



Fact sheet

Changes made to the *Australian Human Rights Commission Act 1986* (April 2017)

Key changes at a glance

On 13 April 2017, amendments to the *Australian Human Rights Commission Act 1986* (Cth) (the AHRCA) came into effect which introduced changes to the way in which complaints of unlawful discrimination are defined and handled by the Commission. The changes were introduced to make sure that the complaint handling processes are fair to all parties and unmeritorious complaints are dismissed at an early stage of the process.

The changes are:

- A higher threshold for making a complaint of unlawful discrimination
- A requirement that the President carry out an initial assessment of the complaint and consider whether to terminate the complaint before commencing an inquiry
- Expanded termination grounds and the introduction of discretionary and mandatory termination grounds
- A complaint can be terminated if lodged more than 6 months after the alleged conduct
- New notification obligations on the Commission for respondents and people who are the subject of adverse allegations
- The confidentiality attached to conciliation before the Commission is clarified
- Where a complaint is terminated on certain grounds, a complainant can now only make an application to the court if the court has granted them leave to do so

Key changes explained

New requirements for making a valid complaint

The amendments have redefined and raised the threshold of what constitutes a valid complaint of unlawful discrimination. Among other things, a complaint has to set out as fully as practicable the details of the alleged acts.

Section 46P of the AHRCA sets out the new requirements for lodging a valid complaint of unlawful discrimination with the Commission.

These requirements are that the complaint:

- must be in writing;
- is lodged by a person aggrieved by alleged unlawful discrimination or by a person on behalf of one or more other people aggrieved by the alleged unlawful discrimination;
- alleges acts, omissions or practices and it must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination; and
- must set out, as fully as practicable, the details of the alleged acts, omissions or practices.

The Explanatory Memorandum refers to the new requirement that it must be ‘reasonably arguable’ that the alleged conduct is unlawful discrimination and states:

“To be a valid complaint under 46P, a complaint must allege conduct that, if true, would constitute unlawful discrimination”.

Initial assessment and the termination grounds

Section 46PF of the AHRCA provides that the President¹ must now undertake an initial assessment to consider whether the complaint should be terminated under the termination grounds set out in section 46PH of the AHRCA. The requirement to consider whether a complaint should be terminated occurs before the President commences an inquiry or attempts to conciliate a complaint.

The termination grounds are now grouped into two categories: discretionary and mandatory.

The mandatory termination grounds include where the President is satisfied that:

- the complaint is trivial, vexatious, misconceived or lacking in substance;
- there is no reasonable prospect of the matter being settled by conciliation; or
- there would be no reasonable prospect of success in court.

The amendments also added an additional discretionary ground under which the President may terminate a complaint, where satisfied that in all the circumstances, an inquiry, or a continuation of an inquiry, is not warranted.

The termination of a complaint at this initial phase, before an inquiry has commenced, is also subject to subsection 46PF(5) of the AHRCA. This subsection provides that the President may decide not to inquire into a complaint if satisfied that the person aggrieved does not want the President to inquire, or the President is satisfied that the complaint has been resolved.

Time limitations

There is no specific time frame in which a complaint must be lodged with the Commission. However, the President can now terminate a complaint if the complaint was lodged more than 6 months after the alleged act or practice took place. This change only applies to acts or practices that take place after 13 April 2017 (the date of the amendment). Prior to this amendment, the President had the power to terminate a complaint lodged more than 12 months after the alleged events.

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Commencing an inquiry and notification obligations

If the President has not terminated a complaint at the initial assessment stage, the President is required to inquire into and attempt to conciliate the complaint.

If the President has decided to inquire into a complaint, the President must notify:

- The respondent(s) to the complaint (unless to do so would prejudice the safety of a person); and
- People who are the subject of an adverse allegation (unless to do so would prejudice the safety of a person or it is not practicable to do so).

An adverse allegation is defined in the AHRCA to mean an allegation that acts, omissions or practices have occurred and those acts, omissions or practices are unlawful discrimination.

Conciliation

If a complaint proceeds to a conciliation conference, sections 46PK and 46PKA of the AHRCA provide that:

- the conciliation conference is to be conducted in private; and
- evidence of anything said or done by a person in the course of a conciliation is not admissible in any proceedings relating to the alleged acts or practices.

An exception to the confidentiality of conciliation is contained in section 46PSA of the AHRCA. This section states that where court proceedings have been instituted against a respondent, in deciding whether to award costs in the proceedings, a court may have regard to any offers made by the complainant or respondent to settle the matter that have been rejected.

The Explanatory Memorandum says that this section is intended to discourage clearly unmeritorious complaints from progressing to court and is intended to deter recourse to courts where earlier settlement offers have been made that may be regarded as equivalent to court ordered remedies.

Termination of a complaint

Prior to these amendments, where the President terminated a complaint, the complainant had an automatic right upon being issued with a termination notice, to make an application to the Federal Court of Australia (FCA) or the Federal Circuit Court of Australia (FCCA) for the court to hear and determine the matter.

The amendments to the AHRCA mean that when a matter is terminated, an application can only be made to the FCA or FCCA if the court concerned grants leave for the complainant to do so, unless the complaint is terminated on one of the following grounds:

- The subject matter of the complaint involves an issue of public importance that should be considered by the courts; or
- There is no reasonable prospect of the matter being settled by conciliation.

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If a complaint is terminated on either of these grounds, there is no requirement to seek leave of the court concerned. For all other termination grounds, leave of the court is required before any application can be made.

¹ The President may delegate her powers to Commission staff.