

An International Comparison of the Racial Discrimination Act 1975

Background Paper No.1



**Human Rights and Equal
Opportunity Commission**
www.humanrights.gov.au

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Introduction

The *Racial Discrimination Act 1975* (Cth) (RDA) came into effect 33 years ago. It was Australia's first federal law dealing with human rights and implemented a basic principle of international law: the principle prohibiting discrimination against people on the basis of their race, colour, or national or ethnic origin.

The RDA declared unambiguously to the Australian people that racism and discrimination were no longer acceptable in our society. Since 1975, thousands of individuals and organisations have used the RDA to address racism, either by making complaints of discrimination, or by negotiating policy changes based on the broader principles of racial equality. The legislation has also made possible important developments in the area of Indigenous land rights, culminating in the recognition of native title in 1993.

While these are important achievements, there is still a long way to go before people from all backgrounds are able to participate fully in the life of our nation. For this reason it is important that the RDA continues to be reviewed against the goals it seeks to achieve; equality and non-discrimination. It is also important that the legislation remains responsive to the changing makeup and attitudes of Australian society. Recognising the need for the Act to evolve if it is to remain relevant to contemporary Australian society, the *Human Rights and Equal Opportunity Commission* (HREOC) is currently conducting research to assess the effectiveness of the Act, and highlight any future need for reform.

This paper seeks to contribute to an analysis of the continuing usefulness and effectiveness of the RDA by placing it in context with contemporary race discrimination legislation in other global jurisdictions. By looking at the way in which other similarly placed nations have responded to the problems of racial discrimination and inequality, we are presented with a series of alternative models against which the current Australian legislation may be compared. Moreover, recent developments in other jurisdictions may suggest potential directions for legislative reform.

This paper will examine how the RDA compares to similar race discrimination laws in four other national and multinational jurisdictions: Canada, the United Kingdom (U.K.), the United States (U.S.) and the European Union (E.U.). It is beyond the scope of this paper to provide a comprehensive and/or comparative analysis of State laws dealing with racial discrimination in Australia. In those countries which, like Australia, have both federal and state regimes for combating racial discrimination, this paper will focus on the federal law as the appropriate point of comparison for the Australian RDA. Similarly, while it is beyond the scope of this paper to provide a comprehensive analysis of the laws of all of the member states in the

European Union, this paper will focus on the treaty law and directives of the Union itself.

The first chapter will set out a brief overview of the relevant legislation in each of the jurisdictions. Subsequent chapters will each focus on a key feature of race discrimination legislation, looking at issues such as who has standing to make a complaint of race discrimination, how such discrimination is defined and what sort of exemptions apply. Responses to racial vilification and racial violence, and the imposition of positive duties to proactively combat discrimination will also be considered, along with issues relating to the burden and standard of proof to be applied in racial discrimination cases.

Executive Summary

The table below sets out the features to be examined in each chapter, along with a summary of the key findings.

Table 1: Summary of Findings	
Chapter 1:	An overview of racial discrimination laws in five jurisdictions
Chapter 2: Standing	<ul style="list-style-type: none"> Individuals who have themselves been adversely affected by discrimination have standing to complain in all jurisdictions. Most jurisdictions (excluding the U.K.) also allow other parties to bring a complaint on behalf of the person affected. In Australia, a person or trade union representing the affected person may bring a complaint before the Commission, but only the affected person has standing to bring an action before the court. A 'concerned bystander' who is not specially affected and does not represent a victim of discrimination generally does not have standing to make a complaint in any jurisdiction, however the Canadian approach gives the Commission the flexibility to accept these kinds of complaints in appropriate cases. In all jurisdictions except Australia, there is some capability for the relevant human rights body to initiate complaints in response to more systemic discrimination or legally complex issues.
Chapter 3: Elements of Direct and Indirect Discrimination	<ul style="list-style-type: none"> The statutory tests for direct and indirect discrimination in the E.U. and U.K. are largely similar in content to the Australian test, with some significant variations.

	<ul style="list-style-type: none"> • In contrast, the U.S. tests for both direct and indirect discrimination are far more difficult to meet. They require proof of actual intent for a finding of direct discrimination, and recognise the existence of indirect discrimination only in limited circumstances. • Of all the jurisdictions, the Canadian approach alone conflates the two concepts of direct and indirect discrimination and establishes a single test for both.
<p>Chapter 4: Grounds of Discrimination</p>	<ul style="list-style-type: none"> • Most jurisdictions list specific grounds (such as employment) where discrimination is unlawful. While the RDA also lists such grounds, it is also the only act which contains a general prohibition on discrimination. • At the same time, there may be some areas, such as the distribution of social advantages, awards and honours, which fall outside of the general prohibition in the RDA due to the fact that they do not affect 'human rights and fundamental freedoms'. • There may also be arguments for expanding the specific grounds in the RDA on the basis that they are better understood, and more widely utilised, than the general prohibition.
<p>Chapter 5: Special Measures</p>	<ul style="list-style-type: none"> • Australia, Canada and the E.U. all allow exceptions for a wide range of special measures designed to compensate for past discrimination and current disadvantage. • In Canada, the courts have found that, at least in the constitutional context, such special measures do not require exemptions from the discrimination laws since these measures are designed to enhance, and not damage, substantial equality, and thus cannot be considered discrimination. • In contrast, only a limited range of special measures are permitted in the U.K., and significant constitutional obstacles restrict their application in the U.S.

<p>Chapter 6: Racial Vilification</p>	<ul style="list-style-type: none"> • Approaches to racial vilification vary substantially between jurisdictions, from the U.S., where the dissemination of racial hatred is constitutionally protected, to the U.K., E.U. and Canada, where it is a criminal offence. Australia currently has civil, but not criminal, laws prohibiting racial vilification. • Religious vilification is prohibited in many of the examined jurisdictions. In Canada, it is treated identically to racial vilification, while in the U.K. and E.U. it receives a lesser degree of protection. In Australia, religious vilification is prohibited by some state laws, but there is no corresponding federal offence. • Most jurisdictions (U.S., U.K., and Canada) have laws which recognise the particular harm caused by racially-motivated hate crime; establishing separate offences for racially motivated crime or making it an aggravating factor when sentencing existing offences. There is no federal equivalent to these kind of laws in Australia. • In some jurisdictions (the E.U., U.K. and Canada) there is also an offence of racial harassment which takes into account the cumulative effect of multiple acts of racial vilification and abuse.
<p>Chapter 7: Positive Duties</p>	<ul style="list-style-type: none"> • The obligation to pro-actively eliminate discrimination and promote equality of opportunity has been imposed on a number of different entities, including the public sector (in all jurisdictions, to varying extent), government contractors (Canada and the U.S.) and some private sector organisations (Canada). • While in most jurisdictions this duty is limited to the area of employment, in the U.K. this duty is applicable to all functions of public bodies. • In Canada and the U.K. (and, to some extent, in the U.S.) these positive duties are monitored by human rights bodies and may be enforced by bringing an action before a court or tribunal.

	<ul style="list-style-type: none"> • In comparison to the international schemes, positive duties in Australia are limited in scope, applying only to employment in the federal public sector, and are not backed-up by effective enforcement mechanisms.
<p>Chapter 8: Burden of Proof</p>	<ul style="list-style-type: none"> • In all jurisdictions except Australia, there is a shift in the allocation of the burden of proof once the plaintiff has established a prima facie case of racial discrimination. Only in Australia does the entire evidentiary and persuasive burden remain with the plaintiff at every stage of the case. • In the U.S. and Canada, it is only the evidentiary burden that falls on the defendant. They must ‘articulate a legitimate explanation’ for the less favourable treatment shown by the plaintiff. • In contrast, in the U.K. and E.U. the persuasive burden also shifts once a prima facie case has been established. The defendant must then prove, on the balance of probabilities, that discrimination did not occur. • The Australian courts also regularly require a higher standard of evidence in racial discrimination cases, although the standard of proof remains the civil standard of the balance of probabilities. • While other jurisdictions also require a similar higher standard of evidence to prove the most serious or damaging of civil claims, this principle is rarely invoked – outside of Australia – with respect to allegations of racial discrimination.

Chapter 1: An Overview of Racial Discrimination Legislation in Each Jurisdiction

1.1 Australia

The Australian Constitution contains no protection against discrimination, except on the narrow grounds of state residency.¹ For this reason, the most significant federal protections against race discrimination in Australia are statutory, and are contained within the Australian *Racial Discrimination Act 1975* (Cth) (RDA). This Act prohibits “any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom...”² As well as this general prohibition, the Act makes it an offence to discriminate in a range of specific areas, such as employment, housing and the provision of goods and services.³ Since the passage of the *Racial Hatred Act 1995*, the RDA has also contained provisions prohibiting racial vilification.⁴

Other laws that are relevant to an understanding of Australia’s federal race discrimination regime include the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which sets out the framework for bringing discrimination complaints,⁵ and the *Workplace Relations Act 1996* (Cth), which prohibits discrimination in the specific areas of federally regulated workplace agreements and terminations.⁶ The *Public Service Act 1999* (Cth) and the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) also impose some positive obligations on federal government authorities and public service agencies with regard to combating race discrimination.

1.2 Canada

The right to freedom from discrimination is protected by section 15 of the Canadian Charter of Rights and Freedoms, which provides that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁷ As a ‘Charter

1 Australian Constitution s 117.

2 Racial Discrimination Act 1975 (Cth) s 9.

3 ibid ss 10-16.

4 ibid s 18C.

5 Human Rights and Equal Opportunity Commission Act 1986 (Cth) Part IIB.

6 Workplace Relations Act 1996 (Cth) see especially ss 222, 659.

7 Canadian Charter of Rights and Freedoms, Schedule B Constitution Act 1982 (UK), c 15(1).

right', the right to non-discrimination prevails over any inconsistent state or federal statute, except in so far as they impose "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".⁸ It is possible, however, for the legislature to expressly exclude the right to equality with respect to specific legislation. This may be done by passing an express declaration, which must be re-enacted every five years, that the law in question is to operate 'notwithstanding' that provision of the Charter.⁹

Outside of the constitutional framework, the key federal legislation regarding race discrimination is the *Canadian Human Rights Act*.¹⁰ This Act prohibits discrimination on a number of grounds (including race) in areas such as the provision of services or accommodation, employment or membership of employee organisations. It also creates offences relating to hate messages, harassment and retaliation against persons making complaints under the Act.

Criminal offences relating to the incitement or promotion of racial hatred were introduced in Canada in 2003, and are contained in sections 318-320 of the *Canadian Criminal Code*.¹¹ The *Criminal Code* also obliges courts to take racially motivated hate or prejudice into account as an aggravating factor when imposing sentences for other crimes.¹²

Also relevant to a consideration of the Canadian anti-discrimination regime is the *Employment Equity Act*, passed in 1995.¹³ This act places positive obligations on certain employers to take steps to identify and overcome barriers to diversity in the workplace, and to institute positive policies which may be supervised and enforced by the Canadian Human Rights Commission. Other policy initiatives such as the *Federal Contractors Programme for Employment Equity* and the *Procurement Strategy for Aboriginal Business* also operate to impose positive obligations on certain employers involved in providing government services.

1.3 The United Kingdom

The *Human Rights Act* entered into force in the U.K. in 1998 and incorporated into domestic law certain rights contained within the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁴ While strictly speaking, not a constitutional document the *Human Rights Act 1998*

8 *ibid*, c 1.

9 *ibid*, c 33, commonly known as the 'notwithstanding clause'.

10 *Canadian Human Rights Act*, R.S., 1985, c. H-6.

11 *Criminal Code*, R.S., 1985, c C-46 ss 318-320.

12 *Ibid* s 718.2 (a)(i).

13 *Employment Equity Act* SC, 1995, c 44.

14 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953).

has been perceived by many as the equivalent of a non-entrenched 'bill of rights' for the United Kingdom. The Act requires the judiciary to interpret all British laws, so far as possible, to be compatible with Convention rights, and makes it unlawful for a public authority to act in a manner that is incompatible with a Convention right unless required to do so by legislation.¹⁵ Where legislation is incompatible with the Convention, the court may make a declaration of incompatibility. While this declaration does not affect the validity of the legislation, it entitles the government to make changes in order to remove the incompatibility.¹⁶ The *Human Rights Act 1998* also requires the government to make a statement when introducing new legislation either that the legislation is compatible with the Convention, or that it wishes to proceed with the bill despite its incompatibility.¹⁷

Amongst the Convention rights incorporated into domestic law by the *Human Rights Act 1998* is the article 14 right, which states that all other rights in the Convention must be secured without discrimination on any ground, including race.¹⁸ The Convention also includes a protocol which provides that "(t)he enjoyment of any right set forth by law" should be secured without discrimination,¹⁹ however unlike article 14 this protocol has not been ratified by the United Kingdom, and hence is not enforceable under the *Human Rights Act 1998*.

Aside from the *Human Rights Act 1998*, the central piece of anti-race discrimination legislation in the United Kingdom is the *Race Relations Act 1976*.²⁰ This Act makes it an offence to discriminate on the grounds of colour, race, nationality or ethnic or national origins in a range of specific areas including employment, planning, housing, education and provision of goods and services, as well as prohibiting discrimination by public authorities in the course of their duties. It also contains offences relating to the victimisation of complainants, and imposes a positive duty to combat racial discrimination upon certain public sector bodies. Since October 2007, the *Race Relations Act 1976* has been administered by the new Commission for Equality and Human Rights, established by the *Equality Act 2006*. This new body replaced the three Commissions that were responsible for race, sex and disability discrimination, and has additional powers with regards to discrimination on the grounds of religion or sexuality.

15 *Human Rights Act 1998* (UK) c 42 ss 3 and 6.

16 *ibid* ss 4 and 10.

17 *ibid* s 19.

18 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5, art 14 (entered into force 3 September 1953).

19 *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 2000, CETS 177, art 1 (entered into force 1 April 2005).

20 *Race Relations Act 1976* (UK) c 74.

Offences relating to racial hatred in the United Kingdom are contained within the *Public Order Act 1986*, specifically sections 17-27, which contain a range of offences relating to the use of threatening, abusive or insulting communication which is intended or likely to cause racial hatred.²¹ The *Crime and Disorder Act 1998* also contains offences of racially or religiously aggravated assault, criminal damage, public order offences or harassment.²²

1.4 The United States

The fourteenth amendment, often referred to as the 'Equal Protection Clause' was added to the U.S. Constitution in 1868. It provides that "*No State shall... deny to any person within its jurisdiction the equal protection of the laws.*"²³ While this clause applies only to states, and not to federal government actions, the courts have inferred a similar constitutional duty of equality from the fifth amendment to the Constitution, which does place limits upon federal government power.²⁴

Federal statute law prohibiting race discrimination in the U.S. includes the *Civil Rights Act of 1866* (reenacted after the 14th Amendment as the *Civil Rights Act of 1870*), which declares that all persons must receive equal treatment under the law and possess the same rights to make, enforce and enjoy the benefits of contracts.²⁵ In more recent times, the key piece of legislation has been the *Civil Rights Act of 1964*, which prohibits discrimination in the areas of voter registration,²⁶ provision of services in hotels, restaurants and places of entertainment,²⁷ access to public facilities,²⁸ education,²⁹ federally funded programs³⁰ and some areas of employment.³¹ Other relevant anti-discrimination legislation includes the *Civil Rights Act of 1968* Title VIII (also known as the *Fair Housing Act of 1968*), which prohibits discrimination in the area of housing and housing finance.³²

The *Civil Rights Act of 1964* also prohibits discrimination in employment by federal agencies, and requires them to institute a program of affirmative action monitored and approved by the Equal Employment Opportunity

21 *Public Order Act 1986*(UK) c 64 ss 17-27.

22 *Crime and Disorder Act 1998* (UK) c 37 ss 28-33.

23 *United States Constitution*, amend XIV, § 1.

24 *Bolling v Sharpe*, 347 US 497 (1954) at 500.

25 *Civil Rights Act of 1866*, 42 USC § 1981.

26 *Civil Rights Act of 1964*, 42 USC § 1971.

27 *ibid* 42 USC § 2000a.

28 *ibid* 42 USC § 2000b.

29 *ibid* 42 USC § 2000c.

30 *ibid* 42 USC § 2000d.

31 *ibid* 42 USC § 2000e.

32 42 USC §§ 3601-3607.

Commission.³³ These affirmative action policies are also imposed upon Federal Government contractors, subcontractors and suppliers by Executive Order 11246.

United States racial hatred laws are circumscribed by the strong constitutional emphasis on the right to freedom of speech.³⁴ It is a criminal offence under federal law to intimidate or interfere with a person because of their race so as to prevent them from undertaking certain federally protected activities such as attending a public school, applying for employment, serving on a jury, etc. These offences only apply, however, where the intimidation or interference involves either the use or threat of force, therefore distinguishing violent actions (or threats of violence) from racist or offensive speech.³⁵ The *Local Law Enforcement Hate Crimes Prevention Act of 2007*, which has been passed by the U.S. House of Representatives and is now before the Senate, would create additional federal 'hate crime' offences, and provide federal assistance to state bodies in investigating such offences at the local level.³⁶ Once again, however, these offences focus on racially motivated violence (involving actual or attempted bodily injury) rather than hate speech.

1.5 The European Union

The European Union currently consists of 27 independent European countries, bound together by treaty. The Union itself possesses its own legislative, judicial and administrative institutions which are responsible for upholding and implementing this treaty law. Directives issued by the Council of the European Union are binding on all member states, who must take steps to transpose them into national law. Where the state fails to do so, directives that are sufficiently "*clear, precise and unconditional*" may be directly enforceable by an individual against the state in the European Court of Justice.³⁷ A state which fails to implement the directives may also be ordered to pay a financial penalty by the Court.³⁸

33 *Civil Rights Act of 1964*, 42 USC § 2000e-16, see also *Exec Order No 11478*, 3 CFR 803 (1966-1970).

34 *United States Constitution*, amend I.

35 18 USC § 245.

36 *Local Law Enforcement Hate Crimes Prevention Act of 2007* HR 1592 (110th U.S. Congress: 2007-2008).

37 *Van Gend & Loos* (C-26/62) [1963] ECR 1; referred to in European Commission, *Enforcement of the Directives* (2007), http://ec.europa.eu/employment_social/fundamental_rights/legis/lgenforce_en.htm (accessed 9/7/07).

38 *Treaty of the Treaty on Establishing the European Community*, [2002] OJ C 325, art 228.

The European Union gained the specific power to legislate with regards to race discrimination in 1999, through the *Treaty of Amsterdam*.³⁹ This Treaty amended the existing *Treaty on Establishing the European Community*, specifically authorising the European Council to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁴⁰

Shortly after these powers came into effect, the European Council issued a directive “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”, commonly known as the *Racial Equality Directive*.⁴¹ This directive required all member states to put in place a legal framework to combat race discrimination within their individual jurisdictions before July 2003. It also laid out the minimum requirements of such legislation, which must protect the principle of equal treatment in fields including employment, membership of professional organisations, social services, education and access to goods and services. In addition, the directives impose minimum requirements for the enforcement of such legal rights, including requirements relating to who may have standing to bring forth a claim, and the burden of proof that may be imposed.

In December 2000, a *Charter of Fundamental Rights for the European Union* was proclaimed, containing the declaration that “(a)ny discrimination based on any ground such as sex, race, colour, ethnic or social origin... shall be prohibited.”⁴² While this text may have some influence on the European Court of Justice, and may potentially be included in a future EU Constitution,⁴³ at present it is not considered treaty law, and is thus not in itself binding on state members.

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁴⁴ is also of relevance within the context of the European Union. While this treaty was created by the Council of Europe, which is a separate political entity to the European Union, all EU member states are signatories to the Convention, and the institutions of the European

39 *Treaty of Amsterdam*, opened for signature 2 October 1997, [1997] OJ C 340, (entered into force 1 May 1999).

40 *Consolidated Version of the Treaty on Establishing the European Community*, [2002] OJ C 325, art 13.

41 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22.

42 *Charter of Fundamental Rights for the European Union* [2000] OJ 364/01 art 21(1).

43 A proposal to establish a Constitution for Europe, which included the *Charter*, was signed by all EU members in October 2004, but failed to obtain ratification due to the negative results of referendums in some member states. New attempts to create an alternative constitution are currently under way.

44 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953).

Union have indicated their intention to respect the Convention rights.⁴⁵ As already noted above (with respect to the United Kingdom), the Convention prohibits discrimination with regards to securing Convention rights.⁴⁶ It also contains a more general, but less widely ratified, protocol prohibiting discrimination.⁴⁷

Table 2: Summary of Race Discrimination Legislation in the Five Jurisdictions⁴⁸

	Constitutional (or quasi-Constitutional) anti-Discrimination measures	Key Race Discrimination Legislation	Other relevant policies and legislation
Australia	Nil	Racial Discrimination Act 1975	Human Rights and Equal Opportunity Act 1986 Workplace Relations Act 1996 Public Service Act 1999 Equal Employment Opportunity (Commonwealth Authorities) 1987

45 See for instance, "Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights, of 5 April 1977", <http://europa.eu/abc/treaties/archives/en/entr25.htm> (accessed 9/7/07).

46 *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome 4.XI.1950 Article 14.

47 *ibid*, Protocol 12.

48 Australian legislation can be found at: <http://www.austlii.edu.au/>
Canadian legislation can be found at: <http://www.canlii.org/en/index.html>
United Kingdom legislation can be found at: <http://www.bailii.org/>
United State legislation can be found at: <http://www.law.cornell.edu/>

Canada	Canadian Charter of Rights and Freedoms s 15	Canadian Human Rights Act 1977	Canadian Criminal Code ss 318, 319, 320 and s 718.2 Employment Equity Act 1995 Federal Contractors Programme for Employment Equity Procurement Strategy for Aboriginal Business
United Kingdom	Human Rights Act 1998	Race Relations Act 1976	Equality Act 2006 Crime and Disorder Act 1998 ss 28-33 Public Order Act 1986 ss 17-29J
United States	United States Constitution: 14 th Amendment	Civil Rights Act of 1866 (Reenacted as the Civil Rights Act of 1870)* Civil Rights Act of 1871* Civil Rights Act of 1964* Civil Rights Act of 1968 Title VIII (Fair Housing Act)**	Executive Order 11246 United States Code Title 18 Chapter 13 Local Law Enforcement Hate Crimes Prevention Act of 2007 (pending Senate approval)

* As amended and codified in the United States Code Title 42 Chapter 21 (Civil Rights).

** As amended and codified in the United States Code Title 42 Chapter 45 (Fair Housing).

	Treaties	Directives	Other Relevant Legislation/Policy
European Union	Treaty on Establishing the European Community (as amended by the Treaty of Amsterdam 1999)	Racial Equality Directive	Charter of Fundamental Rights of the European Union (2000) Article 21 European Convention for the Protection of Human Rights and Fundamental Freedoms (article 14, Protocol 12) (European Community, endorsed by European Union)

Chapter 2: Standing

While the prohibition of racial discrimination as an unlawful act is an important step towards its eradication, the effectiveness of such laws ultimately depends on their enforceability. The issue of effective enforcement of anti-discrimination laws is a particularly complex one. In deciding who, when and where parties can seek to enforce the law, legislators must take into account factors such as the impact of discrimination on private rights and the public interest, the special vulnerability of many victims of discrimination, the broad, systemic nature of many discriminatory practices and the need to minimise the cost of enforcement, as well as deciding how such costs should be distributed within society.

The enforcement mechanisms in each of the jurisdictions being examined differ substantially. All four national systems include at least one independent statutory body with an anti-discrimination role; however there is substantial variation in the way these bodies operate, the role they play in the dispute process, and the alternative or additional means of enforcement provided by the courts. Several jurisdictions possess what might be described as a 'two stage' process, where a complaint may (or must) go before a discrimination commission before it appears before the courts, and the rules for standing can differ at each stage.

2.1 Australia

Enforcement of the law in Australia involves just such a two stage process. Complaints of race discrimination must first be lodged with the *Human Rights and Equal Opportunity Commission* (HREOC). HREOC assesses the complaint and attempts to achieve conciliation between the parties. If the conciliation is successful, and the parties enter into an agreement, the process ends at the first stage. If, however, HREOC terminates the complaint on any ground, then any person affected by the complaint (as defined below) may elect to bring an action before the court. A complaint may be terminated for any of a range of reasons; from an assessment by HREOC that it is ill-founded or vexatious, right through to an opinion that the subject matter is of such public importance that it requires public litigation. It may also be terminated on the grounds that conciliation has no reasonable prospects of success.⁴⁹ Bringing a complaint before HREOC is thus a prerequisite to litigation, however there is no requirement that HREOC reach any particular conclusion about the merit of the complaint for it to proceed to litigation in the courts.

⁴⁹ For a list of grounds on which a complaint may be terminated, see the *Human Rights and Equal Opportunity Commission Act* (Cth) 1986 s 46PH.

The test for standing to bring a complaint before HREOC is quite broad, although narrower than the Canadian test discussed below. One or more ‘persons aggrieved’ by the discrimination may lodge a complaint, either on their own behalf or on behalf of a class of similarly aggrieved persons.⁵⁰ A non-aggrieved person or trade union can also bring a complaint on behalf of one or more aggrieved persons (though not on their own behalf).⁵¹ Where a complaint is on behalf of a class of persons, it is not necessary for all of them to be complainants, or to give their express consent to the action, but an individual can elect to withdraw from the class by giving notice.⁵²

A ‘person aggrieved’ is not defined in the Act, but has been interpreted by the Australian courts to mean a person who “*is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance... if his action fails.*”⁵³ This advantage or disadvantage must be beyond that experienced by an ordinary member of the public.⁵⁴ Effectively this means that people who have been discriminated against (and those who represent them) have standing to make a complaint, while concerned bystanders and those seeking to uphold public rights, which affect everyone equally, are excluded.

A legal person (such as a corporation) may also be a ‘person aggrieved’ if it is subject to discrimination “*by reason of the race, colour or national or ethnic origin of any associate of that corporation.*”⁵⁵ It must, however, be ‘aggrieved’ in its own right, and not merely have members who are individually aggrieved. For example, if the corporation is denied a lease because of the race of its members it has standing, while if some of its members have been denied services because of their race only the individuals themselves have standing to complain. Non-incorporated associations, with the exception of trade unions, do not have standing to bring a complaint, however the head of such an association may have personal standing to make a complaint on behalf of the individual members whose rights have been infringed.⁵⁶

50 *Human Rights and Equal Opportunity Commission Act (Cth) 1986 s 46P (2)(a)(b).*

51 *Human Rights and Equal Opportunity Commission Act (Cth) 1986 s 46P (2)(c).*

52 *Human Rights and Equal Opportunity Commission Act (Cth) 1986 ss 46PB and 46PC(1).* Note that there are some additional conditions regarding class complaints contained in ss 46PB and 46PC.

53 Gibbs J, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; as noted in the Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005) at 215.

54 Wilcox J, *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 at 544-5; noted in the Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005) at 216.

55 Mason J, *Koowarta v Bjelke-Petersen*, (1982) 153 CLR 236; noted in the Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005) at 217.

56 Wilcox J, *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 at 548, noted in the Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005) at 219.

Once a complaint has been terminated, any person on whose behalf the complaint was lodged (described in the act as an 'affected person') has standing to take the complaint before the courts.⁵⁷ Thus the plaintiff before the court need not be the same person as the complainant before HREOC. Indeed, in the case of a person or trade union who brings a complaint on behalf of an aggrieved person, the complainant will lack standing in the courts, and only the 'person aggrieved' may bring an action on their own behalf.

Unusually, when compared with the other jurisdictions, the Australian *Human Rights and Equal Opportunity Commission* does not have standing to independently initiate an action for discrimination in the courts. Only once proceedings have been initiated by a person (or persons) affected by the discrimination can HREOC seek leave to intervene or can a Commissioner apply to assist the court as *amicus curiae*.⁵⁸ HREOC does have the power to decide, of its own volition, to inquire into any act or practice that is done by or on behalf of the Commonwealth that might be inconsistent with any human right, or any act or practice that may constitute discrimination in employment.⁵⁹ If, as a result of either of these lines of inquiry, HREOC decides that human rights have been violated, it may attempt to achieve conciliation between the parties involved or, where this is not appropriate or does not achieve the desired outcome, may make a report to the relevant government minister.⁶⁰ Even where the inquiry reveals acts of unlawful discrimination, however, HREOC cannot initiate legal action against the party concerned.

2.2 Canada

The Canadian system also involves a two stage process of complaint investigation by the *Canadian Human Rights Commission*, followed by a quasi-judicial hearing before the independent *Human Rights Tribunal*. In contrast to the Australian mechanism, however, individuals do not have independent access to the second stage of the process, and the Commission alone has the power to bring complaints before the Tribunal. The Commission is thus, under the Canadian system, the 'gatekeeper' to the Tribunal process, and the Tribunal can hear only those complaints which have been investigated by the Commission and found to warrant an inquiry.

57 *Human Rights and Equal Opportunity Commission Act* (Cth) 1986 ss 3 and 46PO(1).

58 *Racial Discrimination Act* 1975 (Cth) s 20 (1)(e); see also *Human Rights and Equal Opportunity Commission Act* (Cth) 1986 s 46PV.

59 *Human Rights and Equal Opportunity Commission Act* (Cth) 1986 s11(1)(f) for inquiries into acts done on behalf of the Commonwealth and s31(b) for inquiries into discrimination in employment.

60 *Human Rights and Equal Opportunity Commission Act* (Cth) 1986 s 11(1)(f).

All complaints made to the Commission must be investigated, unless they are outside jurisdiction, vexatious, or otherwise invalid.⁶¹ If a complaint is well founded, the Commission may appoint a conciliator (independent of the investigator) to assist the parties settle the dispute.⁶² If conciliation is unsuccessful or inappropriate in the individual instance, the Commission (after receiving the investigator's report) may elect to either dismiss the complaint, or to refer it to the *Human Rights Tribunal* for an inquiry. The Commission then presents the case to the Tribunal, not on behalf of either party, but in the manner it judges to be in the public interest.⁶³ The parties themselves are also entitled to put their case.⁶⁴ Orders made by the Tribunal are enforceable as orders of the Federal Court once they have been registered, and may be reviewed by the Federal or Supreme Court on appeal.

There are few restrictions on standing to make a complaint to the *Canadian Human Rights Commission*. The law states that “any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file... a complaint.”⁶⁵

The Commission itself is also empowered to bring a complaint on its own initiative, although this power is only very rarely used. This, in part, is because its role in assessing complaints and bringing them before the Tribunal has provoked debate over whether it is possible for the Commission to simultaneously play an adjudicative, investigative and advocative role without being perceived as biased.⁶⁶ In 2000, a review of the *Canadian Human Rights Act* recommended retaining the power of the Commission to initiate complaints, while reducing the potential for conflict by downgrading its role as ‘gatekeeper’ to discrimination complaints, and allowing all complaints to go directly before the *Human Rights Tribunal*.⁶⁷

The *Human Rights Tribunal* has affirmed the fact that an individual does not need to be seeking a personal remedy to have standing to bring a complaint under the *Canadian Human Rights Act*, “indeed the Act does not require the complainant to be the *victim* of the alleged discriminatory practice” (original emphasis).⁶⁸ In such a case, the Act allows the Tribunal to make

61 *Canadian Human Rights Act*, RS 1985, c H-6, s 41(1).

62 *Canadian Human Rights Act*, RS 1985, c H-6, ss 47 and 48.

63 *Canadian Human Rights Act*, RS 1985, c H-6, s 51.

64 *Canadian Human Rights Act*, RS 1985, c H-6, s 50(1).

65 *Canadian Human Rights Act*, RS 1985, c. H-6, s 40(1).

66 Canadian Human Rights Act Review Panel, Promoting Equality: A New Vision (2000) at chapter 9, <http://www.justice.gc.ca/chra/en/frp-c9.html> (accessed 4/10/07). See also the litigation over perceived bias in *Bell Canada v CTEA, CEP and Femmes Action* and the CHRC (2 November 2000), No. T-890-99 (FCA).

67 Canadian Human Rights Act Review Panel, Promoting Equality: A New Vision (2000) at chapter 9, <http://www.justice.gc.ca/chra/en/frp-c9.html> (accessed 4/10/07).

68 *Brigitte Lavoie v Treasury Board of Canada* 2007 CHRT 3, http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=823&lg=_e&isruling=0 (accessed 24/7/07).

orders which serve a 'broader public purpose' rather than an individual need for compensation. It is also possible for the court to award damages or compensation directly to the victim of discrimination, even if they are not themselves a party to the litigation.⁶⁹

While the grounds for bringing a complaint are broad enough to allow standing to those who are personally unaffected by discrimination, the Commission does have a discretionary power to reject complaints where the victim of the discrimination has not given their consent.⁷⁰ It is also necessary in most cases for there to be an identifiable, and not merely hypothetical, victim of discrimination, although with respect to certain grounds of discrimination, including advertising, employment policies and practices, hate messages and the supply of goods and services, the Commission may accept complaints where no individual victim has been identified.⁷¹ Despite its broad powers, it is interesting to note that the Commission itself places emphasis on collecting complaints from victims or their near associates rather than non-involved 'concerned citizens'.⁷²

A complaint may be filed by an individual (including a legal person, such as a corporation), or by a group of individuals. In the *Bell Canada* case, the Tribunal interpreted this in light of the legislative intention to promote the protection of rights, stating that: "*It is our opinion that a liberal and purposive interpretation of the Act supports a conclusion that a union, acting to protect individuals rights as opposed to collective rights can be said to be a 'group of individuals' under section 40(1) of the Act.*"⁷³ Thus a non-incorporated association acting to protect the rights of individuals (rather than its own 'rights' as an entity) will have standing under the Act.

2.3 European Union

The *Racial Equality Directive* does not mandate any specific scheme for the enforcement of race discrimination law, but it does set out some minimal requirements relating to standing.

69 *Canadian Human Rights Act*, RS 1985, c. H-6, s 53(2); see also *Groupe D'Aide et D'Information Sur le Harcèlement Sexuel au Travail de la Province de Québec Inc. v Barbe* 2003 CHRT 24 at para 5.

70 *Canadian Human Rights Act*, RS 1985, c. H-6, s 40(2).

71 *Canadian Human Rights Act*, RS 1985, c. H-6, s 40(5)(b); see also the discussion of this section in: Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (2000) at chapter 14 <http://www.doj.ca/chra/en/frp-c14.html> (accessed 4/9/07).

72 See e.g., Canadian Human Rights Commission, *Filing a Complaint* (2003): "Usually the person who has suffered from the discrimination files the complaint but, in certain cases, it may be filed by a third party, such as a relative or a collective bargaining agent" http://www.chrc-ccdp.ca/publications/filing_complaint-en.asp (accessed 6/10/07).

73 *Communications, Energy & Paperworkers Union, Femmes-Action v Bell Canada*, Ruling No. 1, Canadian Human Rights Tribunal, File No. T503/2098 at p. 4 http://www.chrt-tcdp.gc.ca/search/files/t503_2098re_11_29.pdf (accessed 3/8/07).

The Directive states that – to the extent it accords with national practice – legal persons as well as individuals should be entitled to seek redress on their own behalf when they suffer discrimination on the grounds of the racial or ethnic origin of their members.⁷⁴ With regards to the rights of non-incorporated bodies, article 7 requires that “*associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with*” must be allowed to be involved in the enforcement process either “*on behalf or in support of the complainant, with his or her approval*”. Non-incorporated associations with a ‘legitimate interest’, must thus be allowed to appear on the victim’s behalf (as they do in the Canadian and American system), or to provide ‘support’ to the individual conducting their own case, as in the United Kingdom. Unlike incorporated bodies, the directive does not specifically require that such organisations should be allowed to pursue a claim of discrimination on their own behalf.

Under the Directive, all states are required to establish “*a body or bodies for the promotion of equal treatment*”.⁷⁵ As part of their role, these bodies must be able to “*provide independent assistance to victims of discrimination in pursuing their complaints about racial discrimination*”.⁷⁶ The extent of such ‘support’ is left up to national discretion. As a ‘minimum standard’, the directive does not require that the Commissions be authorised to initiate complaints on their own behalf, or to take up and prosecute complaints on behalf of victims.

2.4 United Kingdom

The *Race Relations Act 1976* in the United Kingdom creates two different avenues of enforcement, each of which may operate independently of the other. On the one hand, the *Commission for Equality and Human Rights* has broad enforcement powers of its own initiative, which do not need to be enlivened by a complaint. On the other hand, an individual may independently bring an action before a court or tribunal, and need not bring the complaint before the Commission unless they wish to receive the Commission’s advice or assistance.

74 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, cl 16.

75 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, art 13(1).

76 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, art 13(2).

The Commission has a broad power to conduct an investigation into a suspected breach of the Act.⁷⁷ Where such a breach is found, the Commission may issue an ‘unlawful act notice’, which requires the recipient to draw up an action plan specifying how future acts of discrimination will be avoided.⁷⁸ At any time during the five years after such a plan has been formulated, the Commission may enforce compliance with the plan by applying for an order from the court.⁷⁹ Alternatively, the Commission may negotiate an agreement with someone they believe to have committed an unlawful act, which may also be enforced through the courts by means of an injunction.⁸⁰ The Commission will also have the power to seek an injunction to restrain a party suspected of being about to commit a discriminatory act.⁸¹

In certain areas of race-discrimination law, such as discriminatory advertising or instructions or pressure to discriminate, the Commission has sole responsibility to bring complaints before the relevant court or employment tribunal, with suits by individuals being excluded.⁸² The Commission also has a broad power to “institute or intervene in legal proceedings” relevant to its functions, giving it the power both to bring its own legal actions with regards to discrimination, and to intervene as an amicus in private legal proceedings.⁸³ The Commission also plays a role in enforcing the positive duties placed on public bodies, which will be discussed further in chapter 7.

Except in the abovementioned areas of discriminatory advertising and instructions or pressure to discriminate, private individuals may also have standing to bring a civil action in response to discrimination. Under the *Race Relations Act 1976*, any ‘person’ is entitled to bring a complaint against a respondent who “has committed an act against the complainant”.⁸⁴ ‘Person’ is defined according to the *Interpretation Act 1978* to include “a body of persons corporate or unincorporated”, however there have been few cases of discrimination against non-natural persons heard by the courts.⁸⁵ The requirement of ‘an act against the complainant’ means that only victims of discrimination (whether individual or corporate) have standing to sue, and not other parties acting on their behalf.

77 *Equality Act 2006* (UK) c 3, s 20. Note that the references here are to the new Commission for Equality and Human Rights, with the equivalent powers of the Commission for Racial Equality to be found in the *Race Relations Act 1976* (UK) c 74, parts VII and VIII.

78 *Equality Act 2006* (UK) c 3, s 21. Note that these were referred to as ‘non-discrimination notices’ under the *Race Relations Act 1976* (U.K.) c 74, s 58.

79 *Equality Act 2006* (UK) c 3, s 22.

80 *Equality Act 2006* (UK) c 3, s 24.

81 *Equality Act 2006* (UK) c 3, s 24(1).

82 *Equality Act 2006* (UK) c 3, s 25.

83 *Equality Act 2006* (UK) c 3, s 30.

84 *Race Relations Act 1976* (UK) c 74, s 54(1)(a) and s 57(1)(a).

85 *Interpretation Act 1978* (UK) c 30, schedule 1; see also commentary in O’Cinneide C, *United Kingdom Country Report on Measures to Combat Discrimination* (2007) at 45 http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/ukrep07_en.pdf (accessed 3/8/07).

In some cases, individuals may have standing to sue before any 'act' has been committed against them. Where a collective agreement or rule with respect to employment is discriminatory, or an organisation has discriminatory regulations regarding membership or the bestowal of professional qualifications, an individual may seek to have the rules or regulations declared invalid. In this case, an individual has standing if they can show that the rule "may at some future time have an effect on him" or that they are "genuinely and actively" seeking employment, membership or a professional qualification from the discriminating body.⁸⁶

While a private complainant with sufficient resources or support may go directly to the relevant court or tribunal, individuals may also elect to apply to the Commission for assistance. The Commission will generally offer some advice, and in rare cases may provide further assistance up to and including full representation.⁸⁷ The Commission can also arrange access to conciliation services for all interested parties.⁸⁸

Although they are unable to bring representative actions on behalf of others, organisations such as trade unions and anti-discrimination associations are encouraged to play a role in supporting and advising victims of discrimination. While the complaint must be brought by the individual victim, these organisations may be involved in fact finding, preparing the case for litigation and providing advice and legal representation.⁸⁹ A large proportion of the Commission's budget is spent providing funding to such community organisations and associations to increase their capacity to provide this kind of advice and support.⁹⁰

2.5 United States

Unlike in the other jurisdictions examined, the United States does not have a unified system for administering and enforcing federal racial discrimination laws. Instead, a number of different bodies are responsible for different areas of discrimination, such as the *Equal Employment Opportunity Commission* (EEOC), which deals with employment discrimination, or the *Department of Housing and Urban Development* (HUD), which administers the laws with respect to accommodation. In other areas, such as the provision of goods and services, no commission exists, but the Attorney-General may play a role in enforcing the law on behalf of the Federal Government.

86 *Race Relations Act 1976* (UK) c 74, ss 72A and 72B.

87 *Equality Act 2006* (UK) c 3, s 28.

88 *Equality Act 2006* (UK) c 3, s 27.

89 Bodrogi B, 'Legal Standing, the Practical Experience of a Hungarian Organisation' (2007) 5 *European Anti-Discrimination Law Review* 23 at 25 (comparing UK and Hungarian practice).

90 See 'Getting Results' funding program, <http://www.cre.gov.U.K./about/gettingresults.html> (accessed 31/7/07).

2.5.1 Standing to Lodge a Complaint – Employment and Housing Discrimination

In the field of employment, a complaint before the Commission may be initiated in two ways. It may be filed ‘by or on behalf of’ a person aggrieved, or by a member of the EEOC on its own initiative. Regardless of whether it is initiated by the Commission or a private party, the complaint is investigated by the Commission and, if found to be well founded, the Commission attempts to effect conciliation between the parties.⁹¹ If conciliation is not successful, the Commission (or the federal Attorney-General, if the respondent is a government or government agency) may bring a civil action against the discriminating party. The original complainant has the right to intervene in the action, but does not have primary responsibility for running the case.⁹²

Only after a complaint has been terminated by the EEOC, or the Commission has decided not to commence a civil action, can a private party sue on their own behalf. A private claim may be brought against the respondent by “*the person... aggrieved*” by or on behalf of whom the complaint was lodged or (where the complaint was made by a member of the Commission) any person the complaint alleges was aggrieved by the unlawful practice.⁹³ In some cases, a person who was not involved in the initial complaint may still be allowed to bring an action, or to join a class action, if their claim arises out of similar discriminatory treatment in a similar timeframe.⁹⁴ In the case of private actions for employment discrimination, the Commission or the Attorney-General may be granted leave to intervene if they certify that the case “*is of general public importance*.”⁹⁵

The scheme for enforcing the anti-discrimination provisions regarding housing operates in a broadly similar fashion, with the Secretary for Housing and Urban Development fulfilling the role of the Commission.⁹⁶ One key difference is that it is non-compulsory, allowing a prospective litigant to elect to ignore the complaint mechanism and go directly before the court. The housing discrimination complaints system also allows for the charge brought by the Secretary for HUD to be heard by a Housing Department administrative law judge, unless either party specifically elects to have the case heard in the Federal court.

91 42 USC § 2000e-5(b).

92 42 USC § 2000e-5(f)(1)

93 42 USC § 2000e-5(f)(1).

94 See discussion of *Calloway v Partners National Health Plans* 986 F.2d 446, 61 FEP 550 (11th Cir. 1993) in *Larson L, Employment Discrimination* (2006) at 70.03(2)(b).

95 42 USC § 2000e-5(f)(1).

96 See 42 USC §§ 3610-3614.

In both cases, a complaint can only be lodged with the Commission or the Secretary by a 'person aggrieved' or another person acting on their behalf. The term 'person' is broadly defined by both acts, including "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers".⁹⁷ All these entities are therefore entitled to lodge complaints on their own behalf and on behalf of others. In an employment discrimination case, the complaint may be brought on behalf of a person whose identity is disclosed only to the Commission, and not revealed to the opposite party.⁹⁸

2.5.2 Enforcement by the Attorney-General

While there are no commissions or other bodies empowered to hear complaints with regards to the remaining grounds of discrimination, the Attorney-General retains the power to take action to enforce the law. In some cases, such as with regards to public facilities and education, the Attorney-General may act only after receiving a complaint from an aggrieved individual or, in the case of education, the parent or group of parents whose children are being discriminated against.⁹⁹ In others cases, the Attorney-General may initiate a complaint independently, such as when they perceive a pattern or practice of restricting access to federally protected goods and services or housing, or where they are required to take action in order to prevent discrimination in voter registration.¹⁰⁰

2.5.3 Standing to Initiate a Civil Action

With the exception of Executive Orders, many of which cannot be enforced by private action, private litigation provides an alternative avenue of enforcement for U.S. anti-discrimination law.¹⁰¹

The anti-discrimination statutes prescribe few restrictions on standing;¹⁰² however a potential litigant must satisfy the constitution standing test in order to bring an action before the federal court. This test involves three parts: firstly, the person must show that they have suffered "some threat or actual injury" resulting from the illegal action, such that they have a

97 42 USC § 2000e(a); see similarly (with some variation) 42 USC § 3602(d).

98 29 CFR 1601.7(a).

99 42 USC §§ 2000b(a) and 2000c-6.

100 42 USC §§ 2000a-5, 3614 and 1971(c).

101 See e.g. §§ 2000a-3, 2000b-2 and 2000c-8.

102 In some cases the statute refers to a 'person aggrieved', which has been interpreted by the courts as intending to allowing as broad a standing as is constitutionally possible. See *Hackett v McGuire Bros., Inc.*, 445 F.2d 442, 446, 3 FEP 648, 650 (3d Cir. 1971) as discussed in Larson L, *Employment Discrimination* (2006) at s 78.01(2).

personal stake in the outcome of the controversy; secondly, the interest which is threatened must be “*within the zone of interests to be protected*” by the statute; and thirdly, the injury must be “*likely to be redressed if the relief requested is granted.*”¹⁰³

In general, the courts have interpreted these standing requirements quite broadly. For instance, while non-black workers cannot object to a discriminatory hiring policy of their employer on the grounds that it injures black employees, they may be able to claim on the basis that the hiring policy injures their legitimate interest in working in an inter-racial environment and otherwise negatively impacts upon their working conditions.¹⁰⁴ These requirements may nonetheless restrict the parties who can seek to enforce the law, and the types of remedies they can obtain. For instance, it has been held that an ex-employee does not have standing to seek an injunction to force their previous employer to change their current work practices, since the remedy does not redress any particular harm to the interests of the complainant.¹⁰⁵

As well as being able to bring complaints before the EEOC and HUD, corporations and non-incorporated associations, such as trade unions and anti-discrimination associations may also have standing to bring a court action once the complaint is terminated. An association may sue in its own right if its own interests are affected by discrimination, however these interests are generally confined to economic loss or diminution in membership, and do not include damage to a group’s ‘ideological interests’.¹⁰⁶ Alternatively, an organisation may have standing as a representative of one or more of its members.¹⁰⁷ In the latter case, it is necessary for the members to have standing in their own right, and for the interests which are threatened to be “germane to the organisation’s purposes”. Thus, for instance, a claim based on conditions of employment may be ‘germane to the purposes’ of a trade union,¹⁰⁸ while a claim of sex discrimination would not be ‘germane to the purposes’ of an organisation established to combat racism.¹⁰⁹ It is also necessary to demonstrate that “*neither the claim asserted nor the relief requested requires the participation of individual members*”. Thus, for instance, a claim for individual compensation may require individual participation

103 Larson L, *Employment Discrimination* (2006) at s 78.01(2).

104 *Faulk v Home Oil Co.*, 173 F.R.D. 311, 74 FEP 807 (M.D. Ala. 1997) as cited Larson L, *Employment Discrimination* (2006) at s 78.01(2)(a).

105 *Reese v Batesville Casket Co.* 25 FEP 1472 (D.D.C. 1981), as cited Larson L, *Employment Discrimination* (2006) at s 78.01(2)(c).

106 Gutman J. *Federal Practice Manual for Legal Aid Attorneys* (2006) at chapter 3 para 1D3 http://www.ejustice.org/federal_practice_manual_2006/chapter_3/chap3sec1.html (accessed 1/8/07).

107 *Warth et al v Seldin et al* 422 US 490 at 511, referenced in Larson L, *Employment Discrimination* (2006) at 78.02(2).

108 *Garcia v Spun Steak Co.* (1993, CA9 Cal) 998 F2d 1480, 93 CDOS 5408, 93.

109 *Cox v Consolidated Rail Corp.*, 47 FEP 685 (D.D.C. 1987) as discussed in Larson L, *Employment Discrimination* (2006) at s 78.02(2)(b).

in order to prove various elements of the claim, while a claim for general declaratory or injunctive relief may not.¹¹⁰

2.6 Key differences between Australian and International Regimes

One of the most notable differences between the Australian enforcement regime and that of other jurisdictions, is that the Australian Human Rights and Equal Opportunity Commission does not have standing to bring an action for discrimination on its own initiative. While this is not one of the minimum requirements laid down by E.U. law, the Commissions in each of the three national jurisdictions examined all have the power to investigate and prosecute racial discrimination without relying on individual complaints. This capacity of the Commission to instigate complaints may be a valuable tool for combating systemic discrimination, establishing legal precedent through test cases and responding to situations where no individual has standing, or where the persons affected lack the resources and initiative to make a complaint on their own behalf. For these reasons, recent reviews of both the Canadian and British legislation have strongly recommended that it be retained.¹¹¹ At the same time, the Canadian experience demonstrates that it is important that this power should be consistent with the other roles of the Commission, particularly where the Commission is involved in the adjudication of disputes. Since the adjudicative role of the Australian Commission has, for constitutional reasons, significantly declined in the years since the RDA was originally passed, this could potentially allow scope for the Commission to adopt a larger advocacy role, with greater power to investigate systemic issues and instigate legal action.

The jurisdictions also vary in the extent to which they allow persons who are not affected by the discriminatory conduct to initiate complaints, either on behalf of the victim of discrimination, or simply as a 'concerned citizen' or interested bystander. The power to bring a representative action on behalf of the complainant is quite broad in Canada and the U.S., where representative organisations can both make complaints to the relevant Commission and (in certain circumstances) have standing to appear before the court or tribunal. In contrast, the U.K. allows such organisations to play only a supportive role, providing resources and support to the complainant who must act on their own behalf. Australia falls somewhere in between,

110 *Hunt v Washington State Apple Advertising Comm'n*, 432 US 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) as cited Larson L, *Employment Discrimination* (2006) at 78.02.

111 Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (2000) at Chapter 9, <http://www.justice.gc.ca/chra/en/frp-c9.html> (accessed 4/10/07) and B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000) at 4.26, as cited in Harrington J, 'Making Sense of Equality: A Review of the Hepple Report' (2001) 64(5) *Modern Law Review* 757 at 764.

allowing representatives to bring complaints before the Commission, but allowing only the affected individual to initiate legal action.

Almost no jurisdictions allow a non-involved bystander or witness to discrimination to bring an action if they have not been personally affected and do not represent the victim. Canada is something of an exception to this rule however, as the flexibility of the Canadian complaint process gives the Commission the discretion to accept this kind of complaint, when justice or the public interest so require.

Chapter 3: Direct and Indirect Discrimination

3.1 Statutory Bases of Direct and Indirect Discrimination

Of the five jurisdictions under consideration, only three (Australia, the European Union and the United Kingdom) provide a statutory basis for prohibiting direct and indirect discrimination. These statutory provisions are set out below:

Australia	"It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life." ¹¹¹
European Union	"direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in comparable situation on grounds of racial or ethnic origin." ¹¹²
United Kingdom	"on racial grounds he treats (a person) less favourably than he treats or would treat other persons." ¹¹³

112 *Racial Discrimination Act 1975* (Cth) s 9. Also see sections 11-15 for specific instances of direct discrimination in relation to access, housing, provision of goods and services, trade union membership and employment.

113 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 2(2)(a).

114 *Race Relations Act 1976* (UK) c 74 s 1(1)(a).

Table 4: Statutory Provisions Prohibiting Indirect Discrimination

Australia	<p>“Where:</p> <ul style="list-style-type: none">a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstance of the case; andb) the other person does not or cannot comply with the term, condition or requirement; andc) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”¹¹⁴
European Union	<p>“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other person, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”¹¹⁵</p>
United Kingdom (discrimination on E.U. directive grounds)	<p>“A person also discriminates against another if . . . he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—</p> <ul style="list-style-type: none">a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,

115 *Race Discrimination Act 1975 (UK) s 9(1A).*

116 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, art 2(2)(b).*

	<p>b) which puts that other at that disadvantage, and</p> <p>c) which he cannot show to be a proportionate means of achieving a legitimate aim.”¹¹⁶</p>
<p>United Kingdom (discrimination on non-E.U. directive grounds)</p>	<p>“he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—</p> <p>a) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and</p> <p>b) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and</p> <p>c) which is to the detriment of that other because he cannot comply with it.”¹¹⁷</p>

In the case of the United Kingdom, the *Race Relations Act 1976* (UK) currently includes two definitions of indirect discrimination. In order to comply with its obligations under the E.U. Racial Equality Directive, the United Kingdom introduced a new test in 2003, which more closely, although not precisely, mirrors the Directive definition of indirect discrimination. At the same time, a ‘pre-Racial Equality Directive’ test continues to apply in areas which are not covered by the directive, such as discrimination on the basis of nationality and colour (as distinct from the ‘directive grounds’ of race, ethnic or national origin), discrimination by associations and discrimination by government authorities which does not relate to social security, health care, social protection and social advantages.¹¹⁹ Just how this distinction will operate in practice is unclear, and may lead to some of confusion. This is especially true since indirect discrimination on the grounds of colour and nationality will often also be capable of characterisation as indirect discrimination on the grounds of either race or national or ethnic origin.

117 *Race Relations Act 1976* (UK) c 74 s 1(1A).

118 *Race Relations Act 1976* (U.K.) c 74 s 1(1)(b).

119 *Race Relations Act 1976* (U.K.) c 74 s 1(1B).

Of these four statutory bases for identifying direct and indirect discrimination, only the Australian provisions describe conduct which is unlawful in itself, regardless of the situation in which it occurs. The U.K. and European Union provisions merely define discrimination, which is then declared to be unlawful in certain prescribed areas (as described in Chapter 4).

In each jurisdiction, conduct which places those in a particular racial group at a disadvantage is prescribed, unless it can satisfy some kind of 'reasonableness' or 'necessity' test. Under the Australian test, a requirement will not be considered discriminatory if it is "*reasonable having regard to the circumstances*". This test of 'reasonableness' has been described by the courts as "*less demanding than one of necessity, but more demanding than one of convenience*".¹²⁰ In comparison, the European Union test is stricter, exempting only those conditions which are "*appropriate and necessary*" to achieve a legitimate aim.¹²¹ Of the two U.K. tests, the pre-directive test requires the condition to be "*justifiable*", while the post-directive test requires that the condition be "*a proportionate means of achieving a legitimate aim*". This second definition may still fall short of the E.U. standard of 'necessity', since it could be interpreted to allow measures which are proportionate (taking into account the detriment suffered and the importance of the aim), but which are not 'necessary' since better, alternative means of achieving the goal are available. It is also possible, however, that the U.K. courts will take the Directive into account when interpreting this section, and thus lean towards a stricter test which fulfills the Directive obligations.

The U.K. test of indirect discrimination also falls short of the E.U. Directive due to the fact that it fails to cover indirect discrimination which relates to future or possible events. It prohibits discrimination which "*puts... (the complainant) at that disadvantage*", but does not prohibit discriminatory criteria which, it may be anticipated, would put persons of a particular racial group at a disadvantage, but has so far not been applied to anyone of that racial group.¹²² The United Kingdom has currently received a letter of formal notice from the E.U., requiring it to take further steps to implement the Directive or risk legal sanctions.¹²³

120 Bowen CJ and Gummow J, *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263, as cited in Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005).

121 *Australian Medical Council v Wilson* (1996) 68 FCR 46 as cited Human Rights and Equal Opportunity Commission *Federal Discrimination Law 2005* (2005) at 3.2.3.

122 O'Connell C, *United Kingdom Country Report on Measures to Combat Discrimination* (2007) (unpublished) at 30-31 http://ec.europa.eu/employment_social/fundamental_rights/pdf/leg_net/ukrep07_en.pdf (accessed 3/8/07). But see *Race Relations Act 1976* (UK) c 74 s 72A which prohibits clauses of collective agreements and rules made by employers or trade organisations which may be discriminatory in future.

123 European Commission, 'The Racial Equality Directive' (Press Release 27 June 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/257&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 4/10/07).

The language of the Australian legislation, which states that “a person... requires another person to comply with a term... (and) the other person does not or cannot comply” seems to suggest that the Australian legislation, as in the United Kingdom, deals only with actual events and not with potentially discriminatory conditions.

3.2 Non-Statutory Definitions of Direct and Indirect Discrimination

Neither Canada nor the United States expressly define discrimination in their statute law. In both countries, however, jurisprudence has developed a concept of discrimination which includes an element of indirect as well as direct discrimination.

In the United States, the key case is *Griggs v Duke Power Co.*, in which the court held that the 1964 Civil Rights Act “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”¹²⁴ Practices which have an adverse impact on a protected group will be unlawful unless it can be shown that they are ‘related to job performance’ and ‘business necessity’. Even where an employer can show that the practice relates to business necessity, the complainant may still succeed if they can show that “there were comparable, less discriminatory practices that the employer refused to use.”¹²⁵

The judicial approach has since been reinforced by the *Civil Rights Act (1991)*, which codified the requirements for establishing indirect discrimination in the area of employment, and reiterated the validity of the business necessity test, although without creating a statutory definition of either discrimination or business necessity.¹²⁶

Outside the field of employment discrimination, the application of ‘disparate impact’ (or indirect) discrimination is less clear. While there is still some doubt, “virtually every jurisdiction has held that the ‘disparate impact’ discrimination analysis is appropriate in FHA (Fair Housing Act) cases.”¹²⁷ Some courts have also, with greater hesitation, found it relevant when looking at discrimination in the area of ‘public accommodation’ (the provision of goods and services in hotels, restaurant and places of entertainment).¹²⁸

124 *Griggs v Duke Power Co.*, 401 U.S. 424, 431-2 (1971).

125 DeSario N J, ‘Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law’ (2003) 38(2) *Harvard Civil Rights-Civil Liberties Law Review* 479 at 484. But see also *New York Transit Authority v Beazer*, 40 US 568 (1979), as cited in the same article at 496.

126 42 USC § 2000e-2 k.

127 Stanton J F ‘The Fair Housing Act and Insurance: an Update and the Question of Disability Discrimination’ (2002) 31 *Hofstra Law Review* 141 at 174.

128 *Arguello v Conoco, Inc.*, 207 F.3d 803, 813, n.11 (5th Cir. 2000).

In contrast, the courts have found that disparate impact does not apply in many other areas of discrimination law, including the right to make and enforce contracts,¹²⁹ and the privately enforceable right to prevent discrimination in federally funded programs.¹³⁰ In these cases, it is necessary to show that 'disparate treatment', rather than 'disparate impact' discrimination has occurred, which requires proof of deliberate intent to discriminate. Likewise, the constitutional 'Equal Protection Clauses' have been held to invalidate only those laws which intentionally discriminate against individuals on racial grounds, and not the laws that disproportionately affect a particular racial group.¹³¹ This need to prove intent and a specific discriminatory motive contrasts with the definition of direct discrimination in E.U. and British law, which focus simply on whether an individual has been subject to less favourable treatment.¹³² Australian courts have also held that intent or discriminatory motive are not essential to proving direct discrimination.¹³³

As in the United States, the statute law in Canada contains no express definition of discrimination, however judicial interpretation in Canada has favoured an approach which recognises both direct and indirect discrimination in all areas where discrimination is prohibited. Discrimination, as the term is used in the Charter of Rights and Freedoms, has been defined by the Supreme Court to mean "*a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.*"¹³⁴

Since the 1999 cases of *Meiorin* and *Grismer*, the Canadian courts have deliberately avoided drawing a distinction between direct and indirect discrimination.¹³⁵ Rather than having separate conditions that apply specifically to indirect discrimination, such as the 'reasonableness', 'proportionality',

129 *Queen v Dresser Industries, Inc.* 456 F Supp 257, (1978, DC Md), affd without op 609 F2d 509 (1979, CA4 Md).

130 *Alexander v Sandoval*, 532 U.S. 275 (2001), citing *Alexander v Choate*, 469 U.S. 287, 293 (1985).

131 *Washington v Davis*, 426 U.S. 229 (1976).

132 For a discussion of cases in support of this principle, see Hepple B, 'David C. Baum Memorial Lecture: The European Legacy of *Brown v Board of Education*' (2006) 3 *University of Illinois Law Review* 605 at 614.

133 *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 74 as cited in: Human Rights and Equal Opportunity Commission *Federal Discrimination Law 2005* (2005) at 3.2.2.

134 Dickson C.J. and McIntyre, Lamer, Wilson and L'Heureux-Dubé JJ, *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143.

135 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ('*Meiorin case*'); and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ('*Grismer case*'); as discussed in Canadian Human Rights Commission, *Bona Fide Occupational Requirements and Bona Fide Justifications Under the Canadian Human Rights Act* (2007) <http://www.chrc-ccdp.ca/discrimination/occupational-en.asp> (accessed 7/10/07).

'necessity' or 'business necessity' tests already referred to above, the Canadian courts have developed a unified test to be applied to both direct and indirect discrimination. Thus, under the *Canadian Human Rights Act*, a policy or practice will be invalid if it disadvantages a protected group, whether directly or indirectly, unless it falls within the statutory defences of bona fide occupational requirement (in the case of employment) or bona fide justification.¹³⁶ Moreover, the *Canadian Human Rights Act* specifies that a practice can only be found to be a bona fide occupational requirement or justification if "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."¹³⁷

The significance of this is two-fold; Firstly, it imposes a strict test for indirect discrimination, requiring an employer or service provider to do everything possible short of 'undue hardship' to avoid imposing conditions which disadvantage individuals on the grounds of race. It has been suggested by the *Canadian Human Rights Commission* that "(t)he cost of a proposed accommodation would be considered 'undue' if it is so high that it effects the very survival of the organization or business, or it threatens to change its essential nature. The mere fact that some cost, financial or otherwise, will be incurred is insufficient to establish undue hardship."¹³⁸

The second feature of this approach is that it makes even *direct* discrimination lawful in cases where it can be shown that there is a bona fide reason for the discrimination, and avoiding that discrimination would cause undue hardship. In this context, it should be noted that the *Canadian Human Rights Act* covers a range of different grounds of discrimination in addition to race, and that the majority of cases examining whether direct discrimination represents a bona fide occupational requirement or justification have concerned other grounds, in particular disability.¹³⁹

136 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ('Meiorin case'); and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ('Grismer case'); as discussed in Canadian Human Rights Commission, *Bona Fide Occupational Requirements and Bona Fide Justifications Under the Canadian Human Rights Act* (2007) <http://www.chrc-ccdp.ca/discrimination/occupational-en.asp> (accessed 7/10/07).

137 *Canadian Human Rights Act*, RS 1985, c. H-6 s 15(2).

138 Canadian Human Rights Commission, *Duty to Accommodate Fact Sheet* (2004) http://www.chrc-ccdp.ca/preventing_discrimination/duty_obligation-en.asp (accessed 9/8/07).

139 See for example *B.C. (Superintendent of Motor Vehicles) v B.C. (Council of Human Rights)* [1999] 3 S.C.R. 868, regarding the denial of services (in this case a driver licence) to those with limited vision.

It is possible, however, for a directly discriminatory racial prerequisite in employment to constitute a bona fide occupational requirement; one often cited example is where an actor of a particular race is required to portray a specific character in a performance. Exceptions for bona fide occupational requirements also appear in the United Kingdom,¹⁴⁰ in the E.U. directive,¹⁴¹ and (on the grounds of nationality alone) in the United States,¹⁴² but do not appear to have an equivalent in the Australian legislation.

140 See *Race Relations Act 1976* (UK) c 74 s 4A (race, ethnic and national origin) and s 5 (separate test for colour and nationality).

141 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 art 4.

142 42 USC § 2000e-2 (e).

Chapter 4: Grounds of Discrimination

Of the five jurisdictions under consideration, only the Australian legislation contains a general prohibition of all racial discrimination which detracts from the equal enjoyment of “any human right or fundamental freedom in... any... field of public life”.¹⁴³ In the remaining four jurisdictions, discrimination is only prohibited when it occurs in specified fields, such as employment or housing. Specific contexts in which discrimination is prohibited are also listed in the *Racial Discrimination Act 1975* (Cth), in addition to the general proscription. Anecdotal evidence suggests that some members of the community prefer the clarity of these specific sections of the act, and find the abstract definition relatively difficult to understand. Perhaps for this reason, the majority of complaints continue to be brought in reference to the specifically listed grounds, making it important to ensure that these specific grounds cover the major areas in which discrimination may occur.

4.1 Common Grounds of Discrimination: Equality Before the Law

Every jurisdiction contains some provisions, whether constitutional or statute based, which provide for equality under the law. The right to be free from discriminatory laws is protected by the *Canadian Charter of Rights and Freedoms* and by the equal protection clause of the *U.S. Constitution*, although the latter applies only to intentionally discriminatory laws (see discussion above at 3.2).¹⁴⁴ The E.U. *Racial Equality Directive* also requires all states to ensure that “any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.”¹⁴⁵ In the U.K., as well as being subject internationally to the *Racial Equality Directive*, the legislature’s power to make discriminatory laws is restricted by the *European Convention on Human Rights*.¹⁴⁶ This Convention may be enforced (to a limited extent) domestically through the *Human Rights Act 1976* (UK),¹⁴⁷ and internationally through the *European Court of Human Rights*.¹⁴⁸

In Australia, equal protection under the law is conferred by section 10 of the *Racial Discrimination Act 1975* (Cth). As a non-entrenched federal statute, the *Racial Discrimination Act 1975* (Cth) has the power to override

143 *Racial Discrimination Act 1975* (Cth) s 9(1).

144 *Canadian Charter of Rights and Freedoms*, Schedule B *Constitution Act 1982* (U.K.) cl 15(1), U.S. Constitution amend XIV s 1 (see also 42 USC § 1981).

145 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 14 (a).

146 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953), art 14.

147 All laws must be interpreted so as to give effect to Convention rights: *Human Rights Act 1998* (U.K.) c 42 s 3, and legislators must make a declaration of compatibility when passing laws: *Human Rights Act 1998* (UK) c 42 s 19. Discussed above at 1.3.

148 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953), Part II.

discriminatory state laws and prior Commonwealth laws, but may be overridden by later Commonwealth laws that expressly or by implication exclude its operation.

4.2 Common Grounds of Discrimination: Employment

Discrimination in employment is prohibited in all five jurisdictions.¹⁴⁹ Most jurisdictions also cover employer or professional organisations, although generally only with regards to their ability to influence employment discrimination.¹⁵⁰ Only the U.K. and the E.U. directive specifically prohibit discrimination with regards to membership in such organisations.¹⁵¹ In contrast, trade unions are usually cited both in regard to membership and with respect to their influence on employment discrimination.¹⁵²

4.3 Common Grounds of Discrimination: Housing and Accommodation, Access to Facilities and Provision of Goods and Services

Other common areas covered by most anti-discrimination legislation include access to housing and accommodation, access to public facilities and the provision of goods and services to the public. In the U.S., discriminatory access to facilities is only prohibited with regards to state-run facilities,¹⁵³ and places of 'public accommodation' including hotels, restaurants and places of entertainment, along with other establishments located on the same premises.¹⁵⁴ There is also no general prohibition on discrimination in the supply of goods and services except in these locations. There is, however, a general right to equal treatment in the 'making and enforcing of contracts',¹⁵⁵ which in some circumstances can give protection against discrimination in the supply of goods and services.¹⁵⁶

149 *Racial Discrimination Act 1975* (Cth) s 15; *Canadian Human Rights Act*, RS 1985, c. H-6 s 7; *Race Relations Act 1976* (UK) c 74 part II; and 42 USC § 2000e.

150 *Racial Discrimination Act 1975* (Cth) s 15(3), *Canadian Human Rights Act*, RS 1985, c. H-6 s 10. There is no specific reference in U.S. legislation.

151 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22 art 3 (1) (d), *Race Relations Act 1976* (UK) c 74 s 11.

152 *Racial Discrimination Act 1975* (Cth) ss 14 and 15(3), *Canadian Human Rights Act*, RS 1985, c. H-6 ss 9 and 10, 42 USC § 2000e-2 c).

153 42 USC § 2000b.

154 42 USC § 2000a.

155 42 USC § 1981.

156 But note that the use of this section has been limited by a strict interpretation by the courts of the 'contractual relationship' to be protected. See discussion in; Harris A. G., 'Shopping While Black: Applying 42 USC § 1981 to Cases of Consumer Racial Profiling' (2003) 23 *B.C. Third World L.J.* 1 at 36-40.

4.4 Less Common Grounds

Other, less common areas in which discrimination is prohibited include education, which is specifically cited in the U.S., U.K. and in the E.U. directive, but not mentioned in either of the Australian or Canadian acts.¹⁵⁷

In addition:

- the E.U. directive specifically lists ‘social protection (including social security and healthcare)’ and ‘social advantages’;¹⁵⁸
- the U.S. proscribes discrimination in all federally funded programs, and also has specific prohibitions on discrimination in the area of voter registration.¹⁵⁹ It is also prohibited to take race into account when making decisions relating to adoption.¹⁶⁰

The U.K. *Race Relations Act* cites a number of grounds which are not covered elsewhere including:

- discrimination in the carrying out of all public functions, including those which are delegated to private actors;
- partnerships (in some cases restricted to those with more than 6 partners);
- associations with more than 25 members;
- ‘qualifying bodies’ that grant qualifications relating to employment in a particular profession; and
- discrimination in the distribution of public honours and government appointments.¹⁶¹

While the general clause in the Australian legislation would cover most of the grounds listed above, it is most probably the case that not all of these areas would be covered. Under the *Racial Discrimination Act 1975* (Cth), discrimination is prohibited only in cases where it detracts from the equal enjoyment of “any human right or fundamental freedom” in public life.¹⁶² While this is broader than any individual ground in any of the other jurisdictions, it may not be broad enough to include conduct such as the discriminatory distribution of public honours or social advantages, which may be characterised as benefits or privileges rather than human rights.

157 42 USC § 2000c; *Race Relations Act 1976* (U.K.) c 74 s 17-19ZA; and *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22 art 3 (1)(g).

158 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22 art 3(1)(e-f).

159 42 USC § 2000d and 42 USC § 1971.

160 42 USC § 1996b. Note that there is an exception for children covered by the *Indian Child Welfare Act of 1978*, which creates a preference for placing Native American children with extended family or tribe members.

161 Respectively; *Race Relations Act 1976* (UK) c 74 ss 19B, 10, 25, 12 and 76.

162 *Racial Discrimination Act 1975* (Cth) s 9(1).

This issue has arisen previously in Australia with respect to allegations of discrimination in providing government loans for war veterans.¹⁶³ In this case, the court held that such benefits could not be characterised as human rights for the purpose of the act, and thus fell outside even the broad section nine definition of discrimination.¹⁶⁴ In contrast, it has been accepted that the distribution of ex gratia payments to persons interred in Japanese concentration camps during the war, along with other types of discretionary payments, will fall within the definition of 'social advantages' under E.U. and British law.¹⁶⁵

163 *Secretary, Department of Veteran's Affairs v P* (1998) 79 FCR 594.

164 See also the discussion of this theme in; Human Rights and Equal Opportunity Commission *Federal Discrimination Law* (2005) at 3.2.4.

165 *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 56.

Chapter 5: Special Measures

In many jurisdictions, one of the most significant exceptions to the operation of race discrimination law is the exception for ‘special measures’. These are measures which confer an advantage or benefit on people of a particular race or ethnicity in order to counteract the economic and social disadvantages suffered by that racial group as a result of historic discrimination. While they involve discrimination between individuals on the basis of race, in the sense of treating people differently depending on their race or ethnic background, the ultimate aim of these kinds of measures is to ensure that people of all races have equal opportunities to develop their human potential and enjoy equal access to human rights and freedoms.

5.1 Special Measures in International Law

The concept of ‘special measures’ is expressed in the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), which declares that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintaining of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.¹⁶⁶

In addition to permitting such ‘special measures’, the Convention also places a positive obligation on states to take such steps where they are required in order to “ensure the adequate development and protection of certain racial groups... for the purpose of guaranteeing them full and equal enjoyment of human rights and fundamental freedoms.”¹⁶⁷

5.2 Special Measures in Australia, Canada and the European Union

In Australia, the *Racial Discrimination Act 1975* (Cth) directly incorporates the Convention definition of ‘special measures’. These measures, as defined by the Convention, are exempted from the definition of unlawful

166 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

167 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2(2).

discrimination.¹⁶⁸ This exception does not apply, however, to laws which provide for the management of Aboriginal property without consent, which the Act specifically states cannot be interpreted as ‘special measures’ for the advancement of the Aboriginal people.¹⁶⁹

Similar exceptions for special measures are found in the Canadian jurisdiction. Clause fifteen of the *Canadian Charter of Rights and Freedoms*, which makes laws that discriminate on the basis of race unconstitutional, specifically states that (the clause) “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹⁷⁰ A similar exception in the *Canadian Human Rights Act* makes it lawful for “a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.”¹⁷¹

The E.U. Racial Equality Directive also makes an exemption for special measures, stating that: “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”¹⁷²

In all four definitions, the key features which distinguish special measures from unlawful discrimination are that they are:

- Targeted at a particular racial group which is disadvantaged, and is therefore unable to equally enjoy their human rights and fundamental freedoms, and
- Designed to ameliorate that disadvantage and promote substantive (rather than formal) equality between individuals of different races.

Such measures will therefore only be lawful to the extent that the group concerned continues to require special measures to compensate for disadvantage, and will become invalid discrimination once the measures are no longer required in the interests of substantive equality.

168 *Racial Discrimination Act 1975* (Cth) s 8(1).

169 *Racial Discrimination Act 1975* (Cth) s 8(1) and 10(3).

170 *Canadian Charter of Rights and Freedoms*, Schedule B *Constitution Act 1982* (U.K.), cl 15(2).

171 *Canadian Human Rights Act*, RS 1985, c. H-6 s 16.

172 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 5.

While the legislative provisions are similar, the judicial application of the special measures exception has varied somewhat between the Australian and Canadian jurisdictions. In the Canadian constitutional context, the Supreme Court has taken a purposive approach to the interpretation of discrimination, emphasizing that the goal of the equality clause in the Charter is “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.”¹⁷³ The court has therefore been inclined to take into account the social and historical context in which the alleged discrimination occurs, including any historical prejudice, disadvantage or stereotyping experienced by particular groups in the community.¹⁷⁴ The second part of section fifteen of the Charter, set out above, has been interpreted, not as creating an exception to the prohibition of discrimination, but rather as reinforcing an interpretation of the Charter clause which prohibits only substantive, and not formal, discrimination.¹⁷⁵ Since special measures seek to enhance substantive equality by ameliorating the effect of past discrimination and reducing present disadvantages, they will not be considered discriminatory under the Charter, and thus no exception is required to make them lawful.

In contrast, the Australian courts have interpreted attempts to benefit disadvantaged groups (defined by race) as inherently discriminatory acts, which are only lawful because they fall within the special measures exception contained within the Act. While the end result may be the same, and special measures permitted in both jurisdictions, this is a significant conceptual difference which demonstrates a trend in the Australian courts towards a more formal and less contextually dependent concept of discrimination than that which is relied on in the Canadian Constitutional context.¹⁷⁶

5.3 Special Measures in the United Kingdom

The exceptions for special measures in the United Kingdom are much more narrowly framed. In the area of employment, some special measures directed at a particular racial group may lawfully be taken if it can be shown that “the proportion of persons of that group among those doing that work in Great Britain” (or a particular area of Great Britain) “was small in comparison

173 Wilson J, *R. v Turpin* [1989] 1 SCR 1296.

174 Hurley M C, *Chapter Equality Rights: Interpretations of Section 15 in Supreme Court of Canada Decisions* BP-402E (2007). (<http://www.parl.gc.ca/information/library/PRBpubs/bp402-e.htm#endnote5>) (accessed 14/8/07).

175 Iacobucci J, *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950 at paragraph 53: “And finally, we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory.”

176 For criticism of the Australian approach, see: Wojciech S, ‘Gerhardy v Brown v the concept of discrimination: reflections on the landmark case that wasn’t’ (1986) 11(1) *Sydney University Law Review* 5.

with the proportion of persons of that group among the population”¹⁷⁷ These measures are restricted, however, to either providing specifically targeted facilities for training, or encouraging people from the underrepresented group to apply, and it remains unlawful to take race into account when making hiring or promotional decisions.

A recent review of the United Kingdom legislation acknowledged concerns that “the provisions are too restrictive by being limited to training and encouragement for particular work and not wide enough to tackle the kinds of disadvantage suffered in today’s society.”¹⁷⁸ The review noted specifically that some ethnic minorities are better qualified in terms of higher education and degrees than the majority of the population, and yet still experience difficulty entering particular fields of employment. For these groups, mere training is unlikely to provide a remedy to under-representation.

Some special measures outside of the employment context are also permitted. The *Race Relations Act 1976* (U.K.) contains an exemption for any “act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits.”¹⁷⁹ The Commission for Racial Equality has noted that the courts have interpreted the concept of ‘welfare’ quite narrowly in this context, such that it is unlikely to cover all cases in which temporary measures are introduced to combat disadvantage.¹⁸⁰ Thus in both employment and other areas of discrimination, the extent to which special measures are permissible under British law is significantly more restrictive than in the Australian and Canadian jurisdictions, and makes unlawful many measures that would be permitted under the ICERD or E.U. Racial Equality Directive.

5.4 Special Measures in the United States

Unlike the other jurisdictions examined above, the United States legislation contains no express exception for special measures. Moreover, strict judicial interpretation of the ‘equal protection’ clauses in the *United States Constitution* has led to the invalidation of many government affirmative action policies as unconstitutional.

In direct contrast to the Canadian constitutional approach, American courts have refused to allow any distinction at all to be drawn between ‘benign’

177 *Race Relations Act 1976* (U.K.) c 74 ss 37-38.

178 Department for Communities and Local Government ‘A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain: a consultation paper’ (2007) at 72. <http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation> (accessed 7/10/07).

179 *Race Relations Act 1976* (UK) c 74 s 35.

180 Commission for Racial Equality, *CRE Briefings on Discrimination Law Review: Balancing Measures* (2007) at 3 http://www.cre.gov.uk/downloads/dlr_paper5.pdf (accessed 14/8/07).

and 'discriminatory' racial distinctions in the constitutional context.¹⁸¹ All legislative classifications based on race are subject to the same standard of 'strict scrutiny', regardless of whether they perpetuate or seek to remedy historic disadvantage.¹⁸² This 'strict scrutiny' test requires the party seeking to introduce the measure to show that it is 'narrowly tailored' and 'serves a legitimate government interest'. The courts have repeatedly emphasized that this is a heavy burden, and prior to the case of *Grutter v Bollinger* in 2003 (which succeeded by a 5:4 majority), no measure challenged under this doctrine had ever been found to comply.¹⁸³

Part of the reason why the 'strict scrutiny' test is so difficult to meet is the court's extremely narrow interpretation of the concept of 'legitimate government interest'. While it has been accepted that the state may have a legitimate interest in acting to remedy past, specific instances of discrimination within an institution or industry, there is no corresponding legitimate interest in remedying broader social disadvantage. As stated by Justice O'Connor, "*a governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.*"¹⁸⁴ Thus the mere fact that individuals of a particular racial group are experiencing current disadvantage, and require assistance in order to have substantively equal access to basic human rights such as education or employment, is of itself insufficient to justify racially-targeted measures under the U.S. Constitution.

As an alternative to showing that positive measures are put in place in response to specific instances of discrimination, the courts have also been willing to accept that state institutions, particularly educational institutions, may have a legitimate interest in promoting diversity.¹⁸⁵ Thus in *Grutter v Bollinger*, the policy of a university law school, which considered race amongst other factors in the interests of "*assembling a class that is both exceptionally academically qualified and broadly diverse*", was held not to fall foul of the constitutional amendment.¹⁸⁶

181 For a discussion of the historic and cultural differences between the U.S. and Canada which are reflected in their very different approaches to affirmative action see: Ross S F, 'Symposium: 20 Years Under the Charter: Charter Insights for American Equality Jurisprudence' (2002) 21 *Windsor Year Book of Access to Justice* 227.

182 The key cases in this regard are *City of Richmond v J.A. Croson Co.*, 488 U.S. 469 (1989), in which strict scrutiny was applied to state affirmative action programs, and *Adarand Constructors, Inc. v Peña* 515 U.S. 200 (1995), in which the same standard was extended to federal affirmative action.

183 *Grutter v Bollinger* 123 S. Ct. 2325 (2003). As discussed in Primus R A, 'Equal Protection and Disparate Impact: Round Three' (2003) 117(2) *Harvard Law Review* 493 at 501.

184 O'Connor J, *Wygant v Jackson Board of Education*, 476 U.S. 267 (1986) at 288.

185 See particularly Powell J, *Regents of the University of California v Bakke*, 438 U.S. 265 (1978) at 311; affirmed by *Grutter v Bollinger* 123 S. Ct. 2325 (2003).

186 *Grutter v Bollinger* 123 S. Ct. 2325 (2003).

In this case, the court particularly noted the evidence brought by the university which demonstrated the educational benefits of diversity on the broader student body. As the court has stated in a more recent decision, it is necessary for the party concerned to satisfactorily demonstrate the “pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.”¹⁸⁷ In the context of the approach to ‘special measures’ taken in other jurisdictions, this focus is unusual, since it appears that racial distinction must be justified on the basis of the benefits it confers on those of *other* races, rather than on the disadvantaged group itself.

Outside of the constitutional context, the courts have been somewhat less strict in relation to affirmative action taken by private actors. In the employment context, it may be lawful to take measures to redress ‘manifest imbalance’ between the number of persons of a particular race employed and the proportion of those persons in the relevant labour market who possess the necessary qualifications. Unlike in the constitutional context, this ‘imbalance’ need not be traceable to any specific acts of discrimination within the industry concerned, and may be the result of mere ‘societal’ disadvantage.¹⁸⁸ It will not, however, justify affirmative action when the effect of such broad social disadvantage and inequality has been to limit the number of persons of a particular race who have the necessary qualifications, rather than the number of qualified persons employed.

In order to be lawful under the *Civil Rights Acts*, these kind of affirmative action measures must be flexible and temporary and designed to eliminate an imbalance rather than maintain racial balance. They also cannot ‘unnecessarily trammel’ the interests of other racial groups by, for instance, requiring current employees to be dismissed and replaced by those of a particular racial group, or placing an absolute bar on the hiring or promotion of those outside a particular racial group.¹⁸⁹

187 *Parents Involved in Community Schools v Seattle School District No 1*, No 01-35450 (9th Cir. July 27, 2004) www.supremecourtus.gov/opinions/06pdf/05-908.pdf (accessed 15/8/07).

188 *Johnson v Transportation Agency* 480 U.S. 616 (1987). As discussed in Larson L, *Employment Discrimination* (2006) at 62.05 (2).

189 Test established in *United Steelworkers v Weber* 443 U.S. 193 (1979). As discussed in Larson L, *Employment Discrimination* (2006) at 62.01.

Chapter 6: Racial Vilification

The term 'racial vilification' can be defined in a number of ways. Generally, it is used to refer to offensive and abusive comments which either express or incite serious hatred and contempt for individuals on the grounds of their race or ethnicity. Other terms which are often used interchangeably throughout the various jurisdictions include 'racial hatred', 'hate propaganda' and 'hate speech'.

This chapter will examine some of the responses to racial vilification, focusing primarily on the attempts to restrict it through civil and criminal legislation. In doing so, it is important to bear in mind that in many jurisdictions legislation is not the sole response to this issue, and campaigns to raise public awareness and promote cross-cultural relationships play at least an equally important role in combating racial hatred.

Having looked at the legislation covering racial vilification in each of the jurisdictions, and some of the exemptions and constitutional issues which may limit the coverage and effect of these laws, this chapter will also examine some of the related issues that arise with respect to racial vilification law. For example the extent to which such laws should also deal with vilification on non-racial grounds such as religion or sexual orientation, and the use of the criminal law to deal with other manifestations of racial bias, such as harassment and racially motivated crime.

6.1 Racial Vilification and International Human Rights Law

The *International Convention on Civil and Political Rights* (ICCPR) states that "(a)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."¹⁹⁰ More specifically, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) requires all signatory states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred... as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin..."¹⁹¹ While these two treaties have been ratified by all of the countries examined in this report, both the U.S. and Australia have made reservations with regards to this particular issue.

The U.S. reservation to the ICERD states "(t)hat the Constitution and laws of the United States contain extensive protections of individual freedom of

190 *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, Article 20(2) (entered into force generally 23 March 1976).

191 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, art 4 (a) (entered into force generally 4 January 1969).

speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.”¹⁹²

In contrast, the Australian reservation to the ICERD is provisional, and states, “(t)he Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention... It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).”¹⁹³ Despite the temporary nature of this reservation, all attempts to pass legislation fully implementing this treaty by introducing criminal offences of racial hatred and vilification have so far been unsuccessful.¹⁹⁴

6.2 Racial Hatred Law in Australia

In 1995, the Australian government passed the *Racial Hatred Act*, which added various amendments to the *Racial Discrimination Act 1975* (Cth). By way of compromise, this Act made racial vilification unlawful, and subject to the same range of civil remedies as racial discrimination, but did not make it a criminal offence. Under the amended *Racial Discrimination Act*, it is unlawful “to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people” and “the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.”¹⁹⁵ While the offensive action must be done “because of” the race, colour or ethnic or national origin of the other person, this need not be the sole, or even the dominant reason for the act. It is sufficient if one of the motives behind the action is the race or colour of the victim.¹⁹⁶

In 2005 the Australian government redefined the offence of sedition, previously believed to have fallen into disuse. The new law makes it a criminal offence if a person “urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished).”¹⁹⁷ This new offence

192 <http://www.ohchr.org/english/countries/ratification/2.htm#reservations> (accessed 7/10/07).

193 <http://www.ohchr.org/english/countries/ratification/2.htm#reservations> (accessed 7/10/07).

194 See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005), paragraph 12; “The Committee notes that Australia has not withdrawn its reservation to article 4 (a) of the Convention. It notes with concern that the Commonwealth, the State of Tasmania and the Northern Territory have no legislation criminalizing serious acts of racial hatred or incitement to racial hatred.”

195 *Racial Discrimination Act 1975* (Cth) s 18C.

196 *Racial Discrimination Act 1975* (Cth) s 18B.

197 *Criminal Code Act 1995* (Cth) s 80.2(5).

may go some way towards creating a criminal offence of racial vilification, at least in its most serious manifestation where it involves incitement to the use of force or violence. It has, however, a number of significant limitations. For a start, the offence of sedition applies only where “*the use of the force or violence would threaten the peace, order and good government of the Commonwealth.*” This provision has been criticised on the basis that violence against small minority groups, which are the most vulnerable to racially directed violence, is unlikely to threaten either the geographic integrity or the government institutions of the Commonwealth, and thus is likely to fall outside the provisions of the law.¹⁹⁸ The characterisation of this law as a law of ‘sedition’ has also led to concern that the focus of this law will be directed more towards the protection of the state than towards the needs and interests of racial minorities.¹⁹⁹

6.3 Racial Hatred Laws in Canada

The Canadian *Criminal Code* contains a number of racial hatred offences. It is an offence to advocate or promote genocide against a particular race.²⁰⁰ It is also an offence, by “*communicating statements in a public place*” to “*incite(..) hatred against any identifiable group where such incitement is likely to lead to a breach of the peace*.”²⁰¹ An ‘identifiable group’ is defined by the Act as “*any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.*”²⁰² It is also an offence to communicate statements “*otherwise than in private conversation*” which “*wilfully promote(..) hatred against an identifiable group.*”²⁰³ The Supreme Court has interpreted ‘wilfully’ in this context to require proof of either an intention to promote racial hatred, or “*knowledge of the substantial certainty of such a consequence*”, thus imposing a “*stringent standard of mens rea*.”²⁰⁴

In addition to these criminal offences, the *Canadian Human Rights Act* also declares it a ‘discriminatory practice’ to send repeated messages over the telephone or internet which are “*likely to expose a person... to hatred or contempt*” because of their race or other proscribed grounds of discrimination.²⁰⁵ Like the provisions of the Australian *Racial Discrimination Act*, this ‘discriminatory practice’ is not a criminal offence, but may be enforced through the civil procedure established to deal with discrimination.

198 Australian Law Reform Commission, ‘Fighting Words: A Review of Sedition Laws in Australia’ (2006) ALRC Report 104, s 10.61 and generally Chapter 10.

199 Australian Law Reform Commission, ‘Fighting Words: A Review of Sedition Laws in Australia’ (2006) ALRC Report 104, s 10.47.

200 *Criminal Code*, RS 1985, c. C-46 s 318.

201 *Criminal Code*, RS 1985, c. C-46 s 319(1).

202 *Criminal Code*, RS 1985, c. C-46 Code s 319(7).

203 *Criminal Code*, RS 1985, c. C-46 s 319(2).

204 Dickson C.J. and Wilson, L’Heureux-Dubé and Gonthier JJ, *R. v Keegstra*, [1990] 3 SCR 697.

205 *Canadian Human Rights Act*, RS 1985, c. H-6 s 13(1).

6.4 Racial Hatred Laws in the United Kingdom

Racial hatred offences in the United Kingdom are contained within the *Public Order Act 1986* (UK). Under this act, it is an offence to use, display, publish, show or distribute any words, images or behaviour (including a public broadcast or a play) which are “*threatening, abusive or insulting*” and which are either intended or likely to stir up racial hatred.²⁰⁶

While a person who uses or displays threatening or insulting words or behaviour need not have any intention to stir up racial hatred, it is a defence to show that he (sic) “*did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.*”²⁰⁷ It is therefore necessary to show that the offender was subjectively aware of the possibility that their behaviour might be threatening, abusive or insulting, as well as the objective fact that the behaviour in question was likely to stir up racial hatred. In contrast, a person who publishes and distributes the words of others (either in written form or as an audio or visual recording) must satisfy the stricter test that “*he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting*” (emphasis added).²⁰⁸ The director or producer of a public broadcast or play, meanwhile, may be found innocent of this offence even when they are aware of the threatening, abusive or insulting nature of the material, as they need only show that they “*did not know and had no reason to suspect that the circumstances... would be such that racial hatred would be likely to be stirred up.*”²⁰⁹

Offenders under the *Public Order Act 1986* (UK) may be penalised by up to seven years imprisonment, if tried on indictment.²¹⁰ In comparison, the maximum sentence possible under the Canadian racial vilification legislation is two years (or five years for advocating genocide).²¹¹ In the United Kingdom, the consent of the Attorney-General is required before any prosecution for racial vilification can take place.²¹² This is also true of the sedition offences in Australia, and the offences of wilfully promoting hatred or advocating genocide under the Canadian statute.²¹³ In contrast, the Canadian offence of inciting hatred which is likely to lead to a breach of the peace may be criminally prosecuted without executive consent, and the

206 See *Public Order Act 1986* (U.K.) c 64 ss 17-22. Note that the Act also covers the presenting or directing of a public performance of a play, the public showing of a recording and the broadcasting of a program service. It also makes it offence to possess offensive material for the purpose of making it public (s23).

207 *Public Order Act 1986* (U.K.) c 64 s 18(5).

208 *Public Order Act 1986* (U.K.) c 64 ss 19(2) and 21(3).

209 *Public Order Act 1986* (U.K.) c 64 ss 20(2)(c) and 22(5)(b).

210 *Public Order Act 1986* (U.K.) c 64 s 27(3).

211 *Criminal Code*, RS 1985, c. C-46 ss 318(1), 319(1) and 319(2).

212 *Public Order Act 1986* (U.K.) c 64 s 27(1).

213 *Criminal Code Act 1995* (Cth) s 80.5A, *Criminal Code*, RS 1985, c. C-46 s 318(3) and s 319(6).

civil provisions of both the Australian and Canadian acts may be pursued by any individual with standing to bring a complaint.²¹⁴

6.5 Exceptions

Restrictions on the promotion of racial hatred and vilification are often highly controversial, due to the limits they impose on the right to freedom of speech. One way in which legislators have sought to balance the right to be free from racial vilification and the right to legitimate free expression is by excluding certain types of communication from the operation of racial vilification laws.

One area that is commonly excluded is private communication which does not intrude into the public sphere. Thus, the Australian legislation applies to acts done 'otherwise than in private', which includes any act which "causes words, sounds, images or writing to be communicated to the public", "is done in a public place" or "is done in the sight or hearing of people who are in a public place".²¹⁵ Similarly, the Canadian criminal offences apply to communication which takes place "in a public place" or "otherwise than in private conversation".²¹⁶ In the United Kingdom, the act applies both in public and in private, but not "where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling".²¹⁷ It is also a defence for the accused to show that they had no reason to suspect that their words or behaviour could be heard or seen by a person outside of the dwelling.²¹⁸

Both the Australian and Canadian legislation also set out a list of specific exceptions, designed to protect speech which is perceived as legitimate or socially valuable. Under the Australian *Racial Discrimination Act 1975* (Cth), these exemptions include:

- anything said or done reasonably and in good faith;
- a) in the performance, exhibition or distribution of an artistic work; or
- b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- c) in making or publishing;
 - i) a fair and accurate report of any event or matter of public interest; or

214 For a discussion of standing requirements, see Chapter 2.

215 *Racial Discrimination Act 1975* (Cth) s 18C(2).

216 *Criminal Code*, RS 1985, c. C-46 s 319.

217 *Public Order Act 1986* (U.K.) c 64 s 18(2).

218 *Public Order Act 1986* (U.K.) c 64 s 18(4).

- ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.²¹⁹

The Canadian *Criminal Code* also contains exemptions, however these apply only to the offence of wilfully promoting hatred, and not to the offence of inciting hatred which is likely to lead to a breach of the peace, or advocating genocide. These exemptions provide that:

No person shall be convicted of an offence...

- a) if he establishes that the statements communicated were true;
- b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.²²⁰

The condition that applies to all exemptions under the Australian legislation, that the actions concerned be both 'done reasonably and in good faith' contains both objective as well as subjective elements. It requires an analysis of both the objective facts and the state of mind of the accused. In contrast, some of the Canadian exemptions may be satisfied by a purely subjective test, such as sections b) and d), which depend purely on the honesty and integrity of the intentions of the accused, and not on any objective question of whether such religious arguments are reasonable, or whether the actions of the accused are reasonably likely to be interpreted in the manner in which they are intended. In other cases, the test is purely objective, since a person may make any statement with malicious intent so long as the statement is factually true.

The United Kingdom legislation contains only one exemption, which is much narrower than those discussed above, and applies only to 'fair and accurate reports' of parliamentary or judicial proceedings.²²¹ At the same time, the *Human Rights Act 1998* (UK) imposes an obligation on British courts to interpret the legislation, where possible, to be compatible with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.²²² This Convention, which includes the right to

219 *Racial Discrimination Act 1975* (Cth) s 18D.

220 *Criminal Code*, RS 1985, c. C-46 s 319(3).

221 *Public Order Act 1986* (UK) c 64 s 26. Note that a much broader exemption applies in the area of religious vilification, which is discussed below at 6.8.1.

222 *Human Rights Act 1998* (UK) c 42 s 3.

freedom of expression, imposes some limitations on the extent to which racial vilification can be regulated, and will be discussed further below.

6.6 Racial Hatred Law in the European Union

The European Union is currently in the process of formulating a Framework Decision which will require all member states to meet a minimum standard with regard to the proscription of racial hatred and vilification. In April 2007, after six years of negotiations, the Council of E.U. Justice Ministers reached an agreement as to the text of this Framework Decision, however it has yet to be formally adopted, and it remains unclear if any major changes will be made before it becomes law.

If adopted in its current form, the Framework Decision will require all E.U. states to penalise *“publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”*²²³ They will also be required to create an offence of *“publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes... directed against a group of persons... defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group...”*²²⁴ A similar offence will apply in relation to the denial or trivialisation of crimes defined by the Nuremberg Tribunal.²²⁵ There is an exception, however, which provides that states may elect not to punish conduct which falls within the definitions above unless it is either *“carried out in a manner likely to disturb public order”* or *“threatening, abusive and insulting”*²²⁶

Under the terms of the Framework Decision states will also be obliged to ensure that the maximum sentence for the offences above is at least 1-3 years imprisonment, and to ensure that any ‘racial and xenophobic motivation’ is taken into account as an aggravating factor for other criminal offences.²²⁷

The Decision lays out a framework for criminalizing the aiding, abetting and instigating of such offences, and for ensuring that legal persons may be held liable for actions carried out on their behalf.²²⁸ It also requires states to put in place mechanisms to ensure that investigation and prosecution is *“not dependent on the report or accusation made by the victim”*, in order

223 Council of the European Union, ‘Proposal for a Council Framework Decision on combating racism and xenophobia’, 8544/07 DROI PEN 34 (Brussels, 17 April 2007), annex 1, art 1(a) <http://register.consilium.europa.eu/pdf/en/07/st08/st08544.en07.pdf> (accessed 30/8/07).

224 *ibid* art 1(c).

225 *ibid* art 1(d).

226 *ibid* art 1a.

227 *ibid* art 3(2) and art 4.

228 *ibid* art 2 and art 5-6.

to ensure that the law protects those who are vulnerable and unable to complain on their own behalf.²²⁹

While there are no specific exceptions, such as those which appear in the Australian and Canadian acts, the Framework Decision states that it “*shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including the freedom of expression and association, as enshrined in Article 6 of the Treaty establishing the European Union*”.²³⁰ This article incorporates the rights declared in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, including article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²³¹

In applying this article to cases involving racial and religious vilification laws, the *European Court of Human Rights* has held that “*there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention*”.²³² This interpretation is reinforced by article 17 of the Convention, which states that “*(n)othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein...*” (including the right to freedom from discrimination).²³³

At the same time, states may only place limits on hate speech which are proportionate to the harm suffered and “*necessary in a democratic society*”.²³⁴ Thus, for instance, the Court has found a Danish law that criminalised not

229 *ibid* art 9.

230 *ibid* art 7.

231 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953), art 10.

232 *Gunduz v Turkey* (2003) Eur Court HR 35071/97 at para 41.

233 See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953), arts 17 and 14.

234 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 5 (entered into force 3 September 1953), art 10.

only the making of racially abusive statements, but the act of reporting such statements in a non-supportive manner in a television news program, to be ‘unnecessary’ and thus invalid under article 10.²³⁵ In other cases, the Court has found that the law itself may be valid, but the application in a particular case may contravene the convention. In *Gunduz v Turkey*, for example, the Court found that insulting and derogatory remarks about the Turkish secular state made by the accused were insufficiently serious to be classified as ‘hate speech’ and justify a conviction for religious vilification.²³⁶

6.7 Constitutional Limitations on Racial Hatred Laws

In addition to appearing in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the right to freedom of expression is also entrenched in both the *U.S. Constitution and the Canadian Charter of Human Rights and Freedoms*.²³⁷ Even in Australia, where the Constitution contains few express rights, the High Court has found an implied right to freedom of political communication based on the democratic nature of the political system.²³⁸ In these jurisdictions, as in the European Union, these constitutional norms have been used to challenge hate speech legislation, with varying degrees of success.

6.7.1 Constitutional Limitations in the United States

The right to freedom of expression is most strictly interpreted in the United States. As Neir emphasises: “Few countries in the world provide as great a protection to free speech, and consequently racist speech, as the United States.”²³⁹ This protection stems from the first amendment to the *U.S. Constitution*, which states that: “Congress shall make no law... abridging the freedom of speech.” While the courts have held that this right is not absolute, and certain limitations on speech may validly be imposed by government, the extent and nature of such permissible limitations is much narrower under U.S. constitutional law than under the laws of many other states.

In the case of *Chaplinsky v New Hampshire*, the United States Supreme Court recognised an area of speech described as ‘fighting words’ which could be validly subject to government regulation. These, the court held, were words which “by their very utterance, inflict injury or tend to incite an immediate breach of the peace”. Such words did not receive the same degree

235 *Jersild v Denmark* (1994) Eur Court HR 15890/89.

236 *Gunduz v Turkey* (2003) Eur Court HR 35071/97.

237 U.S. Constitution, amend I and *Canadian Charter of Rights and Freedoms*, Schedule B *Constitution Act 1982* (UK) cl 2(b).

238 For further: Griffiths L ‘The Implied Freedom of Political Communication: The State of the Law Post Coleman and Mulholland’ (2005) 12 *James Cook University Law Review* 93.

239 Neir C L, ‘Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany’ (1994-95) 13 *Dickinson Journal of International Law* 241 at 265.

of constitutional protection as other speech since “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁴⁰

Based on this theory of ‘fighting words’, it might be possible to infer that narrowly drafted racial vilification laws, which focus solely on speech that ‘tends to incite an immediate breach of the peace’, might be constitutionally legitimate. This assumption was overturned, however, in the landmark case of *R.A.V. v St Paul*. In this case, the Supreme Court considered state legislation which made it an offence to “place(..) on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”²⁴¹ The majority of the court accepted that the legislation could be restrictively interpreted to apply only to ‘fighting words’ which aroused ‘anger, alarm or resentment’, and to exclude conduct which caused merely ‘offence’ or ‘hurt feelings’. They went on to find, however, that while the government may have constitutional authority to regulate the use of ‘fighting words’ in general, it “may not regulate use based on hostility–or favoritism–towards the underlying message expressed”. Thus, while it would be valid for the legislature to ban the use of all communications which ‘arouse anger, alarm or resentment’, to ban only the subset of those communications which express racial hatred invalidly targets speech on the basis of its expressive content, and is thus unconstitutional.²⁴²

In a strong dissent (on this point), Justice Stevens made the argument that, since it was accepted that the government could elect to ban only the most severe and damaging examples of ‘fighting words’, it was legitimate for the state to target racial hatred on the ‘reasonable and realistic’ assumption that it causes “more severe harm to both the target and to society than other threats.”²⁴³ This argument appears to have gained further support from the majority in the case of *Virginia v Black*, which ruled that a state could specifically ban cross burning with the intent to intimidate, rather than intimidation more generally, “because burning a cross is a particularly virulent form of intimidation.”²⁴⁴

240 *Chaplinsky v New Hampshire* (1942) 315 U.S. 568 at 572.

241 *RAV v City of St Paul* 505 U.S. 377 (1992).

242 Scalia J (writing for the majority) in *RAV v City of St Paul* 505 U.S. 377 (1992).

243 Stevens J *RAV v City of St Paul* 505 U.S. 377 (1992); see also the dissent (on this point) of White J.

244 *Virginia v Black et. al.*, 538 U.S. 343 (2003). Note, however, that the court specifically made reference to the fact that ‘cross burning’ need not require racial motive, and is therefore not specifically targeting a particular ‘ideology’ of racial hatred. This analysis seems somewhat contradictory, however, since it may be argued that it is primarily the racial history of cross burning, and its use in this context, which has made it such a ‘virulent form’ of intimidation.

While in some ways this is not a settled area of law, as indicated by the somewhat conflicting cases of *Black* and *R.A.V.* cited above, both cases support the premise that it is unconstitutional for the U.S. government to regulate speech on the basis of the opinion and ideology expressed. It is thus not possible in the United States to fulfill the ICERD requirement to prohibit the dissemination of “*ideas based on racial superiority or hatred*” since these ideas, along with all other ideological viewpoints, are constitutionally protected.

While racist speech and the expression of racist ideas are protected, even in circumstances where they may cause hurt or offence, it is important to emphasise that racist actions, such as discrimination or racial motivated crime, do not receive the same protection, even when it may be argued that such conduct is ‘expressive’ of the same ideas of racial supremacy and hatred. The Supreme Court has upheld the constitutional validity of statutes which make racial bias an aggravating factor when linked to crimes such as assault or property damage.²⁴⁵ It is also constitutionally valid for the federal government to create specific offences which apply to racially motivated violence and threats.²⁴⁶ While these offences do not strictly target racial vilification, since they apply to acts that go beyond the expression of racist ideology and offensive speech, they will be considered in more detail later in this chapter along with other legislative responses to racially motivated crime (see 6.8.2).

6.7.2 Constitutional Limitations in Canada

Racial hatred legislation has also been subject to constitutional challenge in Canada, based on the Charter right to “*freedom of thought, belief, opinion and expression*.”²⁴⁷ In *R v Keegstra*, the Supreme Court considered s319(2) of the Canadian *Criminal Code*, which prohibits the wilful promoting of racial hatred.²⁴⁸ The majority of the court found that this clause did infringe on the right to freedom of expression, but that it was saved by clause 1 of the Charter, which states that Charter rights may be “*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*.”²⁴⁹ In this case, the Canadian Court also came to the conclusion that hate propaganda was “*only tenuously connected with the values underlying the guarantee of freedom of expression*.”²⁵⁰ Based on this view, which acknowledged a hierarchy of more and less constitutionally valuable speech, the Court then went to find that “*(p)arliament’s objective of preventing*

245 *Wisconsin v Mitchell* (92-515), 508 U.S. 47 (1993).

246 See e.g. 18 USC §§ 241-245.

247 *Canadian Charter of Rights and Freedoms*, Schedule B *Constitution Act 1982* (U.K.) cl 2(b).

248 *R v Keegstra*, [1990] 3 S.C.R. 697.

249 *Canadian Charter of Rights and Freedoms*, Schedule B *Constitution Act 1982* (U.K.) cl 1.

250 *R v Keegstra*, [1990] 3 S.C.R. 697.

*the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom.*²⁵¹

6.7.3 Constitutional Limitations in Australia

In Australia, the right to freedom of expression is implied and not expressed, and is limited to what is required for the effective operation of the democratic system of government provided for under the Constitution.²⁵² The test to establish constitutional invalidity is set out in *Lange v Australian Broadcasting Corporation*:

... First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government...²⁵³

In *Jones v Scully*, the Federal Court acknowledged that the *Racial Discrimination Act 1975* (Cth) could in some circumstances burden the freedom of communication about political or government matters, but nonetheless found it to be constitutionally valid, as it satisfied the requirements of the second part of the test in *Lange*. The court held that the *Racial Discrimination Act* was reasonably appropriate and adapted to achieving the legitimate end of eliminating racial discrimination, and that “the constitutionally prescribed system of government does not require an unqualified freedom to publish offensive matter or perform offensive acts that are based on race.”²⁵⁴

6.8 Other Approaches to Racially Offensive Behaviour and the Extension of Racial Vilification Law to Other Grounds

While not directly relating to the prohibition of racial vilification, it is important to mention several issues which often arise in the same context. These are, the extension of racial vilification laws to cover other grounds, such as religion or sexual orientation, and the use of racial bias as an aggravating factor when imposing sentence for other crimes, such as assault or damage to property. Finally, this chapter will examine other offences which are being used to combat racially motivated offensive conduct, such as the offence of racial harassment.

251 Dickson C.J. and Wilson, L’Heureux-Dubé and Gonthier JJ, *R v Keegstra*, [1990] 3 S.C.R. 697.

252 *Jones v Scully* [2002] FCA 1080 (2 September 2002) at 235.

253 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

254 *Jones v Scully* [2002] FCA 1080 (2 September 2002) at 239.

6.8.1 Religious Vilification

One key controversy which has often surfaced with regards to racial vilification laws is the extent to which they should be extended to protect individuals from vilification on other grounds, such as religion. Protection from religious vilification has frequently been controversial, due principally to that fact that while religion, like race, is a personal characteristic, which may be used as a basis for vilification and discrimination, it is also a set of beliefs which may be open to challenge and debate in a free and multicultural society.

In response to this difficulty, each of the four jurisdictions (excluding the United States, which has neither race nor religious vilification laws, for reasons set out above) has taken a different approach. In Canada, the relevant sections of the *Criminal Code* apply equally to vilification on the grounds of race, religion and (since 2004) sexual orientation.²⁵⁵ In the United Kingdom, in contrast, racial vilification laws have not previously been applied to religious vilification. In 2006, the *Racial and Religious Hatred Act* introduced new offences of religious vilification, which commenced operation in October 2007.²⁵⁶ Although these new laws are based on the existing racial hatred legislation, they provide significantly lesser protection for religious vilification. Most notably, the religious vilification laws apply only when the offender intends to stir up religious hatred by their actions, and not when it is merely a likely consequence. They are also limited to prohibiting 'threatening' words or behaviour, and not those that are 'abusive and insulting'.²⁵⁷ In addition, the act specifically creates an exception for "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."²⁵⁸ This broad exemption is designed to permit criticism, even unpleasant and offensive criticism, of religious beliefs, while making it unlawful to incite hatred against individual adherents of that religion.

255 *Criminal Code*, RS 1985, c. C-46 ss 318-320.

256 *Racial and Religious Hatred Act 2006* (UK) c 1.

257 *Public Order Act 1986* (UK) c 64 ss 29A-29F.

258 *Public Order Act 1986* (UK) c 64 s 29J.

At first glance, the proposed Framework Decision for the European Union appears to require member states to provide equal minimum protections against racial and religious hatred.²⁵⁹ Religion, however, is curiously defined by the Decision, which states that “the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.”²⁶⁰ This ‘compromise position’ appears to give little protection to groups who are victimised on the basis of religion alone, and do not belong to a recognised racial or ethnic minority.

The Australian federal legislation does not protect individuals from vilification on the grounds of religion, except in so far as the act is done for a mixture of racial and religious motives, in which case (as noted above), race need not be the sole or dominant reason for the act.²⁶¹ Some religious communities, such as Jews or Sikhs, may also be protected under federal law on the basis that they constitute a ‘race’ or ‘ethnic group’ with shared cultural history and geographic origins. However other religious groups such as Christians or Muslims, which encompass a diverse range of cultural and ethnic backgrounds, are unlikely to fall within this definition.²⁶² Some state jurisdictions in Australia provide protection from religious vilification, however in many states there remains no relevant law covering this area.²⁶³

6.8.2 Racially Motivated Crime

Another issue which often arises in the context of racial vilification is how the state should respond when racial hatred goes beyond words, and is expressed in criminal acts of violence, assault, property damage and public disorder. Crimes such as these are generally prohibited regardless of the motivation of the offender, however many jurisdictions have elected to acknowledge the particular harm caused by racially motivated crimes, which affect not only the individual victim, but the targeted group as a whole. This can be done by either creating a separate category of racially

259 See: Council of the European Union, ‘Proposal for a Council Framework Decision on combating racism and xenophobia’, 8544/07 DROIPE 34 (Brussels, 17 April 2007), art 1(1)(a), which requires states to punish “publicly inciting to violence or hatred directed against a group of persons or a member of such group defined by reference to race, colour, religion, descent or national or ethnic origin.” <http://register.consilium.europa.eu/pdf/en/07/st08/st08544.en07.pdf> (accessed 30/8/07).

260 *ibid*, art 1(1)(b).

261 *Racial Discrimination Act 1975* (Cth) s 18B.

262 See further the discussion in: Human Rights and Equal Opportunity Commission *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004) at 1.3.1.3.

263 Queensland, Victoria and Tasmania currently have laws prohibiting religious vilification, while the remaining states of NSW, Western Australia, South Australia and the Territories do not. *Ibid* at 1.3.2.4.

motivated offences, or taking racial bias into account as an aggravated factor in sentencing.

In its forthcoming Framework Directive, the European Union will require every member state to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating factor, or, alternatively that such motivation may be taken into consideration by the courts in the determination of penalties.”²⁶⁴ The Framework Decision also emphasises that decisions to prosecute offences involving racism or xenophobia should not be “dependent on reports or accusations made by victims, who are often particularly vulnerable and reluctant to initiate legal proceedings.”²⁶⁵

In the United Kingdom, the new European Union policy is unlikely to require any major legislative change, since British law already contains a number of special provisions regarding hate crimes. The *Crime and Disorder Act 1998* (UK) has created a special category of ‘racially aggravated offences’, which include assault, criminal damage, and public order offences “motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.”²⁶⁶ For all other offences, the *Criminal Justice Act 2003* (UK) requires the court to impose a higher penalty where it can be shown that an offence was motivated by hostility towards persons of a particular racial group, or by the presumed sexual orientation or disability of the victim.²⁶⁷ Similarly, the Canadian and United States Courts are obliged to take into account prejudicial motivation of the offender as an aggravating factor when imposing sentence, regardless of whether such prejudice is based on race, religion, gender, disability or sexual orientation.²⁶⁸

The United States has also enacted a number of federal offences which apply specifically to racially motivated crimes. It is an offence, for instance, to use force or the threat of force to ‘injure, intimidate or interfere with’ a person of a particular race because they are undertaking certain federally protected activities, such as attending school, applying for employment or serving as a juror.²⁶⁹ The *Local Law Enforcement Hate Crimes Prevention Act*, currently awaiting approval by the U.S. Senate, will, if passed, create further federal offences of “wilfully caus(ing) bodily injury... through use of fire, a firearm, or an explosive or incendiary device” to a person because of their actual or perceived race, colour or religion, and will no longer require evidence that the victim was undertaking a ‘federally protected activity’

264 Council of the European Union, ‘Proposal for a Council Framework Decision on combating racism and xenophobia’, 8544/07 DROIPEN 34 (Brussels, 17 April 2007), annex 1, art 4 <http://register.consilium.europa.eu/pdf/en/07/st08/st08544.en07.pdf> (accessed 30/8/07).

265 *ibid* cl 8.

266 *Crime and Disorder Act 1998* (U.K.) c 37 ss 28-31.

267 *Criminal Justice Act 2003* c 44 ss 145-146.

268 18 USC Appx § 3A1.1; *Criminal Code*, RS 1985, c. C-46 s 718.2.

269 18 USC § 245.

at the time.²⁷⁰ This Act will also authorise the federal authorities to make grants and otherwise provide assistance to local bodies responsible for the investigation and prosecution of violent hate crime, providing access to greater federal resources in order to ensure that such crimes are effectively dealt with.²⁷¹

In contrast to the other four jurisdictions, Australian federal law does not specifically address racially motivated crime, either as a separate category of offence, or as an aggravating factor with the potential to lead to a higher sentence. Even within the state and territory jurisdictions, which deal with the bulk of criminal offences in Australia, only New South Wales and the Northern Territory specifically include racial hatred as an aggravating factor.²⁷²

The creation of a specific federal offence of racial violence was recommended by HREOC's *National Inquiry into Racist Violence* in 1991,²⁷³ and by the *Australian Law Reform Commission* in 1992,²⁷⁴ but these recommendations have so far not been implemented.

6.8.3 Harassment

Another recent development in modern race-discrimination law has been the development of the offence of racial harassment. Harassment has been defined in the European Union Directive as “*unwanted conduct related to racial or ethnic origin (which) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*”²⁷⁵ To some extent, harassment may cover elements of both racial vilification and racially motivated criminal offences, since it may involve both offensive comments and displays of racism and actions such as low level assault or property damage. It is also unique, however, in that it acknowledges the cumulative impact of a number of different events, rather than assessing each incident in isolation.

Under Canadian law, harassment is a ‘discriminatory practice’ subject to the same civil penalties as racial discrimination. The *Canadian Human Rights*

270 Local Law Enforcement Hate Crimes Prevention Act of 2007 H.R. 1592 (110th U.S. Congress: 2007-2008) s 6.

271 *ibid* s 3.

272 See: *Sentencing Act 1995* (NT) s 6A(e) “the offence was motivated by hate against a group of people”; and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (2)(h) “the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)”.

273 Moss I, ‘The Report of the National Inquiry into Racist Violence’ (1991) 49(2) *Aboriginal Law Bulletin* 16.

274 Australian Law Reform Commission, ‘Multiculturalism and the Law’ (1992) ALRC 57 at 7.33.

275 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 2(3).

Act makes it unlawful “to harass an individual on a prohibited ground of discrimination” in a number of different fields, including the provision of goods and services, access to public facilities and commercial or residential accommodation and in matters related to employment.²⁷⁶ The *Canadian Human Rights Commission* defines as harassment “any behaviour that demeans, humiliates, or embarrasses a person, and that a reasonable person should have known would be unwelcome.”²⁷⁷

In the United Kingdom, racial harassment is both unlawful under the race-discrimination regime, and a criminal offence. In 2003, changes to the Race Relations Act were implemented which made racial harassment unlawful in the areas covered by the European Union directive.²⁷⁸ The statutory definition of harassment closely follows the Directive, defining it as “unwanted conduct [on the grounds of race or ethnic or national origins] which has the purpose or effect of violating that other person’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.”²⁷⁹ It notes, however, that “(c)onduct shall be regarded as having... [the effects above] only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.”²⁸⁰

Racially aggravated harassment is also prescribed by the *Crime and Disorders Act 1998* (UK).²⁸¹ Under this act, it is a criminal offence for a person to pursue a course of conduct (which must involve at least two separate occasions) which he “knows or ought to know” amounts to harassment of another person, and which is motivated by racial hostility. It is also an offence, for racially motivated reasons, “to cause(..) another to fear, on at least two occasions, that violence will be used against him... if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.”²⁸² Although these are criminal offences, with potential penalties of up to 2 years imprisonment for racial harassment, and up to 7 years for causing fear of violence, they do not require proof of intent or subjective knowledge. It is sufficient if a reasonable person in possession of the same information as the accused would know that his conduct amounts to harassment or would cause another person to fear violence.²⁸³

276 *Canadian Human Rights Act*, RS 1985, c. H-6 s 14.

277 *Canadian Human Rights Commission, Anti-Harassment Policies for the Workplace: An Employer’s Guide* (2006) at 1.2.

278 For a discussion of grounds which the UK government considers are not covered by the directive, see above 3.1.

279 *Race Relations Act 1976* (UK) c 74 s 3A (1).

280 *Race Relations Act 1976* (UK) c 74 s 3A (2).

281 *Crime and Disorder Act 1998* (UK) c 37, s 32.

282 *Protection from Harassment Act 1997* (UK) c 40, s 4 (1); as referenced by the *Crime and Disorder Act 1998* (UK) c 37, s 32.

283 *Protection from Harassment Act 1997* (UK) c 40, ss 1(2) and 4(2) as referenced by the *Crime and Disorder Act 1998* (UK) c 37, s 32.

While there is no equivalent offence in Australian federal law, racial harassment is an offence under the state laws of Western Australia. The *Equal Opportunity Act 1984 (WA)* makes racial harassment unlawful when it occurs in the context of employment, education or in relation to accommodation.²⁸⁴ Intentional harassment is also a criminal offence under the Western Australian *Criminal Code*.²⁸⁵

284 *Equal Opportunity Act 1984 (WA)* ss 49A-49C.

285 *Criminal Code (WA)* ss 79-80.

Chapter 7: Positive Duties

In recent years, some jurisdictions have displayed a shift away from laws which merely prohibit discrimination and racial vilification, moving towards those which place a positive burden on particular sectors of society to promote racial tolerance and equality. These new, positive duties have been described as ‘fourth generation’ race discrimination laws, which “*move beyond the fault-based model of existing discrimination law, where legal liability only rests on those individuals who can be shown to have actively discriminated, whether directly or indirectly, and the remedy is to compensate the individual victim.*”²⁸⁶ In contrast, these new types of racial equality duties recognise racial discrimination as a pervasive social problem, rather than an offence which can be attributed to a single individual or group, and place the onus of redressing inequality on those who have the greatest power to achieve social change, rather than on those who are most at fault.

7.1 Positive Duties in the United Kingdom

7.1.1 The General Duty

In 1999, the *Lawrence Report* was released in the United Kingdom in response to the failed police investigation into the racially motivated murder of Stephen Lawrence.²⁸⁷ The report found that a culture of institutional racism was present in the Metropolitan Police Force, and acknowledged the failure of existing race discrimination laws to eliminate systemic racism from British public institutions.²⁸⁸ In response, the British Government instituted a wide ranging reform of the *Race Relations Act*.²⁸⁹ Laws prohibiting racial discrimination, which had previously applied to many public authorities only in their capacity as employers, were extended to cover all public functions. More significantly, a new positive obligation was imposed on a wide range of public authorities to have ‘due regard’ to both “*the need to eliminate unlawful racial discrimination*” and “*the need to promote equality of opportunity and good relations between persons of different racial groups*” when carrying out their public functions.²⁹⁰

286 Fredman S, ‘Equality – A New Generation’ (2001) 30(2) *Industrial Law Journal* 145 at part D.

287 Macpherson W, *The Stephen Lawrence Inquiry: Report Of An Inquiry By Sir William Macpherson Of Cluny Advised By Tom Cook, The Right Reverend Dr John Sentamu, Dr Richard Stone* (1999).

288 For further discussion of the impact of this report see Smyth M and Falk A, *Addressing Systemic Discrimination in the Public Sector* (2003) at 33.

289 *Race Relations (Amendment) Act 2000* (UK) c 34.

290 *Race Relations Act 1976* (UK) c 74 s 71.

7.1.2 Organisations Covered by the Duty

The general duty, set out above, now applies to a long list of specific government authorities and public institutions, including government ministers, the *National Health Service*, the armed forces, police and educational bodies.²⁹¹ It also applies to authorities carrying out immigration and nationality functions, although such authorities are only obliged to eliminate unlawful racial discrimination and promote good relations, and are not required to promote equality of opportunity.²⁹² One unfortunate feature of this approach, which lists specific organisations covered by the duty, is that it has required frequent and detailed amendments, and now lists several hundred individual organisations in a long and complex schedule to the Act. More recent laws extending this duty to sex and disability discrimination have avoided this problem by relying upon a general definition of what constitutes a 'public authority', based on whether the body exercises functions of a public nature.²⁹³

The British regime of positive duties is confined to public institutions and those carrying out public functions, and does not impose duties upon the purely private sector. Private organisations may, however, be affected to the extent to which they do business with public authorities, since the general duty obliges public authorities to have regard to racial equality issues when making procurement decisions and working in partnership with private enterprise.²⁹⁴ In a 2002 survey examining preliminary responses to the duty, the Commission for Racial Equality noted that this was an area, which had received little attention in policy development, and consequently "represents a significant lever for change that is currently underutilised."²⁹⁵

7.1.3 Specific Duties and Codes of Practice

In addition to the general duty to have 'due regard' to eliminating racial discrimination and promoting equality of opportunity and good relations, the Secretary of State is also empowered to impose specific duties, in consultation with the *Commission for Equality and Human Rights* on some

291 *Race Relations Act 1976* (UK) c 74 Schedule 1A.

292 *Race Relations Act 1976* (UK) c 74 s 71A.

293 See *Sex Discrimination Act 1975* (UK) s 21A(2) and *Disability Discrimination Act 1995* (UK) c 50, s 21B(2), as noted in Pigott C, 'Strands of Opportunity' (2007) 157 *New Law Journal* 242.

294 Commission for Racial Equality, *Statutory Code of Practice on the Duty to Promote Equality* (2002) http://www.cre.gov.uk/downloads/duty_code.pdf (accessed 28/9/07) at 2.9-2.13. See also; Commission for Racial Equality, *Public Authorities and Partnerships: A guide to the duty to promote race equality* (2004), http://www.cre.gov.uk/downloads/duty_partnership.pdf (accessed 28/9/07) and Commission for Racial Equality, *Race Equality and Public Procurement: A guide for public authorities and contractors* (2003), http://www.cre.gov.uk/downloads/duty_proc_pa.pdf (accessed 28/9/07).

295 Commission for Racial Equality, *Towards Racial Equality: An evaluation of the public duty to promote race equality and good race relations in England and Wales* (2002) at 6.

or all of the listed authorities.²⁹⁶ Some of the duties that have so far been imposed include the obligation to publish a Racial Equality Scheme, setting out publicly the means by which the organisation intends to comply with its general duties, and the obligation to collect data and monitor the racial background of staff, applicants for employment and recipients of training.²⁹⁷ Educational establishments are also subject to specific duties regarding monitoring the attainment levels of pupils and the impact of policies on staff and students of different racial groups.²⁹⁸

Further guidance for public authorities is provided by statutory codes of practice prepared by the Commission and approved by Parliament.²⁹⁹ The current code sets out in detail the steps which public authorities need to take in order to meet the general and specific duties, including the need to identify and prioritise relevant functions, assess their impact on equality and race relations and make appropriate changes where required.³⁰⁰ While a failure to comply with the code is not necessarily a breach of a statutory duty, the code of practice is admissible as evidence in court, and will be taken into account in any legal proceedings.³⁰¹

The emphasis of both the general and specific duties is on proactively removing barriers to participation and policies or practices which adversely affect particular racial groups. Public authorities have a duty to take positive steps to eliminate unlawful discrimination, rather than passively responding to complaints and legal challenges, as well as an obligation to promote 'equality of opportunity', which goes beyond the duty not to unlawfully discriminate. At the same time, the duty to promote 'equality of opportunity' need not equate to a duty to achieve substantive racial equality. The code of practice emphasises the need to avoid policies which, while falling short of unlawful discrimination, adversely affect equality of opportunity or race relations, but notes that only a limited range of 'positive' measures (such as targeted training and recruitment) are permissible under U.K. law in order to redress persistent racial imbalance.³⁰² This restriction, which is described above (Chapter 5) is in marked contrast to the Canadian approach, which will be discussed further below.

296 *Race Relations Act 1976* (UK) c 74, s 71(2).

297 *Race Relations Act 1976 (Statutory Duties) Order 2001* ss 2 and 5.

298 *ibid* s 3.

299 *Race Relations Act 1976* (UK) c 74, s 71C.

300 Commission for Racial Equality, *Statutory Code of Practice on the Duty to Promote Equality* (May 2002), http://www.cre.gov.uk/downloads/duty_code.pdf (accessed 28/9/07).

301 *Race Relations Act 1976* (UK) c 74, s 71C(11).

302 Commission for Racial Equality, *Statutory Code of Practice on the Duty to Promote Equality* (May 2002), http://www.cre.gov.uk/downloads/duty_code.pdf (accessed 28/9/07) esp. 5.11 and 5.12.

7.1.4 Enforcement Mechanisms

A crucial feature of the new British regime is that it puts in place enforcement mechanisms to ensure that both the general and specific positive duties are implemented, transforming them from aspirational statements into enforceable legal obligations.

The general duty may be enforced by either the Commission or an affected individual, either of whom may seek judicial review of the actions (or inaction) of a government authority.³⁰³ While initially assumed to be quite a weak duty, recent cases such as *Secretary of State for Defence v Elias*³⁰⁴ have demonstrated that “the duty contained in s 71 (is) a salutary requirement in default of which public law decisions (can) be successfully judicially reviewed.”³⁰⁵ In *Elias*, the court held that “(i)t is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them.”³⁰⁶ The failure of the department to give any consideration at all to the potential discriminatory impact of its policies meant that it was clearly in breach of this duty, and made it much more difficult for it to defend its indirectly discriminatory policy on the grounds of necessity.³⁰⁷ As Burnham notes, however, it remains unclear to what extent courts will be willing to find a breach of the general duty in cases where an agency has given superficial ‘regard’ to the impact of its policies on racial inequality, but otherwise failed to take any appropriate action to minimise or avoid negative effects.³⁰⁸

In contrast to the general duty, specific duties are only enforceable by the Commission.³⁰⁹ Where an authority is found by the Commission to be in breach of one of its specific duties, the Commission has the power to issue a compliance notice requiring the organisation concerned to fulfil its obligations, or to provide information in order to demonstrate that the duties have been complied with.³¹⁰ Where the other party fails to respond, the Commission may go before the court to obtain an order forcing the authority to comply.³¹¹ These enforcement measures are lengthy and resource intensive, and remain steps of final resort after cooperative attempts to assist public authorities to meet their responsibilities have

303 The Commission for Racial Equality *The Race Equality Duty: Compliance and Enforcement* <http://www.cre.gov.uk/duty/compliance.html> (accessed 28/9/07).

304 R (on the application of Elias) v Secretary of State for Defence [2006] EWCA Civ 1293.

305 Burnham U, ‘Public Law Update’ 15 *New Law Journal* 429 at para 4.

306 Arden LJ, R (on the application of Elias) v Secretary of State for Defence [2006] EWCA Civ 1293 at para. 274.

307 Mummery LJ, R (on the application of Elias) v Secretary of State for Defence [2006] EWCA Civ 1293 at para. 133.

308 Burnham U, ‘Public Law Update’ 15 *New Law Journal* 429 at para 13.

309 *Race Relations Act 1976* (UK) c 74, s 71E(4).

310 *Race Relations Act 1976* (UK) c 74, s 71D.

311 *Race Relations Act 1976* (UK) c 74, ss 71D and 71E.

been unsuccessful, but they provide an ultimate legal sanction with which to ensure that compliance is compulsory for all the agencies concerned.

7.2 Positive Duties in Canada

In Canada, the concept of a positive duty to promote equality dates back to the first *Employment Equity Act of 1986*, which imposed certain positive obligations upon federally regulated private employers.³¹² This Act was replaced in 1995 by the current *Employment Equity Act*, which extended the duty to include the federal public service, and instituted a more effective system of monitoring and enforcement.³¹³

7.2.1 Organisations and Functions Covered by the Duty

The scope of the Canadian *Employment Equity Act* is both broader and narrower than the equivalent U.K. legislation. It is broader because, unlike the British legislation, it applies to both public and private organisations. In addition to the Federal Public Service and other large public sector employers, the Canadian legislation also applies to all private organisations with more than 100 employees that operate in federally regulated industries such as banking, transportation and communications. In addition, the *Federal Contractors Program for Employment Equity* imposes equivalent obligations on all organisations with more than 100 employees who bid on or receive federal contracts valued at \$200,000 or more.³¹⁴

At the same time, the Canadian Act is considerably narrower in scope, since it imposes positive duties only in the area of employment, unlike the British legislation which applies to ‘all functions’ of public authorities, including law enforcement, administration and service delivery. To some extent, this approach may be problematic since it seeks to address racial inequality at the relatively ‘late stage’ of employment outcomes, rather than addressing factors, such as economic or social disadvantage and access to education, which ultimately contribute to this disparity.

312 *Employment Equity Act*, SC 1995, c. 44. For more information on the historic context in which this Act arose, see: *Employment Equity Act Review: A Report to the Standing Committee on Human Resources Development and the Status of Persons with Disabilities* (December 2001) chapter 2 <http://www.hrsdc.gc.ca/en/lp/lo/lsw/we/review/report/main.shtml#1> (accessed 1/10/07).

313 *Employment Equity Act*, SC 1995, c. 44.

314 Treasury Board of Canada Secretariat, *Contracting Policy: Appendix D “The Federal Contractors Program for Employment Equity”* (July 1 2003) http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/contractingpol_d_e.asp (accessed 1/10/07). See also the *Employment Equity Act*, SC 1995, c. 44 s 42(2), which specifies that the Minister is responsible for ensuring that the Federal Contractors Employment Equity Program imposes requirements which are equivalent to those imposed by the Act.

7.2.2 Nature and Content of the Duty

Unlike the British law, which focuses on the need to promote ‘equality of opportunity’ and eliminate unlawful discrimination, the Canadian *Employment Equity Act* targets the more substantive goal of achieving “equality in the workplace” and explicitly acknowledges that “employment equity... also requires special measures and the accommodation of differences.”³¹⁵ Under the Canadian legislation, employers must not only seek out and remove barriers that are preventing women, those with disabilities and ‘visible minorities’ from having equal access to employment, but must also institute “such positive policies and practices... as will ensure that persons in designated groups achieve a degree of representation in each occupation group in the employer’s workforce that reflects their representation in the Canadian workforce...” (or the relevant workforce as defined by geographic location and level of qualification).³¹⁶

All employers covered by the Canadian legislation are required to prepare and regularly review an employment equity plan. This plan must establish both short and long term goals for increasing minority employment in areas in which they are underrepresented, and set out positive plans and policies for achieving such goals.³¹⁷ Such policies may include some types of ‘positive discrimination’ which would be unlawful under the U.K. regime, such as taking race into account as a factor when making individual hiring or promotion decisions, as well as practices such as targeted recruitment and training which would be permissible in both jurisdictions.³¹⁸ Employers will not be required, however, to create new positions, hire unqualified individuals or take steps which involve ‘undue hardship’ in order to achieve racial equality.³¹⁹

7.2.3 Enforcement Mechanisms

Since 1996, the *Canadian Human Rights Commission* has been responsible for monitoring and enforcing the *Employment Equity Act*. The Commission receives copies of yearly reports submitted by each employer covered by the Act, and has special powers to conduct compliance audits.³²⁰ Where an organisation is found to be in breach of its obligations, the Commission will notify the organisation concerned, and attempt to negotiate a written undertaking to take measures to comply with the Act.³²¹ Where the employer

315 *Employment Equity Act*, SC 1995, c. 44 s 2.

316 *Employment Equity Act*, SC 1995, c. 44 s 5.

317 *Employment Equity Act*, SC 1995, c. 44 s 10.

318 Note however that the *Public Service Employment Act* may in some cases require that hiring or promotion be based solely on merit, without regard to other factors. See *Employment Equity Act*, SC 1995, c. 44 s 6(c) and *Public Service Employment Act* 2003 c. 22.

319 *Employment Equity Act*, SC 1995, c. 44 s 6.

320 *Employment Equity Act*, SC 1995, c. 44 s 21(7) and s 22.

321 *Employment Equity Act*, SC 1995, c. 44 s 25.

refuses to voluntarily make such an undertaking, or fails to fulfill the agreement, the Commission may issue a direction ordering the organisation to take specific measures to remedy the non-compliance. Where the issue is still in dispute, the Commission or the organisation concerned can take the matter before the *Employment Equity Review Tribunal*, which can confirm the direction, or make an alternative order, which will be enforceable as an order of the Federal Court.³²² Throughout the process, the Commission's primary goal is to work cooperatively with organisations to assist them to achieve their obligations, with applications before the Tribunal being used only as a means of last resort.³²³

Private sector employers may also be subject to financial penalties under the *Employment Equity Act* if they fail to provide information that is required in the annual report, or provide information that they know to be false and misleading. These penalties, which may amount to up to \$50,000 for a continuing violation, are issued by the Minister, and may be appealed to the *Employment Equity Review Tribunal*.³²⁴

The *Federal Contractors Program for Employment Equity* is enforced separately by Human Resources Development Canada-Labour. All organisations with more than 100 employees who receive federal contracts worth \$200,000 or above must sign a 'Certificate of Commitment', agreeing to be bound by obligations equivalent to those set out in the *Employment Equity Act*. The HRDC-Labour conducts compliance audits of these contractors, and may declare non-complying contractors ineligible for future federal contracts.³²⁵

7.2.4 Procurement Strategy for Aboriginal Businesses

In addition to these positive duties targeting 'visible minorities', federal agencies also have specific duties designed to promote the economic participation of Indigenous Canadians. The *Procurement Strategy for Aboriginal Businesses* is a response to a recognised under-representation of Indigenous businesses amongst federal government contractors. It creates a special category of federal contracts which are worth more than \$5,000 and involve the procurement of goods and services destined primarily for the Aboriginal population. These contracts must, where practical, be awarded to Aboriginal suppliers, defined as businesses where at least

322 *Employment Equity Act*, SC 1995, c. 44 ss 30-31.

323 *Employment Equity Act*, SC 1995, c. 44 s 22(2).

324 *Employment Equity Act*, SC 1995, c. 44 ss 35-39.

325 Treasury Board of Canada Secretariat, *Contracting Policy: Appendix D "The Federal Contractors Program for Employment Equity"* (July 1 2003) http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/contractingpol_d_e.asp (accessed 1/10/07).

51% of the owners and a third of employees are Aboriginal people.³²⁶ In addition to these kinds of 'set-aside' contracts, large government agencies (which award over \$1 million in federal contracts annually) must also set performance objectives for increasing the overall proportion of contracts awarded to Aboriginal suppliers, and promote initiatives such as joint ventures and Aboriginal sub-contracting plans which provide avenues for Indigenous participation in this area of the federal economy.³²⁷

7.3 Positive Duties in the United States

7.3.1 Organisations Covered by the Duty

Positive duties in the United States stem from two separate sources. Title VII of the *Civil Rights Act of 1964* (as amended) applies to federal public sector employers (such as executive agencies, military departments and the United States Postal Service).³²⁸ At the same time, *Executive Order 11246* requires all federal government contracts exceeding \$10,000 in value (individually or over a 12 month period) to contain an affirmative action clause, thus placing a duty on federal contractors and subcontractors to avoid discrimination and take affirmative action to ensure equality of opportunity in employment.³²⁹

7.3.2 Nature and Content of the Duty

Federal Government Agencies covered by the *Civil Rights Act* provisions are required to put in place an 'equal opportunity plan' to promote equality of opportunity for women, people with disabilities and minority groups. As in Canada, this duty is limited to the field of employment, and does not extend to other public functions.

Employment equity plans must be submitted annually for approval by the *Equal Employment Opportunity Commission*.³³⁰ The required content of this plan is set out, partly in the Act itself, and partly in regulations and

326 Treasury Board of Canada, Secretariat, *Procurement Strategy for Aboriginal Business: Guidelines for Buyers/Government Officials* (1997) http://www.tbs-sct.gc.ca/Pubs_pol/dcgpubs/ContPolNotices/97-6_e.asp#prom (accessed 4/10/07).

327 Indian and Northern Affairs Canada, *Promoting Aboriginal Economic Development* http://www.ainc-inac.gc.ca/saea-psab/pub/polinf/ifps_e.html (accessed 4/10/07).

328 42 USC § 2000e-16. Covered organisations are listed in this section, and include; military departments, executive agencies, United States Postal Service, federal judiciary, Government of the district of Columbia, Smithsonian, Government Printing Office, Government Accountability Office and the Library of Congress.

329 Exec Order 11246 3 CFR § 339 (1964-5) as amended and implemented by 41 CFR 60-1 et seq. See also U.S. Department of Labor, *Employment Law Guide* (2007) at Chapter G <http://www.dol.gov/compliance/guide/discrim.htm> (accessed 3/10/07).

330 42 USC § 2000e-16(b)(1).

guidelines which are produced by the Commission.³³¹ Government agencies are required to proactively prevent discrimination, and identify and remove barriers to workplace diversity. Specifically, where self-monitoring reveals that people of a particular group are being recruited at a rate of less than 80% of their representation in the labour force, this is to be regarded as prima facie evidence that the selection procedures involved are indirectly discriminatory, and must be assessed to determine if alternative, less discriminatory, processes are available.³³²

All federal contractors with contracts exceeding \$10,000 must accept certain responsibilities regarding the elimination of discrimination and the promotion of affirmative action in the workplace. Those employers with more than 50 employees, and who receive non-construction contracts to the value of \$50,000 or above, must also put in place a written Affirmative Action Program. Similarly to the Employment Equity Plans described above, these programs require a process of self-analysis of employment procedures, combined with good faith efforts to avoid discrimination and remove barriers to employment for minority groups. Where evidence of the continuing impact of past discrimination is identified, they may also involve taking steps to counter this effect through hiring and promotional 'goals' based on the labour market availability of relevantly qualified minority groups.³³³

As emphasised above in the chapter on special measures, there are strict constitutional limitations on the types of 'positive discrimination' which may be carried out by the U.S. Government. Thus, while agencies and contractors have an obligation to redress underrepresentation of minority groups, they must do so through indirect means such as targeted recruitment programs and the promotion of training opportunities, and cannot utilise fixed quotas or racial preference in individual hiring decisions.³³⁴ There is still some degree of doubt, however, as to whether even these indirect types of

331 See legislative provisions at 42 USC § 2000e-16 (b); Exec Order 11478, 3 CFR § 803 (1966-1970); Regulations 29 CFR § 1614 et seq. and Equal Employment Opportunity Commission Management Directive 715 (EEO MD-715), <http://www.eeoc.gov/federal/eeomd715.html> (accessed 3/10/07).

332 29 CFR § 1607.4.

333 US Department of Labor, *Employment Law Guide* (2007) at Chapter G, <http://www.dol.gov/compliance/guide/discrim.htm> (accessed 3/10/07).

334 See, for example, 41 CFR § 60-2.16 (regarding placement goals for federal contractors), which state that: "Quotas are expressly forbidden" and "Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race...". Similar provisions appear in the regulations regarding federal government employers, such as 29 CFR § 1614.601 (e).

positive measures can withstand the constitutional requirements of strict scrutiny if they are ever subject to challenge in the Supreme Court.³³⁵

7.3.3 Enforcement Mechanisms

The duties applicable to federal contractors are enforced by the Office of Federal Contractors Compliance Program (OFCCP), which conducts compliance evaluations either on its own initiative or in response to specific complaints. Where the office finds that a contractor is not in compliance, they may bring an administrative complaint against the employer before an administrative law judge, with recourse on appeal to the Department of Labor's Administrative Review Board. A range of sanctions may be imposed for non-compliance with the duty, including suspension or termination of the federal contract or debarment from access to future contracting opportunities, as well as specific penalties and compensation in cases where the breach amounts to unlawful discrimination.³³⁶

In contrast, the enforcement mechanisms available under the *Civil Rights Act*, applicable to federal government employers, are much less well developed. Such agencies must make yearly reports to the Equal Employment Opportunity Commission, which evaluates and assesses the programs put in place. There are no specific penalties or enforcement mechanisms, however, for agencies which fail to take positive measures as required by the Act, except where such a failure amounts to unlawful discrimination.³³⁷ Instead, the Commission must report any failure to implement an effective 'equal employment opportunity program' to the President and congressional committees, who then have executive discretion to respond as they see fit.³³⁸

7.4 Positive Duties in Australia

While it would not be true to say that positive duties do not exist in Australia, they are much more narrowly framed than those in other jurisdictions (particularly in comparison to the United Kingdom and Canada) and, like

335 See especially the discussion of caselaw in Millenson D, 'Whither Affirmative Action: The Future of EO 11246' (1999) 29 *University of Memphis Law Review* 679 at 704-717 and Appel A N, Gray A L and Loy N 'The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Affirmative Action in the Workplace: Forty Years Later' (2005) 22 *Hofstra Labor & Employment Law Journal* 549 at 555-557.

336 Exec Order 11246 3 CFR § 339 (1964-5) s 209.

337 The only penalties applicable are criminal sanctions for making willfully false statements in the report to the Commission (29 CFR § 1602.8 and 18 USC § 1001) and civil complaints mechanisms where unlawful discrimination has occurred (29 CFR § 1603).

338 Equal Employment Opportunity Commission Management Directive 715 (EEO MD-715), part C "where annual reports or information otherwise obtained by EEOC suggest that an agency is giving insufficient attention to its obligations under this Directive, EEOC will inform the President and appropriate Congressional committees." <http://www.eeoc.gov/federal/eoemd715.html> (accessed 3/10/07).

the U.S. *Civil Rights Act*, rely primarily on executive discretion, rather than enforcement through the judicial system or quasi-judicial administrative tribunals.

7.4.1 Organisations Covered by the Duty

The two key pieces of federal legislation in the Australian context are the *Public Service Act 1999* and the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (The *EEOCA Act*). The former act applies to the Federal public service, while the latter encompasses larger organisations (with more than 40 employees) which have been created for a public purpose under federal (or territory) legislation. They therefore apply to the federal public sector, but do not extend to federal contractors or the private sector.

7.4.2 Nature and Content of the Duty

As in the U.S. and Canada, the Australian legislation imposes positive duties only in the area of employment. The *EEOCA Act* is also further restricted by the fact that it applies only to 'designated groups'. These include Aboriginal and Torres Strait Islanders and first and second generation migrants from non-English speaking countries, but do not apply more broadly to racial and ethnic minorities. The *Public Service Act* historically contained a similar requirement to prevent discrimination against 'designated groups', which was replaced in 1999 by a more general requirement to 'establish a workplace diversity program to assist in giving effect to the APS Values'.³³⁹ The Public Service Commissioner's Directions, which set out in greater detail what this, rather vague obligation entails, require agencies to ensure "*measures are taken to eliminate any employment-related disadvantage... on the basis of... race or ethnicity*".³⁴⁰ As the most recent State of the Service Report demonstrates, however, public service agencies continue to collect data and assess diversity programs on the narrower category of first generation migrants, rather than focusing more broadly on race and ethnicity.³⁴¹

Both pieces of legislation require the agencies concerned to draw up 'employment opportunity programs' (under the *EEOCA Act*) or 'workplace diversity programs' (under the *Public Service Act*) which set out the agency's plan for eliminating discrimination and promoting equality of opportunity.³⁴² Strategies to improve workplace diversity may (at the discretion of the

339 Compare *Public Service Act 1922* (Cth) s 7(1) and s 22B and *Public Service Act 1999* (Cth) s 18.

340 Australian Public Service Commission, *Public Service Commissioner's Directions: Consolidated Version* (1999) at 2.13 <http://www.apsc.gov.au/publications/directionsConsolidated.htm> (accessed 7/10/07).

341 Australian Public Service Commission, *State of the Service Report 2005-2006* (2006) at 113.

342 *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s 5 and *Public Service Act 1999* (Cth) s 18.

agency involved) involve a wide range of positive measures, including some, such as positions restricted to Indigenous applicants and targeted scholarships, which would be invalid under the U.S. and U.K. (but not the Canadian) legislation.

7.4.3 Enforcement Mechanisms

Under both the *EEOCA Act* and the *Public Service Act*, agencies are required to produce annual reports which are publicly submitted before parliament.³⁴³ Reports produced under the *Public Service Act* are scrutinised by the Public Service Commissioner, who may also undertake inquiries into any breach of the Act. Ultimately, however, the Commissioner can only make recommendations to the minister concerned, and has no recourse to judicial or administrative penalties to enforce compliance with the Act.³⁴⁴ Similarly, while the Commissioner has the power to issue 'Directions', which are binding on both APS employees and agency heads, these Directions cannot be used to create offences or impose penalties.³⁴⁵

Authorities covered by the *EEOCA Act* are likewise not subject to any threat of sanctions or judicial enforcement of their obligations under the Act. The reports made by these organisations are assessed by the responsible minister, who may make written recommendations or issue directions to an authority which is failing to comply. The minister is also responsible for tabling the authority's report in parliament. Both Acts thus rely on the effects of public and parliamentary scrutiny to place pressure on agencies to comply with their obligations, along with the potential for direct executive intervention by government ministers. They do not, however, provide for the kind of judicial and administrative enforcement, or monitoring by independent human rights bodies, which is a key feature of both the British and Canadian schemes.

343 Australian Public Service Commission, *Public Service Commissioner's Directions: Consolidated Version* (1999) s 3.5, *Public Service Act 1999* (Cth) s 44 and *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s 9.

344 *Public Service Act 1999* (Cth) s 41.

345 *Public Service Act 1999* (Cth) s 42.

Chapter 8: The Burden of Proof

8.1 The Burden of Proof in Australia

It is a basic principle of many adversarial legal systems that, in civil matters, 'he who asserts must prove'. That is, it is the person seeking the benefit of the law who bears the burden of persuading the court that it should exercise its authority. Like many general principles, however, this rule has its exceptions, where for reasons of justice or public policy it makes sense to require the respondent to carry the onus of proof, or at least bear the burden of bringing evidence on a particular issue, which the plaintiff must then refute. In Australian tort law, for example, while the burden of proof generally rests on the plaintiff, it has been established that the defendant bears the burden of proving contributory negligence, or proving that the plaintiff failed to take steps to mitigate damages.³⁴⁶

Under the Australian *Racial Discrimination Act 1975* (Cth), the person alleging racial discrimination is required to establish all the elements of the offence on the balance of probabilities. Where direct discrimination is alleged, for example, the plaintiff is required to prove:

- that the respondent did an “act involving a distinction, exclusion, restriction or preference... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life” and;
- that this act was based on race, colour, descent or national or ethnic origin.³⁴⁷

Of these two elements, it is often the second which presents the plaintiff with the greatest difficulty. As Professor Gaze notes: “Proving the reason for an action or decision that exists in another person’s mind, where all the evidence is controlled by the other person and they are not required to give any reason, is very difficult.”³⁴⁸ The difficulty for the plaintiff is compounded by the high standard of evidence required by the court, which has been historically reluctant to find that a respondent has discriminated on the basis of race without clear and cogent evidence (based on the *Briginshaw* principle, which will be discussed further at 8.6.1). As a result of these two

346 Examples taken from: Williams C R, ‘Burdens and Standards in Civil Litigation’ (2003) 25(2) *Sydney Law Review* 165.

347 *Racial Discrimination Act 1975* (Cth) s 9(1).

348 Gaze B, ‘Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-2004’ (2005) 11(1) *Australian Journal of Human Rights* 171 at paragraph 50.

factors, there have been very few successful cases in which direct racial discrimination has been proved under Australian federal law.³⁴⁹

This interpretation of the *Racial Discrimination Act 1975* (Cth), which places the entire persuasive and evidentiary burden on the plaintiff at all stages of the case, has been criticised in some quarters. The *Committee for the Elimination of All Forms of Racial Discrimination*, for example, has urged Australia to “envisage regulating the burden of proof in civil proceedings involving racial discrimination so that once an alleged victim has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for differential treatment.”³⁵⁰ In light of this, it is useful to consider the alternative approaches taken in each of the other four jurisdictions studied in this paper. In each of these jurisdictions, there is an onus on the defendant to give an explanation for conduct which is prima facie discriminatory, either by proving on the balance of probabilities that their actions were not racially motivated, as in the U.K. and the rest of the European Union, or simply by articulating a legitimate explanation for the apparently discriminatory behaviour, as in the U.S. and Canada.

Interestingly, this concept of a reversed burden of proof in discrimination matters is not entirely alien to Australian federal law. The *Workplace Relations Act 1996* (Cth) sets out certain proscribed reasons for terminating the employment of a person covered by the act, one of which is “race, colour... national extraction or social origin”.³⁵¹ When an employee seeks to make a claim under this section of the act, “it is not necessary for the employee to prove that the termination was for a proscribed reason”, rather “it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason”.³⁵² Thus, it appears that the employee need only prove that their employment was terminated, after which the burden of proof falls on the defendant to prove that race was not a reason for the termination. It is unclear why such a different standard of proof should apply only to a limited subset of employees (those covered by federal regulation) and only in the narrow field of employment termination.

349 See discussion of successful race discrimination cases in Hunyor J, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25(4) *Sydney Law Review* 535 at 535; and Gaze B, ‘Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-2004’ (2005) 11(1) *Australian Journal of Human Rights* 171.

350 *Concluding Observations of the Committee for the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005) at 15.

351 *Workplace Relations Act 1996* (Cth) s 659(2)(f).

352 *Workplace Relations Act 1996* (Cth) s 664.

8.2 The Burden of Proof in the European Union

The Racial Equality Directive sets out certain minimum standards regarding the burden of proof to be applied in cases of racial discrimination, while noting that it remains open to member states to put in place rules which are more favourable to plaintiffs.³⁵³ Where a person alleging discriminatory treatment manages to establish “facts from which it may be presumed that there has been direct or indirect discrimination” the burden of proof shifts to the respondent to “prove that there has been no breach of the principle of equal treatment.”³⁵⁴ This principle applies only to civil, and not criminal proceedings, and need not be applied in cases that are tried under an inquisitorial system, where the court itself is responsible for establishing the facts of the case.³⁵⁵

Crucially, the question of what facts will be sufficient to create a presumption of discrimination, and therefore shift the onus on to the respondent, is left to the discretion of national courts.³⁵⁶ Some guidance may be provided, however, by the approach taken by the *European Court of Human Rights* (ECHR) and the *European Court of Justice* (ECJ).³⁵⁷ When ruling on whether the right to non-discrimination contained within the *European Convention on Human Rights* has been breached by a state party, the ECHR has stated that the applicant is only required to show evidence of a difference in treatment, after which the onus passes to the state to demonstrate that the difference in treatment can be justified.³⁵⁸

Thus, the plaintiff must show that they have been treated differently to a (perhaps hypothetical) group of persons in a comparable situation but from a different racial background. Once this has been shown, the respondent is then obliged to provide evidence of a non-discriminatory explanation for such a difference in treatment, in order to displace the assumption that it constitutes unlawful racial discrimination. The rationale for this shift in the burden of proof is that it is very difficult for the plaintiff to prove that any particular treatment is due to the plaintiff’s race, since the facts that go to prove such a matter are likely to be known only to the respondent.

353 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 8(2).

354 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 8(1).

355 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, art 8(3) and (5).

356 *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L180/22, cl 15.

357 For a history of how the burden shifting principle has developed in ECJ jurisprudence, particularly arising out of sex discrimination and equal pay cases, see: Houtzager D, *Shifting Perspectives: Changing the Burden of Proof in Racial Equality Cases* (2006).

358 *Timishev v Russia* (2005) Eur Court HR 55762/00 and 55954/00, at para 57.

Likewise, in cases of indirect discrimination, it is difficult for the plaintiff to prove a negative (that there is no objective justification for the actions which have an adverse effect), but correspondingly easier for the respondent to prove a positive justification where one exists.³⁵⁹

8.3 The Burden of Proof in the United Kingdom

8.3.1 Pre-Directive Judicial Approaches

Prior to the implementation of the *Racial Equality Directive*, the courts in the U.K. had already established a practice of requiring the respondent in a racial discrimination case to provide an explanation for actions which appeared prima facie to be discriminatory. In the case of *King v Great Britain-China Centre*, Lord Justice Neil stated that “a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances, the Tribunal will look to the employer for an explanation. If no explanation is then put forward or if the Tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds.”³⁶⁰ This requirement that the respondent provide an adequate explanation was not expressed as a shifting legal burden of proof, since the risk of non-persuasion remains at all times with the plaintiff. Nonetheless, the court described this approach as “almost common sense” given the unlikelihood that any evidence will be available to the plaintiff to directly prove the causal link between the differential treatment and the difference in race.³⁶¹

While it may be ‘legitimate’ for the court to draw an inference of discrimination where the respondent fails to provide an adequate explanation to rebut the plaintiff’s prima facie case, the pre-Directive case law in the U.K. also emphasises that the court is not legally bound to find in the plaintiff’s favour.³⁶² It will therefore not always be sufficient for the plaintiff to demonstrate differential treatment and difference in race and rely on the absence of an explanation to infer racially discriminatory grounds.

8.3.2 Implementation of the Racial Equality Directive

In 2003, several changes were made to the *Race Relations Act 1976* (UK) in order to implement the E.U. *Racial Equality Directive*.³⁶³ These changes

359 Espin E ‘Burden of Proof in Council Directives 2000/43/EC and 2000/78/EC on equal treatment’ (Working Paper, Academy of European Law, 2005) at 3. http://www.era.int/web/en/resources/5_2341_2279_file_en.3066.pdf (accessed 12/11/07).

360 Neil LJ *King v Great Britain-China Centre* [1991] IRLR 513 at 518 as cited in *Strathclyde Regional Council v Zafar* [1997] UKHL 54.

361 Neil LJ *King v Great Britain-China Centre* [1991] IRLR 513 at 518 as cited in *Strathclyde Regional Council v Zafar* [1997] UKHL 54.

362 *Strathclyde Regional Council v Zafar* [1997] UKHL 54.

363 *Race Relations Act 1976 (Amendment) Regulations 2003* SI 2003/1626.

included a statutory procedure for shifting the burden of proof from the plaintiff to the defendant once a prima facie case has been established. The new sections of the Act state that:

Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent... has committed such an act of discrimination or harassment against the complainant... the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.³⁶⁴

This new burden shifting process applies only to those types of discrimination which are covered by the Directive. Non-Directive grounds of discrimination, such as colour or national origin, continue to be governed by the pre-existing judicial approach outlined above.³⁶⁵

The new statutory requirements effectively mean that once a plaintiff has established a prima facie case of discrimination or harassment, the burden of proof shifts to the defendant to convince the court that racial discrimination was not a factor in the decision or treatment in question. While it is clear that this section alters the existing law to the extent that a court is now required, rather than simply permitted, to find in favour of the plaintiff when the respondent fails to provide an adequate explanation to rebut the prima facie evidence,³⁶⁶ there remains a significant degree of confusion as to what facts must be established by the plaintiff before the burden of proof is shifted to the respondent.

8.3.3 The Requirements of a Prima Facie Case

In some cases, the British courts have suggested that a prima facie case is only established, and the burden shifted to the defence, once the plaintiff has established all the elements of the offence. In *Madarassy v Nomura International*, the court stated that merely proving “a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.” In addition to proving the plaintiff was treated differently to those of a different race (or, in this case, gender), it is also necessary for the plaintiff to prove that race (or gender) was the reason for the disparate treatment.

364 *Race Relations Act 1976* (UK) c 74 ss 54A and 57ZA, which apply respectively to discrimination claims before employment tribunals and county or sheriff courts.

365 For a description of Directive and non-Directive grounds of discrimination, see above at 3.1.

366 *Madarassy v Nomura International Plc* [2007] EWCA Civ 33 at 60.

In contrast, the court in *Igen v Wong* described the rationale behind the statutory changes as making ‘good sense’ since “a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.” Such an approach seems to suggest that the plaintiff need only prove the difference in treatment in order to establish a prima facie case, with the reasons for the treatment to be established by the respondent at the second stage. This conclusion is born out by the finding in this case that, where the plaintiff had shown only that they belonged to a racial minority and were treated unreasonably by their white employer, it was open to the court to draw an inference of discrimination, and thus shift the burden of providing an explanation onto the respondent.³⁶⁷

The guidelines established in *Igen v Wong* and affirmed in *Madarassy* go some way to resolving this confusion. These state that the plaintiff must prove all the elements of the offence, showing “facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the grounds of race” before the burden of proof shifts to the respondent.³⁶⁸ They thus require the plaintiff to show both less favourable treatment, and facts that would allow the court to conclude that the less favourable treatment was on racial grounds. At the same time, the plaintiff’s prima facie case need not be established by direct proof, which is unlikely to be available, but may depend upon inferences available from the primary facts.³⁶⁹ Where the plaintiff can show only that they come from a racial minority, and were treated differently, it seems that the pre-amendment case law will continue to apply and, as a matter of ‘common sense’, the court will in some circumstances be able to infer from these facts that the treatment was based on race.³⁷⁰ At this point, the burden of proof will shift to the respondent to disprove the allegations of racial discrimination.

8.3.4 The Effect of Shifting – or Failing to Shift – the Burden of Proof

Once the onus of proof is transferred to the respondent, it imposes quite a heavy burden. The respondent must “prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of (race).”³⁷¹ Moreover, while inferences might be sufficient for the plaintiff at the initial stage, more direct evidence may be expected from the respondent. “Since the facts necessary to prove an explanation would normally be in the possession

367 See *Igen v Wong* [2005] ICR 931 at paras 49-51.

368 *Igen v Wong* [2005] ICR 931 at annex cl 9.

369 *Igen v Wong* [2005] ICR 931 at annex cls 3 and 4.

370 See above note 15: “a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination”.

371 *Igen v Wong* [2005] ICR 931 at annex cl 11.

*of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.*³⁷²

Even in cases where the complainant fails to make out a prima facie case, this will not necessarily mean that their claim will not succeed. This is because, when the court is assessing whether a prima facie case has been made out, it is obliged to ignore any explanation offered by the defendant. In some cases, however, if the defendant's explanation itself reveals a discriminatory line of reasoning or is demonstrably fabricated, the explanation itself will lend weight to the plaintiff's case. It is possible, therefore, for the plaintiff to fail at the initial stage to shift the burden of proof onto the respondent, but still ultimately succeed in proving discrimination on the balance of probabilities.³⁷³

8.3.5 Further Complications: The Relevant Comparator

Before deciding whether the complainant has established a prima facie case sufficient to shift the burden of proof, the court will consider all the evidence of both parties, excluding only the defendant's explanation for why the treatment occurred.³⁷⁴ In some cases, it may be difficult to decide which evidence should be ignored at this stage, since evidence adduced by the respondent to show that the plaintiff was not subject to different treatment may also be evidence of an alternative, non-racial explanation for the respondent's actions. For example, if the complainant asserts that she is the only racial minority employed by the respondent, and the only employee to be demoted, the respondent may reply that the reason the complainant was demoted was because she frequently failed to show up for shifts. This argument is clearly an explanation, and would be ignored by the court when assessing whether a prima facie case had been made out. The respondent might also claim, however, that the complainant was treated identically to (hypothetical or actual) non-minority employees, who would also be demoted if they failed to show up for shifts. In this case, it is less obvious that the employer is presenting an explanation, since the argument is phrased in terms of denying the complainant was treated differently, and disputing the relevance of the comparator group chosen by the complainant.

Those cases that attempt to distinguish between arguments regarding the appropriate comparator (which may be taken into account at the first stage) and explanations (which are relevant only once the burden of proof has shifted to the respondent) often involve a great deal of highly complex and artificial reasoning. In *Laing v Manchester City Council*, the court held that,

372 *Igen v Wong* [2005] ICR 931 at annex cl 13.

373 *Laing v Manchester City Council* [2006] IRLR 748 at para 77.

374 *Laing v Manchester City Council* [2006] IRLR 748 at para 59.

since it was so difficult to distinguish between these two types of evidence, and since the allocation of the burden of proof was really only relevant when the evidence of both parties was exactly matched, it made sense in most cases to abandon the two stage test all together.³⁷⁵ Perhaps a better solution, and one which seems to have been adopted in *Dattani v West Murcia Police*, is to exclude at the first stage of decision-making all of the respondent's evidence which "could properly be described" as explanations, even where such evidence is phrased as a challenge to the complainant's prima facie case.³⁷⁶ Such an approach avoids artificial distinctions, and has little risk of causing injustice for the respondent, since their evidence will be given full consideration at the second stage of the decision making process.

8.3.6 Questionnaires

Even with a shifting burden of proof, it would still be possible for a respondent to remain silent and refuse to give any explanation for the alleged discriminatory acts, taking the tactical risk that the plaintiff will not be able to establish a prima facie case. To assist claimants to make out their case against such uncommunicative respondents, the U.K. legislature has established a system of questionnaires. Under the *Race Relations (Questions and Replies) Order 1977*, a complainant may ask the respondent any question relating to the allegation of race discrimination using a prescribed form.³⁷⁷ The plaintiff may therefore ask the respondent to confirm that a particular event occurred, give an explanation for why they were treated differently, or provide statistical information about the racial makeup of the workforce in order to support a claim of direct or indirect discrimination. Answers to these questions are admissible in court, and a failure to respond or an ambiguous answer may allow the court to draw an adverse inference against the party concerned.³⁷⁸

8.4 The Burden of Proof in the United States and Canada

In the United States and Canada, a similar procedure has developed, which requires the person accused of discrimination to explain or justify their

375 *Laing v Manchester City Council* [2006] IRLR 748 at paras 73-75.

376 See *Dattani v Chief Constable of West Mercia Police* [2005] IRLR 327 at para 40 for an example which suggests this approach.

377 *Race Relations (Questions and Replies) Order 1977* SI 1977/842 as cited in Galbraith-Marten J 'The Fight Against Discrimination in Practice: Shifting the Burden of Proof and Access to Evidence' (Working Paper, Academy of European Law, 2005) at 36. http://www.era.int/web/en/resources/5_1095_4982_file_en.7063.pdf (accessed 12/11/07).

378 *Race Relations Act 1976* (UK) c 74 s 65(2)(b) as cited in Galbraith-Marten J 'The Fight Against Discrimination in Practice: Shifting the Burden of Proof and Access to Evidence' (Working Paper, Academy of European Law, 2005) at 37. http://www.era.int/web/en/resources/5_1095_4982_file_en.7063.pdf (accessed 12/11/07).

conduct once a prima facie case has been established. In cases where direct discrimination is alleged,³⁷⁹ the deliberative process in both jurisdictions may be divided into three stages:

1. The plaintiff establishes a prima facie case of racial discrimination.
2. The respondent articulates a legitimate reason for the apparent difference in treatment.
3. The plaintiff proves that the reason given by the respondent is a mere pretext, and that the real reason for the disparate treatment is race discrimination.³⁸⁰

Stage 1: The Prima Facie Case

A prima facie case has been described by the Canadian court as “one which covers the allegations made, and which if believed, is complete and sufficient for a decision in favour of the complainant in the absence of an answer from the respondent.”³⁸¹ Thus, as in the United Kingdom, the defendant’s explanation is ignored at this initial stage.

The case of *McDonnell Douglas*,³⁸² which has been cited in both U.S. and Canadian jurisprudence,³⁸³ sets out an example of facts that would be sufficient to establish a prima facie case. It is sufficient for the plaintiff to prove:

- i) that he belongs to a racial minority;
- ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- iii) that, despite his qualifications, he was rejected; and
- iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.³⁸⁴

The plaintiff is not required, at this stage, to prove that the respondent’s actions were motivated by race, but only to “carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion....”³⁸⁵ Thus, in the example above, the plaintiff need not bring direct proof of discrimination, but

379 Indirect discrimination will be discussed below at 8.5.

380 See eg *McDonnell Douglas Corp v Green* 411 US 792 (1973), discussed in Whitman R S, ‘Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment under Title VII’ (1989) 87(4) *Michigan Law Review* 863 at 867-868.

381 *Lincoln v Bay Ferries Ltd* 2004 FCA 204 (CanLII) at 17.

382 *McDonnell Douglas Corp v Green* 411 US 792 (1973).

383 See eg *Israeli v Canada (Canadian Human Rights Commission)* 1983 CanLII 5 (CHRT).

384 *McDonnell Douglas Corp v Green* 411 US 792 (1973) at 12.

385 *Teamsters v United States* 431 US 324 (1977) at II A.

must “demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanations, to create an inference that the decision was a discriminatory one.”³⁸⁶

Stage 2: The Legitimate Explanation

In both the United States and Canada, once the plaintiff has established the prima facie case of discrimination, the onus falls on the defendant to provide a reasonable explanation for why the allegedly discriminatory conduct occurred. The burden, which shifts to the defendant at this stage is, however, only an evidentiary burden.³⁸⁷ The ultimate burden of persuasion remains at all times with the plaintiff. Thus, the defendant need only ‘articulate a legitimate explanation’ for the act, rather than prove, on the balance of probabilities, that there was no discriminatory motive.³⁸⁸ This contrasts to the approach in both the *Race Relations Act 1976* (UK) and the E.U. Directive, where the risk of non-persuasion shifts to the defendant once the plaintiff’s prima facie case is made out.

Stage 3: Proving that Race is the Real Motivation

This third stage is often described as placing an onus on the plaintiff to rebut the legitimate explanation offered by the defendant. Strictly speaking, however, proving that the defendant’s explanation is false is neither necessary nor sufficient to establish a claim of racial discrimination.

Under both American and Canadian law, an act is unlawful if it is motivated by race, regardless of whether other factors also motivated the practice.³⁸⁹ Thus, even where the explanation offered by the employer is true, and the act in question was partly motivated by a non-discriminatory cause, the plaintiff may still succeed if they can obtain evidence showing that

386 *Teamsters v United States* 431 US 324 (1977) at footnote 44.

387 *Texas Department of Community Affairs v Burdine* 450 US 248 (1981) as cited in; Green T K, ‘Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII’ (1999) 87(4) *California Law Review* 983 at 987-988. See also (in the Canadian context) *Basi v Canadian National Railway* 1988 CanLII 108 (CHRT) at V; “there is an evidentiary onus on the Respondent to provide an explanation of events...”.

388 Whitman R S, ‘Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment under Title VII’ (1989) 87(4) *Michigan Law Review* 863 at 868.

389 42 USC s 2000e-2(m). In the Canadian context, see *Almeida v Chubb Fire Security Division of Chubb Industries Ltd* (1984) 5 CHRR D/2104 at 2105 as cited in *Basi v Canadian National Railway* 1988 CanLII 108 (CHRT) at IX.

race was also a factor in the decision-making process.³⁹⁰ In many cases, however, such direct evidence is unavailable, and it is easier for the plaintiff to establish that the defendant has given a false explanation in order to indirectly infer that the real reason for the difference in treatment was racial discrimination.

There has been some debate, particularly within the United States, over whether a plaintiff who establishes a prima facie case and then proves that the defendant's explanation is false is therefore automatically entitled to succeed, or whether the plaintiff must also provide direct evidence of racial bias. In the Supreme Court case of *Reeves*, the court held that "*a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.*"³⁹¹ At the same time, such evidence will not always be sufficient, since there may be instances where the evidence reveals a different, non-discriminatory reason for the employer's decision, which is more probable than the discrimination alleged by the plaintiff or the explanation given by the defendant. The tribunal could conclude, for example, that the plaintiff was fired due to personal animosity or incompetence, even where these explanations are not put forward by the defence.³⁹² Nonetheless, the court also emphasised that "*once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.*"³⁹³

8.5 Indirect Discrimination

The burden of proof with regards to indirect discrimination often follows from the way in which the test for such discrimination is constructed. In the United Kingdom, for example, the statutory test is as follows:

(1A) A person also discriminates against another if... he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –

390 But note that, in the United States, the court may not find in favour of the plaintiff, or may not order relief, if the defendant can establish that they would have made the same decision even if an impermissible factor such as race had not been taken into account. See discussion of *Mt Healthy City School District Board of Education v Doyle* 429 US 274 (1977) in Whitman R S, 'Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment under Title VII' (1989) 87(4) *Michigan Law Review* 863 at 875-877.

391 O'Connor J, *Reeves v Sanderson Plumbing Products Inc* 530 US 133 (2000) at paragraph 15.

392 For an example of this kind of finding in the Canadian jurisdiction, see the dissenting judgement of Norton QC, *Chandler and Joshi v Department of National Health and Welfare* (unreported) TD 16/95, Decision rendered December 13 1995, Human Rights Tribunal. http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=225&lg=_e&isruling=0 (accessed 5/11/07).

393 O'Connor J, *Reeves v Sanderson Plumbing Products Inc* 530 US 133 (2000) at paragraph 15.

- (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
- (b) which puts that other at that disadvantage, and
- (c) which he cannot show to be a proportionate means of achieving a legitimate aim.³⁹⁴

Similarly, the *Civil Rights Act of 1991* in the United States provides that:

An unlawful employment practice based on disparate impact is established... only if:

- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race... and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity...³⁹⁵

In both cases, the statute makes clear that the onus rests on the complainant to prove that a condition has been imposed, which has a disproportionate impact on a particular racial group. Once that has been established, the onus shifts to the respondent to show that the condition is “consistent with business necessity” or “a proportionate means of achieving a legitimate aim”.

Similarly, in the Canadian context, once the claimant has shown that a particular policy or condition has a disparate impact upon a particular racial group, the onus falls on the respondent to prove, on the balance of probabilities, that the policy is a bona fide occupational requirement or that there is a bona fide justification for imposing that condition.³⁹⁶ This will require the respondent to bring evidence to show that getting rid of the condition would cause the respondent undue hardship, because of the financial costs or health and safety implications involved.³⁹⁷

The approach taken in each of these three jurisdictions seems to be based on the principle that it is the respondent, rather than the plaintiff, who is best placed to provide evidence of the conditions or policies necessary to achieve the respondent’s legitimate aims or fulfil their business requirements. This approach also avoids placing an obligation on the plaintiff to prove a negative fact – that there is no reason why such a condition is necessary – placing the onus on the respondent to prove a positive justification where one exists. As stated in the Canadian case of *O’Malley*: “it is the employer who

394 *Race Relations Act 1976* (UK) c 74 s 1(1A). Note that this section applies only to directive grounds, however the non-directive definition (s 1(1)(b)) similarly requires the respondent to show that the provision is justified on non-racial grounds.

395 42 USC s 2000e-2 (k)(1)(A)(i).

396 *B.C. (Superintendent of Motor Vehicles) v B.C.(Council of Human Rights)* [1999] 3 SCR 868 at para 20.

397 *Canadian Human Rights Act*, RS 1985, c H-6, ss 15(1)(a), 15(1)(g) and 15(2).

*will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence.*³⁹⁸

In contrast, in a complaint of indirect discrimination under the Australian *Racial Discrimination Act 1975* (Cth), the burden of proof remains on the plaintiff at every stage. Thus, even once the claimant has shown that the respondent has imposed a condition that has an adverse effect upon people of the complainant's race or ethnic origin (and thereby affects their equal enjoyment of human rights and fundamental freedoms), the complainant must also prove that this condition is, in the circumstances, unreasonable.³⁹⁹ To do so, the complainant must prove that the term or condition is "*not rational, logical or understandable*". Merely proving that an alternative, less discriminatory approach exists, which would achieve the same effect, is not sufficient if both means could be considered rational approaches to achieving the goal in question.⁴⁰⁰

8.6 Standards of Proof and Standards of Evidence

8.6.1 Australia

The ease with which a plaintiff alleging race discrimination will be able to make out their case depends not only on which party bears the onus of proof, but also on what standard of evidence will be considered sufficient by the courts to discharge that burden.

The general standard of proof applicable to civil cases in Common Law jurisdictions is usually described as 'the balance of probabilities', and requires the tribunal of fact to be satisfied that it is more likely than not that a particular fact occurred. This is in contrast to the more stringent criminal standard of 'beyond a reasonable doubt'. In Australia, while the courts have continually emphasised that there is 'no third standard of proof', it is generally accepted that the strength of evidence required to satisfy a court as to the existence of a given fact may vary depending on the nature of what is to be proved.⁴⁰¹

In the often cited case of *Briginshaw v Briginshaw*, Justice Dixon stated that:

when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. ... (R) easonable satisfaction is not a state of mind that is attained or

398 *Ontario Human Rights Commission v Simpson-Sears* 1985 CanLII 18 (SCC) at 28.

399 *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 62; cited in Human Rights and Equal Opportunity Commission *Federal Discrimination Law* (2005) at 3.2.3 (d).

400 *ibid.*

401 See eg *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-50, as cited in De Plevitz L 'The Briginshaw Standard of Proof in Anti-Discrimination Law: Pointing With a Wavering Finger' (2003) 27(2) *Melbourne University Law Review* 308.

established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.⁴⁰²

This relationship between the nature of what is to be proved, and the standard of evidence required, has also been codified in the *Evidence Act*, which states that:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.⁴⁰³

The *Briginshaw* test has been interpreted as requiring a particularly high standard of evidence where the plaintiff seeks to prove that the defendant has engaged in serious misconduct or where the consequences for the defendant of a finding in the plaintiff's favour would be particularly grave. It has been applied "*where there are serious accusations (murder, sexual abuse of children, corruption... gross medical negligence or fraud) or where the effect of the finding would be permanent and damaging to the respondent's future (loss of liberty, racial identity, sexual functioning or profession).*"⁴⁰⁴

The *Briginshaw* test has also been frequently invoked in discrimination proceedings. As Hunyor notes: "*(t)he courts have generally regarded allegations of racial discrimination as being of such seriousness that they require a higher standard of evidence... to reach a state of 'reasonable satisfaction'*".⁴⁰⁵ This is understandable in cases where the respondent is alleged to have deliberately and maliciously discriminated against the complainant on the grounds of race, as this sort of accusation of racism might be thought to carry a certain amount of social stigma. What remains unclear, however, is whether the *Briginshaw* higher standard of evidence will also be required even in those cases which only raise issues of unconscious or

402 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

403 *Evidence Act 1995* (Cth) s 140A.

404 De Plevitz L 'The *Briginshaw* Standard of Proof in Anti-Discrimination Law: Pointing With a Wavering Finger' (2003) 27(2) *Melbourne University Law Review* 308 at IV.

405 Hunyor J, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535 at 540.

systematic discrimination, and do not accuse the respondent of deliberate misconduct.

In several instances, it appears that the *Briginshaw* higher standard of evidence has been automatically required whenever racial discrimination is alleged, regardless of any analysis of the seriousness of the allegation or the consequences involved. Thus, for instance, in *Sharma v Legal Aid Queensland* it was accepted without argument that “*the standard of proof for breaches of the Racial Discrimination Act 1975 is the higher standard referred to in Briginshaw v Briginshaw (1938)*”⁴⁰⁶

On the other hand, at least one Federal Court case has distinguished between claims of racial discrimination that involve serious allegations of misconduct, and those that should be treated according to the normal standards of evidence. In the case of *Macedonian Teachers Association of Victoria Inc v HREOC*, the court held that “(t)he mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the *Briginshaw* test”⁴⁰⁷ In this case, the state government was accused of having unintentionally, and while acting according to the best of intentions, discriminated against a particular ethnic group. In this case, the court held, “(n)o issue of fraud or impropriety was raised or needed to be determined”, and the more stringent standards of evidence described in *Briginshaw* were therefore not appropriate.⁴⁰⁸

While this approach has been largely ignored in subsequent racial discrimination cases (of which *Sharma v Legal Aid Queensland* is an example),⁴⁰⁹ recent cases concerning sex and disability discrimination have drawn a similar distinction between ‘serious’ allegations to which the *Briginshaw* test applies and other discrimination claims, which do not warrant such a higher evidentiary standard.⁴¹⁰ This approach also accords with the way in which the *Briginshaw* standard has been applied outside of the discrimination field. As De Plevitz notes in her article analysing the application of this test, only in the area of discrimination law has the *Briginshaw* test been applied as a matter of course.⁴¹¹ In all other areas of law, the demand for a higher standard of evidence has been reserved for

406 *Sharma v Legal Aid Queensland* [2001] FCA 1699 at 62. See also the discussion of cases in the Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005* (2005) at 6.15.1.

407 *Macedonian Teachers Association of Victoria Inc v HREOC* (1999) 91 FCR 47 at 50-51; as cited in Hunyor J, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25(4) *Sydney Law Review* 535 at 550.

408 *ibid.*

409 *Sharma v Legal Aid Queensland* [2001] FCA 1699.

410 See discussion of cases in Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005: Supplement 1 March 2005 – 1 July 2007* (2007) at 6.15.

411 De Plevitz L ‘The *Briginshaw* Standard of Proof in Anti-Discrimination Law: Pointing With a Wavering Finger’ (2003) 27(2) *Melbourne University Law Review* 308.

the most serious of accusations or where the potential consequences for the defendant are permanent or severe.⁴¹²

8.6.2 Standards of Proof in Other Jurisdictions

The idea that the amount of evidence required to satisfy a tribunal of a given fact may depend on the nature and seriousness of the fact alleged is not unique to Australia. In Canada, the Supreme Court has adopted the comments of Justice Dixon in *Briginshaw*, stating that, in a civil action: “before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and... whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgement is formed including the gravity of the consequences of the finding.”⁴¹³

In the United Kingdom, and to a limited extent in Canada,⁴¹⁴ there has been some debate over whether it is the degree of probability which changes according to the gravity of the offence (requiring proof to a higher standard than the balance of probabilities), or whether a more serious allegation simply requires more convincing evidence in order to satisfy the court on the ordinary standard.⁴¹⁵ Setting aside these somewhat semantic distinctions, however, the U.K. courts have confirmed that: “the essential point that runs through the authorities is that the civil standard of proof is flexible in its application and enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them.”⁴¹⁶

In Canada, this heightened standard of evidence has been referred to in cases where sexual assault, insurance fraud and other charges of criminal misconduct are alleged.⁴¹⁷ Similarly, in the U.K., it has been invoked in civil cases, which involve allegations of serious crimes such as sexual abuse or murder,⁴¹⁸ and where the state is seeking to significantly restrict the rights of an individual, by detaining them as an illegal immigrant or placing them under an antisocial behaviour order or sexual offender order.⁴¹⁹

412 *ibid.*

413 *Smith v Smith* [1952] 2 SCR 312 at 331.

414 See particularly *R v Oakes* 1986 CanLII 46 (SCC) at 67 which has been cited in support of the argument that there are “different degrees of probability depending on the nature of the case”.

415 See discussion of caselaw in *An, R (on the application of) & Anor v Secretary of State for the Home Department & Ors* [2005] EWCA Civ 1605 (on the application of) at 36 et seq.

416 *ibid* at 59.

417 See eg *Kruska v Manufacturers Life Insurance Company* (1984) 54 BCLR 343 at 353-54; *B(D) v Canada (Attorney General)* 2000 SKQB (CanLII) at 17; and *PL v College of Physicians and Surgeons of the Province of Alberta* 1999 ABCA 126 (CanLII).

418 See eg *Dellow's Will Trusts* [1964] 1 WLR 451.

419 See eg *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74 at 113F-114C as cited in *An, R (on the application of) & Anor v Secretary of State for the Home Department & Ors* [2005] EWCA Civ 1605; and *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213.

Both Canada and the United Kingdom thus possess a test for establishing the standard of evidence which closely resembles, in function if not always in form, the test described in *Briginshaw*, and is applied in similar circumstances. Significantly, however, neither the Canadian nor the U.K. courts have regularly invoked this standard with respect to allegations of racial discrimination. Instead, both jurisdictions have obliged victims of discrimination to prove their allegation according to the ordinary standard of proof, and have accepted that such allegations will normally rely on indirect inference, as direct evidence of discrimination is unlikely to be available.⁴²⁰ Indeed, in the United Kingdom, it may be the defendant, rather than the plaintiff in a discrimination case, who is expected to meet a higher standard of evidence once the plaintiff has provided a prima facie case and shifted the onus of proof. As set out in the *Igen v Wong* guidelines: “*Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof.*”⁴²¹

The situation in the United States is slightly different due to that fact that the U.S. has expressly adopted a third standard of proof, rather than relying on a shifting standard of evidence.⁴²² This ‘middle standard’, which falls between the normal civil standard of balance of probabilities and the criminal standard of beyond a reasonable doubt, is described as a standard of ‘clear and convincing evidence.’⁴²³ It has been applied in cases where “*the government seeks to take unusual coercive action – action more dramatic than entering an award of money damages or other conventional relief – against an individual.*”⁴²⁴ This may include cases where the government seeks to have an individual committed for mental illness, to remove an individual’s parenting rights, or take away citizenship.⁴²⁵ Like the higher standard of evidence referred to in *Briginshaw*, it may also apply in cases where fraud or other quasi-criminal wrongdoing is alleged, so as to reduce the possibility of wrongfully tarnishing the defendant’s reputation.⁴²⁶ This higher standard of proof may also be expressly required by statute.⁴²⁷

420 See for example *Basi v Canadian National Railway* 1988 CanLII 108 (CHRT) at VI where it was stated that “*an inference of discrimination may be drawn where the evidence offered in support of it renders such as inference more probable than the other possible inferences or hypotheses.*”

421 *Igen v Wong* [2005] ICR 931 at annex cl 13.

422 Despite this, the standard itself ‘clear and convincing evidence’ sounds more like a standard of evidence than a standard of proof, if a meaningful distinction could be drawn between the two. It is unlike the *Briginshaw* standard, however, in the sense that it is not a flexible test that might be applied to all decisions in civil cases, but rather a set standard which will be applied in particular circumstances.

423 *Addington v Texas* 441 US 418 (1979) at 424.

424 *Price Waterhouse v Hopkins* 490 US 228 (1989) at 253.

425 See eg *Addington v Texas* 441 US 418 (1979); *Santosky v Kramer* 455 US 745 (1982); *Schneiderman v United States* 320 US 118 (1943).

426 *Addington v Texas* 441 US 418 (1979) at 424.

427 See eg *Antiterrorism and Effective Death Penalty Act of 1996* 28 USC 2254 (e)(1).

Once again, while this higher standard of proof exists, it has not been generally applied to discrimination cases.⁴²⁸ As stated by the U.S. Supreme Court in *Price Waterhouse v Hopkins*: “Conventional rules of civil litigation generally apply in Title VII cases... and one of these rules is that parties to civil litigation only need to prove their case by a preponderance of evidence.”⁴²⁹ Thus, once again, in contrast to the approach taken by the Australian courts, the standard of evidence required to establish a claim of race discrimination is the ordinary civil standard.

While all four of the national jurisdictions considered in this paper apply a higher standard of evidence (or require a higher standard of proof) for the most serious of civil claims, this higher standard is not commonly applied outside of Australia, to allegations of racial discrimination. The practical effect of this difference is hard to quantify. Since most discrimination cases involve complex issues of credibility and evidence, it is hard to compare outcomes across jurisdictions, and state with any degree of certainty that a case decided one way in a particular court would have been decided differently in another. Nonetheless, it seems clear that the Australian courts are alone amongst the jurisdictions considered in expressly applying a higher standard of evidence to some, if perhaps not all, allegations of racial discrimination. When this is combined with the inflexible nature of the burden of proof, which remains on the plaintiff throughout, it is unsurprising that claims of discrimination have proved difficult to establish.

428 For a case in which the plaintiff alleging discrimination has been held to this higher standard see *Miller-El v Dretke* 545 US 231 (2005), which involved a convicted prisoner attempting to secure a new trial by proving that their original trial was marred by discrimination in the jury selection process. In this cases, the *Antiterrorism and Effective Death Penalty Act of 1996* stated that any factual finding made by a State court would be assumed to be correct, and the plaintiffs were required to produce clear and convincing evidence to overturn this assumption.

429 *Price Waterhouse v Hopkins* 490 US 228 at 253.

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