the hearing of the appeal. In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the DDA will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.[127]

(b) 'Refusal' of a service

In *Wood v Calvary Hospital*,[128] Brewster FM held that there must be a service available to be offered before that service can be said to have been refused.[129] In this case, the applicant had requested admission to the 'Calvary at Home' scheme, which allows patients to be treated by hospital staff at home or attend the hospital for treatment on a daily basis.[130] The applicant requested that she be treated at home.[131] Upon making that request, she was told that she would not be able to be treated at home because of her past intravenous drug use and past aggressive behaviour.[132] However, at the time that the applicant requested to be treated at home, the home visits scheme was closed to new entrants because of staff shortages.[133]

Brewster FM held that because there was no service available to be offered by the hospital, it could not be said to have refused that service:

> It seems to me that there must be a service available to be offered before that service can, in any meaningful sense, be said to have been refused. In my opinion, the applicant's case is not saved by section 10. In my view, it is meaningless to speak of the hospital refusing to provide its services for two or more reasons. It did not have a service which it could refuse to provide to her.[134]

His Honour went on to find that neither the hospital's purported refusal nor its failure to inform the applicant that it did not have that service to offer affected the legal

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[126] Ibid [54].
[127] Ibid [55].
[128] [2005] FMCA 799.
[129] Ibid [23].
[130] Ibid [9].
[131] Ibid [16].
[132] Ibid [11], [14].
[133] Ibid [19].
[134] Ibid [23].

position of the parties:

> Telling the applicant that it could not provide home visits because of her disability was an unfortunate, gratuitous and hurtful statement. But in effect what it was saying to the applicant was that if it had had a service available to it would have refused to provide it to her.[135]
>
> …
>
> The hospital did not inform the applicant that it had no service to provide but told her that it was refusing the service because of her disability. In my opinion that omission does not affect the legal situation.[136]

Consequently, his Honour held that s 24 of the DDA did not apply in the present case.[137]

5.6 Victimisation

Section 42 of the DDA provides as follows:

> (1) It is an offence for a person to commit an act of victimisation against another person.
>
> Penalty: Imprisonment for 6 months.
>
> (2) For the purposes of subsection (1), a person is taken to commit an act of victimisation against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:
>
> (a) has made, or proposes to make, a complaint under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (b) has brought, or proposes to bring, proceedings under this Act or the *Human Rights and Equal Opportunity Commission Act 1986* against any person; or
>
> (c) has given, or proposes to give, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (d) has attended, or proposes to attend, a conference held under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
>
> (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of this Part;
>
> or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g) (inclusive).

In *Damiano v Wilkinson*,[138] the applicants had brought a claim of disability discrimination on behalf of their son, Anthony, who was a student. It was alleged that he was unfairly treated in class and in his capacity as a student trombone player who wished to join the school band and participate in other musical events. Complaint was

[135] Ibid.
[136] Ibid [25].
[137] Ibid [26].
[138] [2004] FMCA 891.

subsequently made about the conduct of the principal of the school, after the complaint of discrimination had been lodged with HREOC. The conduct considered by the Court[139] was:

- the failure to return three phone calls made by the parents;
- shouting at the parents during a phone conversation, including shouting that he would speak to the mother 'only when he was ready to do so'; and
- making statements to the local paper including that the complaint was 'trivial, vexatious, misleading or lacking in substance', that the matter had been taken 'to the highest authority and thrown out' and that the school 'is currently investigating what legal recourse we have in terms of taking action against people who are guilty of these sorts of complaints, because there is a high degree of harassment we want investigated'.

This conduct was said to have caused Anthony emotional distress and to constitute victimisation.

In upholding an application for summary dismissal, Baumann FM held that for victimisation to be established, one of the grounds referred to in s 42(2) of the DDA must be a 'substantial and operative' factor in the action taken.[140] It is necessary to show a causal link between the detriment (or threat to cause detriment) and the making of a complaint to HREOC. While 'detriment' is not defined by the DDA, Baumann FM considered that it involves placing a complainant 'under a disadvantage as a matter of substance',[141] results in a complainant suffering 'a material difference in treatment'[142] which is 'real and not trivial'.[143]

Baumann FM was satisfied that the allegations in relation to the phone calls could not, if proved, amount to victimisation within the meaning of s 42 of the DDA as they were 'trivial and lack particularity'.[144] The comments made to the newspaper also could not constitute victimisation. Those relating to the complaint that had been made to HREOC were accurate and were an understandable response to the allegations made to the newspaper by the applicants.[145] The statement that the school was investigating legal recourse against the applicant was not a threat.[146]

In *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4),*[147] the respondent was found to have made a decision not to re-employ the applicant because of his previous complaint to HREOC and consequent proceedings in the Federal Court and because he had threatened in correspondence to repeat that action were he not given

[139] Note that other conduct alleged by the applicants was found not to have formed part of the complaint to HREOC and was excluded from consideration by virtue of s 46PO(3) of the HREOC Act: ibid [39].
[140] Ibid [22], citing *Bailey v Australian National University* (1995) EOC 92-744.
[141] Ibid [23], citing *Bogie v University of Western Sydney* (1990) EOC 92-313.
[142] Ibid, citing *Bailey v Australian National University* (1995) EOC 92-744.
[143] *Sivanathan v Commissioner of Police (NSW)* (2001) NSWADT 44.
[144] [2004] FMCA 891, [24].
[145] Ibid [28].
[146] Ibid [29].
[147] [2005] FMCA 1226.

employment. Raphael FM stated:

> I can understand that the company might have been disturbed by [the applicant's] correspondence with them. But that correspondence when read in context and as a whole is no more than a firm assertion of [the applicant's] rights. The Act does not excuse the respondent to a victimisation claim because the proposal to make a complaint to HREOC is couched in intemperate words. In this particular case, and again reading the correspondence as a whole, I do not think that it could be so described. Certainly [the applicant] says that if he is not offered work he will take the matter up again with HREOC and certainly he suggests he will be calling witnesses and requiring documents to be produced, but he also says that he doesn't want to go to court and he wants to settle the matter by getting back his job and by using the money earned from that job to repay the company the costs he owes them for the previously aborted proceedings before Driver FM.[148]

Chapter 6: Procedure and Evidence

6.8A State Statutes of Limitation

The HREOC Act does not provide for any strict time limit for bringing a complaint of unlawful discrimination to HREOC. The President has a discretion to terminate a complaint if it is lodged more than 12 months after the alleged unlawful discrimination took place: see s 46PH(1)(b). Termination on this basis does not, however, prevent a complainant from making an application to the Federal Court or Federal Magistrates Court in relation to that alleged discrimination. As set out in section 6.8 of this publication, such an application must be brought within 28 days of termination or such further time as the court concerned allows.

The applicability of State statutes of limitation to unlawful discrimination proceedings has arisen in a number of recent matters.[149] Section 79 of the *Judiciary Act 1903* (Cth) provides as follows:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

In *McBride v Victoria*, [150] McInnis FM expressed doubt as to whether or not the terms of the *Limitation of Actions Act 1958* (Vic) applied to proceedings commenced under the HREOC Act. On the other hand, in *Gama v Qantas Airways Ltd* ('*Gama*')[151] Raphael FM expressed the view that the similarly worded *Limitation Act 1969* (NSW) did apply to proceedings under the HREOC Act, such proceedings being 'an action for damages for breach of statutory duty' in accordance with s 14(1)(b) of the NSW Act.

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[148] Ibid [31].
[149] For discussion of these recent cases, see Jonathon Hunyor, 'Time limits for unlawful discrimination claims' (2006) 44 *Law Society Journal* 40.
[150] [2001] FMCA 55, [10].
[151] [2006] FMCA 11, [6].

In *Baird v Queensland* ('*Baird*'),[152] the Federal Court assumed that the *Limitation of Actions Act 1974* (Qld) applied to the proceedings and found that its effect is to bar proceedings commenced in court more than six years after termination by the President of HREOC. The Court noted that the limitation period established by the Queensland Act was to be calculated from the date on which the 'cause of action' arose. Dowsett J held that a 'cause of action' only existed under the HREOC Act upon termination by the President of HREOC as before such time there was no right to relief before a court (and HREOC has no power to grant such relief).[153]

This decision was not considered in *Gama*, in which a different result was reached. In *Gama*, while deciding the matter on another basis, the Federal Magistrates Court expressed the view that events taking place more than six years before proceedings were commenced in court were statute-barred.[154] It has been suggested that the approach in *Baird* is the preferable one.[155]

6.15 Standard of Proof in Discrimination Matters

6.15.2 Cases under the SDA

In *Fenton v Hair & Beauty Gallery Pty Ltd*,[156] the applicant claimed that she was sent home without pay and then dismissed from her employment by reason of her pregnancy. Driver FM held that the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[157]

6.15.3 Cases under the DDA

In *Tyler v Kesser Torah College*,[158] the applicant complained of disability discrimination in his exclusion from the respondent school. Driver FM held that the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[159]

In *Hollingdale v North Coast Area Health Service*,[160] the applicant made allegations of disability discrimination in employment. Driver FM notes that there were 'no allegations… of fraud or criminal or even moral wrongdoing' and there was no question of 'any grave consequences' flowing from adverse findings against the respondent. In those circumstances the case was not one that warranted the application of the higher standard referred to in *Briginshaw*.[161]

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[152] [2005] FCA 1516.
[153] Ibid [9].
[154] [2006] FMCA 11, [6]-[9].
[155] See note 149 above. See also the decision in *McBride v Victoria* [2001] FMCA 55 in which the Court's analysis seems to be similar to that in *Baird*, but suggests that it is necessary for an application to be lodged *with HREOC* within 6 years.
[156] [2006] FMCA 3.
[157] Ibid [78].
[158] [2006] FMCA 1.
[159] Ibid [100].
[160] [2006] FMCA 5.
[161] Ibid [138].

6.16 Miscellaneous Procedural and Evidentiary Matters

6.16.6 Security for Costs

In *Drury v Andreco Hurll Refractory*[162] Raphael FM declined to award security for costs against an applicant who had not paid costs to the respondent from earlier proceedings. His Honour followed the approach taken in *Elshanawany v Greater Murray Health Service*[163] and *Croker v Sydney Institute of TAFE (NSW)*[164] and applied standard principles in determining the application. Although dismissing the application for security for costs, his Honour stated, with reference to *Elshanawany* that there was no 'underlying legislative policy' or 'aspects of public interest' that 'weigh in the balance against the making of an order'.[165]

6.16.8 Judicial Immunity from Suit under Federal Discrimination Law

In *Paramasivam v O'Shane*,[166] Barnes FM summarily dismissed proceedings commenced against a NSW Magistrate alleging discrimination contrary to the RDA. His Honour was satisfied that the conduct complained of on the part of the Magistrate was conduct that, if it occurred, occurred in the exercise of her judicial function or capacity. The Magistrate was accordingly protected from liability under the RDA by operation of the doctrine of judicial immunity.[167] Following *Re East; Ex parte Nguyen*,[168] Barnes FM held that judicial immunity applied not only to judges of superior courts but also to state magistrates.[169]

Chapter 7: Damages and Remedies

7.2 Damages

7.2.1 General Approach to Damages

(b) Hurt, Humiliations and Distress

In *Phillis v Mandic*,[170] Raphael FM noted the difficulty in assessing appropriate damages for hurt and humiliation in discrimination cases and stated:

> It is often the case that the Courts are assisted in this determination by medical evidence in the form of psychological or psychiatric assessments. Given that it is the effect of the accepted acts of harassment and not the act itself that is relevant, it is appropriate that due regard is had to the expertise of the medical profession.[171]

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[162] [2005] FMCA 186.
[163] [2004] FCA 1272
[164] [2003] FCA 942.
[165] [2005] FMCA 196, [11].
[166] [2005] FMCA 1686.
[167] Ibid [49].
[168] (1998) 196 CLR 354.
[169] [2005] FMCA 1686, [44].
[170] [2005] FMCA 330.
[171] Ibid [24].

His Honour also suggested that comparisons with damages awards in other cases should be undertaken with caution:

> At some point judicial officers are required to assess damages having regard to the individual circumstances before them. A degree of comparison between decided cases is both unavoidable and appropriate. However care needs to be taken to ensure that particular acts are not 'rated'. To do so ignores the requirement to 'consider the effect on the complainant of the conduct complained of': *Hall v Sheiban* [(1989) 20 FCR 217 at 256]. The award of general damages in discrimination matters is not intended to be punitive but rather to place complainants in the situation that they would otherwise have been in had the harassment not occurred: *Howe v Qantas* [2004] FMCA 242; *Hall v Sheiban* (supra). To do so clearly requires specific reference to a person's individual circumstances.[172]

In *South Pacific Resort Hotels Pty Ltd v Trainor*,[173] the appellant challenged the decision at first instance to award damages to a victim of sexual harassment who had a pre-existing 'significant psychological vulnerability'.[174] The appellant argued that as the respondent was not a person of 'normal fortitude', she had not made out any entitlement to damages because, as a threshold matter, the events relied upon must have been such as would have affected a person of 'normal fortitude'. The submission was said to be reinforced by the fact that the respondent's vulnerability was not disclosed to the employer at the time she was employed so that it would be 'quite unfair, and contrary to the policy of the SDA', to impose liability on the appellant (employer) for the unseen consequences of the harassment committed by the respondent's co-worker. [175]

It was also argued that 'the notion of what a reasonable person would have anticipated, which forms an element of the statutory definition of sexual harassment in s 28A of the SDA, carries through to an assessment of damages'. Hence, 'if the overall reaction of a victim could not have been anticipated by a reasonable person any damage suffered by such a person would be altogether outside the contemplation of the statute and thus not recoverable'.[176]

The Full Court rejected these submissions. On the issue of 'normal fortitude', Black CJ and Tamberlin J, with whom Kiefel J agreed, stated:

> Care should be taken to avoid the introduction of the notion of 'normal fortitude' into discrimination law and particularly into the law relating to sexual harassment. It is a potentially dangerous irrelevancy in this context, readily capable of misuse in support of the false idea – perhaps hinted at rather than stated bluntly – that some degree of sexual harassment (or some other form of unlawful discrimination) would and should be accepted by persons of normal fortitude. With respect to sexual harassment the true and only standard is that prescribed by the statutory definition.
>
> The submission that Ms Trainor was in some way disqualified from an award of damages because she did not disclose her particular vulnerability to her employer seems to have been based on no more than a general notion of unfairness. In any case, there was no evidence that Ms Trainor knew that she suffered from a psychiatric condition that should have been disclosed to the employer. Nor, indeed, was there any evidence to suggest that she was (or thought she was) unable to cope with normal working conditions – conditions that she was

[172] Ibid [26].
[173] [2005] FCAFC 130.
[174] *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374.
[175] [2005] FCAFC 130, [44] (Black CJ and Tamberlin J with whom Kiefel J agreed).
[176] Ibid [45].

> entitled to expect would not involve acts of sexual harassment by another employee in the accommodation provided for her by the employer.[177]

The Court also rejected the notion that the 'reasonable person' test in the context of sexual harassment carried over into the assessment of damages. Black CJ and Tamberlin J noted that there is a 'sharp distinction' drawn by the legislative scheme

> between, on the one hand, the definition of sexual harassment in the SDA and the operation of that that Act in making sexual harassment unlawful in certain circumstances and, on the other hand, the power conferred by the HREOC Act to make an order for damages by way of compensation if the court is satisfied that there has been unlawful discrimination.[178]

(c) Aggravated and exemplary damages

In *Frith v The Exchange Hotel*,[179] Rimmer FM stated in *obiter* comments that he disagreed with Raphael FM's conclusion in *Font v Paspaley Pearls* that the court has a power to award exemplary damages. Rimmer FM's stated:

> [i]t is clear from section 46PO(4) that the respondent can only be ordered to pay to an applicant 'damages by way of compensation for any loss or damage suffered because of the conduct of the respondent'. It follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages.[180]

7.2.3 Damages under the SDA Generally

Table 2: Overview of damages awarded under the SDA

Case		Damages awarded
(m)	*Dare v Hurley* [2005] FMCA 844	Total damages: $12,005.51 $3,000 (general damages) $9,005.51 (special damages)
(o)	*Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3	Total damages: $1,338 plus interest $500 (non-economic loss) $838 (economic loss including associated contractual claim)

(m) Dare v Hurley

In *Dare v Hurley*,[181] Driver FM held that the respondent had dismissed the applicant in breach of s 14(2)(c) of the SDA. His Honour considered that the applicant should receive damages for the distress caused to her by the dismissal and special damages for her economic loss. His Honour awarded $3,000 in general damages and $9,005.51 in special damages for the applicant's economic loss.

[177] Ibid [51]-[52].
[178] Ibid [46].
[179] [2005] FMCA 402.
[180] Ibid [99].
[181] [2005] FMCA 844.

(o) Fenton v Hair & Beauty Gallery Pty Ltd

In *Fenton v Hair & Beauty Gallery Pty Ltd*,[182] Driver FM found that the applicant was discriminated against on the ground of pregnancy when she was sent home by her employer despite being 'fit, ready and able to work'. She was awarded $838 for economic loss and $500 for non-economic loss on the basis that she 'was annoyed by being sent home but suffered no real harm'.[183]

7.2.4 Damages in Sexual Harassment Cases

Table 3: Overview of damages awarded in sexual harassment cases under the SDA

Case		Damages awarded
(m)	*Phillis v Mandic* [2005] FMCA 330	$4,000 (non-economic loss)
(n)	*Frith v The Exchange Hotel* [2005] FMCA 402	Total damages: $15,000 $10,000 non-economic loss $5,000 economic loss
(o)	*San v Dirluck Pty Ltd* [2005] FMCA 750	$2,000 (non-economic loss)

(m) ***Phillis v Mandic***

In *Phillis v Mandic*,[184] Raphael FM found that the respondent had sexually harassed the applicant through a range of conduct that included repeatedly asking to see her 'padlock' (a reference to her navel ring), seeking to dance with her, repeatedly asking if he could eat a banana that she was eating, grabbing her arm and pushing a toolbox between her legs. The applicant was awarded $4,000 for non-economic loss based on medical evidence as to the impact of the harassment on her, described by the Court as being 'in the minimal range of depression'.[185]

(n) ***Frith v The Exchange Hotel***

In *Frith v The Exchange Hotel*,[186] Rimmer FM found that a director of the Exchange Hotel, Mr Brindley, had sexually harassed the applicant by a range of conduct that included stating words to the effect that if she did not have sex with him, she could not work for him. The applicant claimed both economic and non-economic loss. Rimmer FM accepted that the applicant would have continued to work at the Exchange Hotel had it not been for the conduct of Mr Brindley. Rimmer FM awarded the applicant $5,000 for economic loss, as the applicant was unable to secure employment for a period of time following her resignation from the Exchange Hotel. Rimmer FM also accepted that the conduct of Mr Brindley had a significant and negative impact on the applicant and that this impact continued until the trial. Rimmer FM awarded the applicant $10,000 for (general) non-economic loss.

[182] [2006] FMCA 3.
[183] Ibid [98].
[184] [2005] FMCA 330.
[185] Ibid [28].
[186] [2005] FMCA 402.

(o) *San v Dirluck Pty Ltd*

In *San v Dirluck Pty Ltd*,[187] Raphael FM found that the second respondent breached s 28B(2) of the SDA and s 18C(1) of the RDA. The first respondent accepted its vicarious liability under s 18A of the RDA and s 106 of the SDA. Raphael FM accepted that the remarks made by the second respondent including 'How's your love life', 'I haven't seen an Asian come before' and 'Fuck off ching chong go back home' were hurtful to the applicant. However, Raphael FM did not accept that the remarks contributed towards the applicant's decision to leave her employment. His Honour awarded the applicant $2,000 in damages. His Honour noted:

> It is perhaps unfortunate that neither the SDA nor the RDA have a provision for additional damages the type found in s.115 of the *Copyright Act 1968* that are intended to deter the type of conduct found to have occurred.[188]

7.2.5 Damages under the DDA

Table 3: Overview of damages awarded under the DDA

Case		Damages awarded
(o)	*Hurst and Devlin v Education Queensland* [2005] FCA 405	Total damages: $64,000 $40,000 (economic loss) $20,000 (non-economic loss) $4,000 (interest)
(p)	*Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)* 920050 FMCA 1226	$5,000 (non-economic loss) Damages for economic loss to be agreed.

(o) Hurst and Devlin v Education Queensland

In *Hurst and Devlin v Education Queensland*,[189] Lander J found that the respondent had discriminated against the second applicant by imposing a requirement or condition that he be educated in English without the assistance of an Auslan teacher or interpreter.[190] Lander J awarded the second applicant $20,000 (plus $4,000 in interest)[191] in general damages for the hurt, embarrassment and social dislocation which had been occasioned by his inability to communicate in any language.[192]

Lander J also awarded the second applicant $40,000 (without interest) for loss of earning capacity on the basis that he had lost two school years as a result of the discrimination and that, if he were to stay at school for an extra two years, he would lose two years of earnings some time between the ages of 17 and 19 years (if he does not complete tertiary education) or 22 and 24 years (if he does complete tertiary education).[193] Lander J rejected the submission that he assess the economic loss of the second applicant on the basis that the second applicant lost the opportunity of a tertiary education and employment commensurate with tertiary education on the basis

[187] [2005] FMCA 750.
[188] Ibid [46].
[189] [2005] FCA 405.
[190] Ibid [797] and [806].
[191] Ibid [866].
[192] Ibid [846].
[193] Ibid [859]-[861].

that there was no evidence before him as to whether the second applicant had lost that opportunity and was therefore less likely to obtain employment.[194]

(p) Drury v Andreco Hurll Refractory Services Pty Ltd

In *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4),*[195] the respondent was found to have victimised the applicant contrary to s 42 of the DDA by deciding that it would not consider employing him because of previous and threatened future applications under the HREOC Act alleging disability discrimination. The respondent was ordered to pay the applicant $5,000 in general damages. The Court also found that the applicant should be compensated for the fact that he would have been offered work on a particular job were it not for the victimisation and ordered the respondent to pay a sum to be agreed between the parties (or, failing agreement, as determined by a Registrar of the Court). However, no damages were awarded for loss of future earnings as the Court was not satisfied that the applicant had made any effort to mitigate his loss.

7.6 Other Remedies

In *Tyler v Kesser Torah College,*[196] Driver FM made comment on the availability of remedies under the HREOC Act. In that matter, the applicant had sought an order that the respondent school accept him back as a student. While Driver FM dismissed the application and stated that he would not have made such an order as it was not appropriate in the circumstances, his Honour was of the view that the power to make such an order existed:

> Section 46PO(4) of the HREOC Act is not an exhaustive statement of the orders that can be made by the Court and I would not regard resort to s 15 of the *Federal Magistrates Act 1999* (Cth) as unavailable. [197]

Chapter 8: Costs Awards

8.3 Factors Considered

8.3.1 Where there is a Public Interest Element

In *Hurst and Devlin v Education Queensland,*[198] the first applicant had been unsuccessful in her application under the DDA. The first applicant, a deaf student, had argued that the respondent's failure to provide her with an Auslan interpreter as part of its 'Total Education Policy' constituted indirect disability discrimination. The issue of costs was considered in *Hurst and Devlin v Education Queensland (No 2).*[199] In seeking to resist having a costs order made against her next friend (her mother Ms Smith), it was argued by the applicant, amongst other things, that there was a public

[194] Ibid [855]-[857].
[195] [2005] FMCA 1226.
[196] [2006] FMCA 1.
[197] Ibid [108].
[198] [2005] FCA 405.
[199] [2005] FCA 793.

interest in having the 'Total Education Policy' clarified through the litigation as it 'affects the rights of numerous disabled children in the vital area of their education'.[200]

Lander J apparently accepted that when litigation is brought in the public interest, this might be a relevant matter to which regard should be had in the exercise of the discretion to award costs, citing the decision in *Oshlack v Richmond River Council*.[201] Nevertheless, his Honour stated:

> No doubt it would be in the interests of all parties if Education Queensland's Total Communication Policy could be understood by all persons affected in the same way. However, in my opinion, legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy.[202]

Lander J also found that it was not relevant that Ms Smith had nothing to gain personally from the proceedings and may become bankrupt as a result of the costs order.[203]

In *AB v New South Wales*,[204] the Court considered the issue of costs for an applicant who was unsuccessful in bringing a claim of indirect racial discrimination in the admission criteria for a NSW selective High School.[205] In the exercise of his discretion, Driver FM ordered that there be no order for costs, stating (footnotes in square brackets):

> …the applicant was represented *pro bono publico* by Mr Robertson. It is appropriate that the Court should place on record its gratitude to counsel for his willingness to appear on that basis. Counsel only agrees to appear *pro bono publico* where an element of public interest is discerned. As I said in *Xiros v Fortis Life Assurance* [[2001] FMCA 15 at [24]], there is always an element of public interest in human right proceedings, given that the legislation is beneficial and seeking to redress the public mischief of discrimination.
>
> However, ordinarily in human rights proceedings a claimant is exercising a private right to claim damages. There will frequently be an insufficient public interest element to outweigh the general principle that costs should follow the event in such proceedings [see *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815]. I was also taken by Ms Barbaro to a decision of Federal Magistrate Raphael in *Minns v New South Wales (No 2)* [2002] FMCA 197] where His Honour said, at paragraph 13, that something more than precedent value is required in order to establish an element of public interest sufficient to warrant a departure from the ordinary principle that costs follow the event.
>
> In this case, in my view, a combination of the public interest inherent in a case which is relatively novel and which counsel recognised by appearing *pro bono publico*, the fact that there was no claim for damages but simply the seeking of a right of access to a public school (which raised an issue of public importance) and the fact that but for the issue of evidence the applicant would have succeeded, all lead me to the view that there should be no order as to costs.

[200] Ibid [31].
[201] (1998) 193 CLR 72.
[202] [2005] FCA 793, [33].
[203] Ibid [38].
[204] [2005] FMCA 1624.
[205] See *AB v New South Wales* [2005] FMCA 1113.

8.3.3 The Successful Party Should Not Lose the Benefit of their Victory

Add to footnote 67: See also *Frith v The Exchange Hotel* [2005] FMCA 1284, [6] (Rimmer FM).

8.3.5 Unmeritorious Claims and Conduct Which Unnecessarily Prolongs Proceedings

In *Kelly v TPG Internet Pty Ltd (No 2)*,[206] the applicant was partly successful in her claims. Raphael FM declined to reduce the award of costs to the applicant, noting that '[she] did not fail because I disbelieved her. She failed because I took a different view of the law to that which she was promoting. I do not believe that she should be robbed of the fruits of her success…'[207] His Honour suggested, however, a different approach may be taken in cases where the pleadings were unnecessarily lengthy:

> As I stated *in arguendo* there may be much to recommend a different approach by the courts to this question that would possibly rid them of the prolix form of pleading to which one has become accustomed in the commercial or equity divisions of the state supreme courts, and to some extent in the Federal Court. But this is not one of those cases and there is equally much to be said for the proposition that proceedings should not be even further prolonged by lengthy arguments as to how much time was taken in the preparation and hearing of unsuccessful constituents of a claim…[208]

8.4 Applications for Indemnity Costs

8.4.1 General Principles on Indemnity Costs

In *Piper v Choice Property Group Pty Ltd*,[209] McInnis FM found that the respondent to the proceedings was not the appropriate party for the applicant to pursue in relation to her complaint of discrimination. This fact was raised by the respondent in correspondence seeking to have the application discontinued prior to it being argued in court.

McInnis FM summarily dismissed the application and awarded indemnity costs at a fixed sum of $3,500 to the respondent. His Honour found that it was not a relevant factor in the present case that the respondent had been unwilling to participate in the conciliation process. McInnis FM further found that although the application had been terminated at an early stage in proceedings, this was not to be taken into account as a factor in favour of the applicant as the respondent had sought the matter to be finalised at an earlier stage by way of discontinuance or dismissal by consent.

8.4.2 Offers of Compromise

In *Meka v Shell Company of Australia Ltd (No 2)*,[210] Driver FM found that the form of offer made did not strictly comply with Order 23 but that the respondents should

[206] [2005] FMCA 291.
[207] Ibid [7].
[208] Ibid [6].
[209] [2005] FMCA 87.
[210] [2005] FMCA 700.

receive indemnity costs on an application of general principles. Indemnity costs were awarded from the day after the offer was rejected. While this date was a period of time later than the offer was to have expired, the Court held, in effect, that the respondent had kept the offer open by calling the applicant's solicitor to discuss it.[211]

In *San v Dirluck Pty Ltd (No 2)*,[212] the respondent had made a number of offers to settle the matter, none of which were accepted. The offers were made conditional upon the matter being settled 'with no order as to costs'. The last such offer was made on the first day of the hearing of the matter, expressed as follows:

> 1. The first respondent and second respondent to pay the applicant the total combined sum of $5,000 by way of damages.
>
> ….
>
> 3. The complaint to be withdrawn with no order as to costs.

The applicant was successful in the proceedings[213] and was awarded $2,000 in damages. The respondent sought indemnity costs on the basis of the rejection of the final offer made. Raphael FM commented that this sum was 'obviously less that the $5,000 offered… but it is quite clearly not less than the amount of $2,000 plus the applicant's reasonable costs calculated under schedule 1 of the Federal Magistrates Court Rules'.[214]

His Honour cited from the decision in *Dr Martens (Australia) Pty Ltd v Figgins Holdings Pty Ltd (No 2)*,[215] in which Goldberg J had stated:

> … I do not consider it appropriate in determining whether an order for indemnity costs should be made to take into account a Calderbank offer which makes an all in offer inclusive of money and the claimant costs.[216]

Raphael FM concluded as follows:

> … I think that the reference in each of the letters upon which [counsel for the respondent] relies to the fact that the complaint is to be withdrawn with no order as to costs, is an indication that the costs matter is not up for negotiation but is included in the award. In the circumstances, I am satisfied that none of the offers made by the respondent, fair as they might have been in respect of the general damages, constituted an offer in excess of the value of the judgment to the applicant. For that reason, I do not propose to alter the view I had expressed in the original judgment, namely that the applicant should obtain her costs from the respondent.[217]

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[211] Ibid [7].
[212] [2005] FMCA 846.
[213] See *San v Dirluck Pty Ltd* [2005] FMCA 750.
[214] [2005] FMCA 846, [8].
[215] [2000] FCA 602.
[216] Ibid [32].
[217] [2005] FMCA 846, [13].