CONSOLIDATION – COMPARATIVE ANALYSIS
PART 1 – APPLICATION

1. Application to States – incomplete coverage of SDA to States and State instrumentalities

SDA report, recommendation 11: ensure SDA covers States and State instrumentalities.
AHRC submission to the SDA inquiry, recommendations 18, 19 and 28: extend coverage to state and state instrumentalities, Crown in right of States, administration of state and territory laws and programs.

The ADA, DDA and RDA specifically bind the Crown in right of the State, while the SDA does not bind the States unless expressly provided for (s 12(1)).

<table>
<thead>
<tr>
<th>SDA provisions that apply to the States</th>
<th>SDA provisions that don’t apply to the States</th>
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</thead>
<tbody>
<tr>
<td>• discrimination in education – s 21</td>
<td>• discrimination in employment – s 14</td>
</tr>
<tr>
<td>• discrimination in the provision of goods, services and facilities – s 22</td>
<td>• discrimination against commission agents – s 15</td>
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<td>• discrimination in provision of accommodation – s 23</td>
<td>• discrimination against contract workers – s 16</td>
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<tr>
<td>• discrimination in land dealings – s 24</td>
<td>• discrimination in partnerships – s 17 (not applicable to States)</td>
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<tr>
<td>• discrimination in the administration of Commonwealth laws and programs – s 26</td>
<td>• discrimination by qualifying bodies – s 18</td>
</tr>
<tr>
<td>• requests for information – s 27</td>
<td>• discrimination by registered organisations – s 19 (not applicable to States)</td>
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</tbody>
</table>

Section 13 also provides that provisions relating to discrimination in employment (s 14) and harassment in employment (s 18B) do not apply in relation to employment by an instrumentality of a State or in relation to an act done by an employee of a State or of a State instrumentality.

While a complainant can pursue a claim against a State or State instrumentality under the relevant State or Territory law, there may be limitations in relation to the amount of damages. State or Territory laws may also provide less protection than the SDA (for example, because of an exemption for acts done in compliance with a State law).

Submissions to the SDA inquiry argued that sections 12 and 13 be repealed so that all women in all parts of Australia have access to the same levels of protection against discrimination.
and sexual harassment. AHRC submitted that the exclusion of States and State instrumentalities is inconsistent with Australia’s obligations under CEDAW.

2. Geographical application

<table>
<thead>
<tr>
<th>ADA</th>
<th>DDA</th>
<th>RDA</th>
<th>SDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>• applies throughout Australia (including external Territories) – s 9(2)</td>
<td>• applies throughout Australia (s 17(a) of Acts Interpretation Act – Australia includes Christmas Island and Cocos (Keeling) Islands only) – s 12(2)</td>
<td>• applies to every external Territory – s 4</td>
<td>• applies throughout Australia (including external Territories) – s 9(2)</td>
</tr>
</tbody>
</table>

• has effect in relation to discrimination in Australia involving persons, things or matters arising outside Australia – s 9(3)  
• has effect in relation to discrimination in Australia involving persons, things or matters arising outside Australia – s 12(14)  
• has effect in relation to discrimination in Australia involving persons, things or matters arising outside Australia – s 9(20) 

There is a general presumption that legislation is not intended to have extraterritorial effect (see *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association*¹ and s 21(1)(b) of the Acts Interpretation Act).

In *Brannigan v Commonwealth*² (involving a complaint by an Australian citizen of discrimination in employment with the Australian High Commission in London) the Court held that the DDA, RDA and SDA do not apply extra-territorially. The Court held that s 9(2) of the SDA is clear indication that the SDA is limited in its effect to Australia.

The ADA, DDA and SDA will apply if a discriminatory act is done in Australia but has some impact overseas – ie discrimination in Australia involving matters arising outside Australia. For example, a decision made in Australia to terminate the employment of a Commonwealth employee deployed overseas on the basis of a disability would fall within the scope of the DDA. The ADA, DDA and SDA may also apply to discriminatory acts done outside Australia which affects a person within Australia (see *Clarke v Oceania Judo Union*³ which involved a decision made in NZ to prevent the complainant participating in a judo tournament in Australia on the basis of the complainant’s blindness).

AGS advice indicates that the above analysis of what would constitute discrimination within Australia would apply equally to the RDA even in the absence of a provision on discrimination involving matters arising outside Australia.

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¹ (1908) 6 CLR 309  
² [2000] FCA 1591  
³ [2007] FMCA 292
3. **Constitutional basis – external affairs power**

SDA report, recommendation 7: subsection 9(10) of the Act be amended to refer to ICCPR, ICESCR, and the ILO conventions which create obligations in relation to gender equality, as well as CEDAW, in order to ensure that the Act provides equal coverage to men and women.

*Accepted in Government response to SDA report.*

The ADA, DDA, RDA and SDA rely on the external affairs power, among other enumerated powers, for Constitutional validity. The AHRC does not explicitly list enumerated powers but refers to the ICCPR, declared instruments and declarations in the definition of ‘human rights’.

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Implementation/Reference</th>
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</thead>
<tbody>
<tr>
<td><strong>AHRC</strong></td>
<td>ICCPR, ICESCR (only in relation to functions of ATSISJC – s 46C), CRPD, ILO 111 – discrimination in employment (only in relation to equal opportunity in employment functions – s 31), Declaration on the rights of the Child, Declaration the Rights of Mentally retarded persons, Declaration on the Rights of Disabled Persons, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</td>
</tr>
<tr>
<td><strong>ADA</strong></td>
<td>ICCPR, ICESCR, CRC, ILO 111</td>
</tr>
<tr>
<td><strong>DDA</strong></td>
<td>ICCPR, ICESCR, CRPD, ILO 111</td>
</tr>
<tr>
<td><strong>RDA</strong></td>
<td>CERD</td>
</tr>
<tr>
<td><strong>SDA</strong></td>
<td>ICCPR, ICESCR, CRC, CEDAW, ILO 100 – equal remuneration (inserted by SDA Bill), ILO 111, ILO 156 – workers with family responsibilities (inserted by SDA Bill), ILO 158 – termination of employment (inserted by SDA Bill)</td>
</tr>
</tbody>
</table>
ICCPR and ICESCR provide for the right to equal enjoyment of the rights recognised in the conventions without distinction of any kind. Distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status are not permitted (see article 2.1, ICCPR; article 2.2, ICESCR).

ICCPR separately provides for equality before the law and freedom from discrimination (article 26).

The other core UN human rights instruments – CERD, CEDAW, CRC, CRPD, CAT – elaborate on the rights guaranteed under ICCPR and ICESCR in relation to specific groups (eg persons with disabilities, CRPD; women, CEDAW) issues or circumstances. The Declarations referenced in the AHRC Act definition of ‘human rights’ do not contain rights or principles that are not otherwise covered in the core instruments.

The non-discrimination provisions in ICCPR and ICESCR, as well as the other core UN human rights instruments, will support Commonwealth legislation prohibiting discrimination on the ground of the following attributes:

- race, colour, national, social or ethnic origin (CERD)
- disability (CRPD)
- sex (CEDAW)
- maternity and pregnancy (ICESCR, CEDAW, CRC)
- marital status for women (CEDAW)
- language
- religion
- political or other opinion
- property, birth
- ‘other status’
  - age (see CESCR General Comment No.20)
  - nationality (see CESCR General Comment No.20)
  - marital and family status, including family responsibilities (see CESCR General Comment No.20)
  - sexual orientation (see CESCR General Comment No.20; Toonen v. Australia) – although not encompassing the right to marry person of the same sex (see Joslin v. New Zealand)
  - gender identity (see CESCR General Comment No.20)
  - place of residence (see CESCR General Comment No.20)
  - economic and social situation (see CESCR General Comment No.20)

ILO 111 (discrimination in employment Convention) obliges States take measures to eliminate discrimination in employment and occupation (article 2). ‘Discrimination’ is defined in article 1 to include any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or ‘any other distinction’ which has the effect.
of nullifying or impairing equality of opportunity or treatment in employment or occupation. ILO 111 does not cover any attributes that are not otherwise covered by the core UN human rights instruments.

ILO 156 (workers with family responsibilities Convention) obliges States to enable persons with family responsibilities to engage in employment without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

ILO 158 (termination of employment Convention) provides that employment shall not be terminated unless there is a ‘valid reason’. The following are not valid reasons for termination: trade union membership and activity; filing complaint against an employer for alleged violation of laws or participating in such proceedings (victimisation); race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave; temporary absence from work because of illness or injury.

ILO 100 – equal remuneration obliges States to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

The ILO Conventions largely elaborate on the principle of non-discrimination contained in ICCPR and ICESCR in the employment context. ILO 156 provides additional certainty around family responsibilities as a protected attribute.

4. **Limited application provisions**

The ADA, DDA and SDA all use limited application provisions (ie limit application of certain provisions to areas in which the Commonwealth has legislative power, such as banking or corporations). It reflects a particularly conservative approach and is not frequently used in Commonwealth legislation. The limited application provisions also add a layer of complexity for all users, including the courts, which can lead to incorrect results.

For example, in *Court v Hamlyn-Harris*[^2000] it appears that both counsel for the complainant and the Court erred by relying only on s 12(12) – interstate trade – to give effect to s 15(2)(c) of the DDA (discrimination in employment). The defendant was a sole trader who operated oyster farms in Tasmania (where the discriminatory conduct was alleged to have taken place) and in NSW. The Court found that s 15(2)(c) of the DDA did not apply because the conduct was internal to the defendant’s business and not in the course of interstate trade. However, s 12(8)(a) – external affairs, ILO 111 – would have supported the application of the DDA to this case.

Given that the external affairs power is likely to support the current scope of the Acts as well as any expanded consolidated Act, it would be desirable to remove the limited application provisions for clarity and simplicity. A savings provision which provides that the consolidated Act be read down to be within Commonwealth legislative power could be included.

[^2000]: [2000] FCA 1870
5. Interpretation – consistent with international instruments

SDA report, recommendation 3: Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

The existing position at common law is that the courts should, in a case of ambiguity, favour a construction of Commonwealth statute which accords with Australia’s international obligations under a treaty.\(^5\) There is also a well established principle of interpretation that statutes are construed, where constructional choices are open, so they do not encroach upon fundamental rights and freedoms at common law.\(^6\)

In addition to the common law rule, the Acts Interpretation Act 1901 provides that:

- Courts must prefer an interpretation which promotes the object or purpose underlying the Act.\(^7\)
- Courts may have regard to extrinsic materials to assist interpretation by confirming the ordinary meaning of the provisions or when the meaning is ambiguous or unclear.\(^8\)
- Extrinsic materials include explanatory memoranda, second reading speeches, relevant reports of a Parliamentary Committee or other committee of inquiry and any treaty or international agreement referred to in the Act.

Implementing this recommendation would in effect codify existing common law and does not appear necessary to improve clarity or promote simpler drafting.

6. Interpretation – objects clause

The ADA, DDA and SDA contain objects clauses. The RDA and AHRC Act do not contain objects clauses.


\(^6\) K-Generation Pty Ltd v Liquor Licensing Court (2009) 252 ALR 471 at 480 (French CJ). For an early statement of this principle in Australia see Potter v Minahan (1908) 7 CLR 277 at 304.

\(^7\) Section 15AA.

\(^8\) Section 15AB.