

# Anti-racial Discrimination Law in Germany and Beyond: A Comparative Analysis

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This contribution compares anti-racial discrimination law (ARDL) in selected European Union/Organisation for Economic Co-operation and Development countries,<sup>1</sup> with an emphasis on Germany. It focuses on best and worst practices. The goal is to develop indicators to inform the development of a comparative national discrimination and racism monitor. The report adopts a broad public health approach (Solanke 2017) by treating discrimination as a virus. Public health specialists combat viruses not only by treating afflicted individuals; they also address the social and environmental factors that contribute to its spread. This approach helps highlight the extent to which ARDL goes beyond individual actions to address discrimination at the structural and social levels in text and practice.

The analysis employs seven indicators to conduct the country comparisons: vision, definitions; relevance; access and support; legal education and training; exceptions, justifications, remedies, and sanctions; and social salience. Each is described separately, in the following sections which also give the county overviews. The Annex lists the relevant laws and publications from the last decade in the selected jurisdictions.

## Vision

This indicator assesses which groups are protected by the law. In particular, it evaluates whether intersectional discrimination is part of the national framework – for example, are black women protected as a discrete group? Given that this is rarely the case, the existence of such protection should be interpreted as a progressive vision.

**Australia** The Racial Discrimination Act (RDA) was adopted in 1975. Section 9 of the Act prohibits discrimination on the grounds of race, color, descent, or national or

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1 Australia, Brazil, Canada, Cuba, Great Britain & Northern Ireland, Hong Kong, Ireland, Republic of South Africa (RSA), and the USA.

ethnic origin. Immigration status is not listed in the RDA but is mentioned in the preamble. Refusing to hire an individual because of their visa status can be discrimination, although the RDA does not specifically prohibit discrimination based on nationality or citizenship.

**Brazil** The Brazilian Statute of Racial Equality (BSRE) (Law No. 12.288, of July 20, 2010) is part of the country's criminal code. It prohibits discrimination on the grounds of race, color, descent, or national or ethnic origin. »Afro-Brazilian women« are explicitly mentioned as a protected group; Section IV defines the »Afro-Brazilian population« as »people who declared themselves black and colored according to the color or race definition used by the Brazilian Institute of Geography and Statistics, or who adopt a similar self-definition.«

**Canada** The Canadian Human Rights Act (HRA) was adopted in 1985. Section 2 of the Act prohibits discrimination on grounds of race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for which a pardon has been granted. A »discriminatory practice« includes intersectional discrimination.

**Cuba** Title V, Chapter 1 (Article 41) of the Constitution of the Republic of Cuba<sup>2</sup> sets out the principle that: »All people are equal before the law, receive the same protection and treatment from the authorities, and enjoy the same rights, liberties, and opportunities, without any discrimination for reasons of sex, gender, sexual orientation, gender identity, age, ethnic origin, skin color, religious belief, disability, national or territorial origin, or any other personal condition or circumstance that implies a distinction injurious to human dignity. All people have the right to enjoy the same public spaces and service facilities. Likewise, they should receive equal salary for equal work, with no discrimination whatsoever. Article 44 obliges the state to create »the conditions necessary to guarantee the equality of its citizens« and to educate »all people from the earliest age possible in the respect of this principle.« The state is furthermore compelled to activate this right »with the implementation of public laws and policies to encourage social inclusion and the safeguard of the rights of people whose condition requires it.«

**Great Britain and Northern Ireland** The Equality Act 2010 (EqA 2010) protects against unlawful discrimination in relation to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Section 9 specifies that »race includes colour, nationality, ethnic or national origins.« Section 5 of the 1997 Race Relations (Northern Ireland)

2 Available at: [https://www.constituteproject.org/constitution/Cuba\\_2019.pdf?lang=en](https://www.constituteproject.org/constitution/Cuba_2019.pdf?lang=en)

Order states in that »racial grounds« means any of the following grounds, namely colour, race, nationality or ethnic or national origins. A »racial group« means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.« Section 2(a) of the order specifies that »racial grounds« includes belonging to the Irish Traveler community.«

**Hong Kong** The Hong Kong Race Discrimination Ordinance (RDO) was adopted in 2008.<sup>3</sup> Section 8(1) provides protection on the grounds of race, color, descent, or national or ethnic origin of the person, real or imputed. It does not clearly define these terms, stating only that »race« indicates the race, color, descent, or national or ethnic origin of a person, real or imputed. The RDO does not bind the government.

**Ireland** Section 3(2) of the Equal Status Acts 2000 and 2004 (ESA)<sup>4</sup> prohibit discrimination on the grounds of gender; marital status; family status; sexual orientation; religion; age; disability; race, color, nationality, or ethnic or nation origins; or membership of the Traveler community. The Employment Equality Acts (EEA) 1998 Part II Section 6 specifies race, color, nationality, or ethnic or national origins and the Traveler community. The Irish Constitution also provides protection from racial discrimination.

**Republic of South Africa** Chapter 1 Section 1(xxii)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) prohibits discrimination on the grounds of race, ethnic or social origin, color, language, or birth. Chapter 5 promotes equality. Chapter 2, Section 6 of the Employment Equity Act 1998 protects citizens from race, ethnic or social origin, color, culture, language, or birth discrimination. Section 9 of the country's constitution also provides protection from discrimination.

**USA** Title VII, US Civil Rights Act 1964 Sec 2000e-2 (Section 703) prohibits discrimination on the grounds of race, color, religion, sex, or national origin. The Equal Protection Clause in the Constitution also protects against discrimination.

Globally, ARDL appears in multiple jurisdictions (e.g., common law and civil law) as well as various forms of law including constitutional law and human rights charters as well as ordinary statute law, such as employment law. ARDL contains a core set of

3 Available at: [https://www.elegislation.gov.hk/hk/cap602?pmc=1&xpid=ID\\_1438403515424\\_005&m=1&pm=0](https://www.elegislation.gov.hk/hk/cap602?pmc=1&xpid=ID_1438403515424_005&m=1&pm=0)

4 The Equal Status Act 2000 was amended by the Equality Act 2004. Together, they are referred to as the Equal Status Acts.

protected characteristics that have evolved over the last 60 years, one of the oldest and most important of which is legal protection from race discrimination. ARDL rarely prohibits discrimination based on nationality or citizenship. Canada is the only jurisdiction of those reviewed that protects pardoned criminals from discrimination. Likewise, refusal to hire somebody due to their visa status (as in Australia) is novel.

The location of the law is important, as this determines access, remedies, and the extent to which the law can be amended. For the most part ARDL will be a legislative act in civil law. Protection from racial discrimination set in criminal law can be ineffective due to the need for claimants to satisfy a higher standard of proof. It is rare for state actors to be *per se* excluded from the scope of ARDL, as seen in Hong Kong.

## Definitions

This indicator measures the breadth and clarity of the legal framework, both of which help make the law accessible to non-specialists; people can only use a law if they understand it. It therefore assesses whether the text explains concepts such as ›direct‹ and ›indirect‹ discrimination or whether this is left to case law. Additional questions include: Is ›positive action‹ included? Is institutional or systemic discrimination prohibited *per se*?

**Australia** Direct and indirect discrimination are prohibited and defined in Section 9 of the RDA as any act with ›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.« The section also categorizes the imposition of unreasonable terms and conditions that have the above purpose or effect as prohibited discrimination. Section 18 prohibits intersectional discrimination, which refers to acts done for two or more reasons, where ›one of the reasons is the race, color, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act).«

**Brazil** The BSRE covers three specific areas. First, racial or ethnic-racial discrimination is defined as: ›any distinction, exclusion, restriction or preference ... which has the aim of nullifying or impairing the recognition, enjoyment or exercise, on equal terms, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public or private life.« Second, racial inequality is defined as: ›every unjustified situation of differentiation of access and enjoyment of goods, services and opportunities in public and private spheres.« Third, gender

and race inequality (intersectional discrimination) is recognized as »asymmetry existing within the society that emphasizes the social distance between afro-Brazilian women and other social sectors.«

**Canada** Section 39 HRA defines a *discriminatory practice* as one that is a discriminatory practice within the meaning of Sections 5 to 14.1. Section 3.1 stipulates that intersectional discrimination is a discriminatory practice including a »practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.«

**Cuba** The country's Constitution does not define discrimination.

**Great Britain and Northern Ireland** Direct and indirect discrimination are defined in Sections 13(1) and 19(1) EqA, respectively. The failure to provide reasonable accommodation also constitutes discrimination. Section 14 prohibits discrimination that involves »a combination of two relevant protected characteristics« (intersectional discrimination), but this provision is not yet in force. Discrimination includes harassment (Section 26) and victimization (Section 27). Section 149 sets out a Public Sector Equality Duty (PSED) on public bodies, which has been given substance in case law. In relation to *Northern Ireland*, Section 3(1) of the Race Relations (Northern Ireland Order) 1997 defines direct and indirect discrimination. Positive action is permissible according to Section 35. A PSED is also set out in Section 75 Northern Ireland Act 1998, wherein »public authorities are required to have due regard to the need to promote equality of opportunity« (Equality Commission for Northern Ireland 2010).

**Hong Kong** Section 4 RDO provides a detailed definition of racial discrimination (direct and indirect). Section 4(3) highlights that racial segregation is less favorable treatment. Section 7(1) prohibits direct and associative racial harassment by individuals or by groups. Section 49 introduces »special measures« that permit positive action to employment, education, welfare or clubs, or the provision of premises, goods, services or facilities. Section 41 prohibits »discriminatory practices,« defined as a requirement or condition that results in an unlawful act of discrimination. Section 9 provides protection from racial discrimination in relation to acts motivated by racial and another reason (intersectional discrimination).

**Ireland** The ESA 2000 and 2004 define direct and indirect discrimination in Section 3. Section 3(2)(j) provides protection from victimization. The failure to provide reasonable accommodation constitutes discrimination under Section 4. Section 11 prohibits sexual and other harassment, and Section 14(b) permits positive action to promote equality, opportunity, and special needs. The EEA 1998 also defines direct

and indirect discrimination in Sections 6 and 31, respectively. Direct discrimination arises where »one person is treated less favorably than another is, has been or would be treated.« Section 42 of the Irish Human Rights and Equality Act 2014 stipulates a public sector equality and human rights duty.

**Republic of South Africa** PEPUDA Chapter 1 Section (viii) and the EEA 1998 Section 6 define direct and indirect discrimination, and incorporate intersectional discrimination, defined as discrimination on »one or more of the prohibited grounds.« Affirmative action is set out in Chapter III EEA 1998.

**USA** There is no definition of discrimination given in the text of the Civil Rights Act. Both direct (disparate treatment) and indirect (disparate impact) discrimination are defined in the case law. Positive action is established in Section 717 Title VII CRA – it requires federal agencies to take proactive steps to ensure equal employment opportunity for all their employees and applicants.

In summary, definitions are important. Even where these are set out in law, they require interpretation by judges. Where these are absent, ARDL can easily be made redundant unless courts take on the task of establishing clear meanings. Judges and judiciaries have a greater role where the ARDL text is weak – usually where there is limited political and public support. If there is little social salience, the law will remain underdeveloped and ineffective. The clearer the definitions, the stronger the parliamentary will and political agreement, and the more effective the protection in society. While interpretations may differ, the existence of definitions can therefore be used to compare and contrast ARDL.

Intersectional discrimination is rarely incorporated into ARDL, even though this concept was introduced more than 30 years ago. This may be due to its conflation with multiple discrimination and the socio-political reluctance to discuss race – and thus take race and racism seriously – in many European countries. The explicit protection from intersectional discrimination can therefore be used to evaluate the extent to which a legal framework for protection from discrimination provides protection from *racial* discrimination.

## Relevance

This section highlights the extent to which the law tackles current problems of discrimination. Most anti-discrimination laws will encompass employment and education, but do they also include discrimination in the media, or on the part of authorities such as the police and border control?

**Australia** The RDA covers employment (Section 15); education; land, housing, or accommodation (Section 12); provision of goods and services (Section 13); access to places and facilities for public use (Section 11); advertising (Section 150); and joining a trade union (Section 14). The RDA also prohibits »racial hatred« – public speech or acts that offend, insult, humiliate, or intimidate protected persons or groups. Examples of racial hatred include behavior and spoken language (jokes, epithets, comments) or gestures as well as material in print or on the internet, images on posters, cartoons, or memes.

**Brazil** The BSRE covers health (Chapter 1); education, culture, sport, leisure (Chapter 2); religion, conscience, and beliefs (Chapter 3); land and housing (Chap 4); work and self-employment (Article 60, adverts, recruitment, promotion pay) (Chapter 5); Media (Chapter 6); domestic violence (Article 52), police violence, especially African-Brazilian youth and their re-integration (Article 53); and civil servants (Article 54).

**Canada** The HRA covers the denial of goods, services, facility, or accommodation (Section 5) and employment (Section 7).

**Cuba** Article 41 of the Constitution stipulates that: »The Cuban State recognizes and guarantees to a person the non-renounceable, indivisible, and interdependent enjoyment and exercise of human rights, in correspondence with the principles of progressivity and non-discrimination. Their respect and guarantee are obligatory for all.«

**Great Britain and Northern Ireland** Part 5 of the EqA 2010 covers employment (employees, police officers, partner, the bar, officeholders, qualification bodies, trade organizations, local authority member, recruitment) (Chapter 1, Sections 39–60). Part 6 covers education: schools (Chapter 1), further and higher education (Chapter 2), and general qualification bodies (Chapter 3). Part 7 covers associations, Part 15 relates to family property, and Schedule 19 to public authorities. The Race Relations (Northern Ireland) Order 1997 covers employment (Part II) and education, public authorities, foods, facilities, services and premises (Part III).

**Hong Kong** The RDO covers work and self-employment; education and training; provision of goods, facilities or services, land and housing; eligibility to stand in elections/vote; culture/sport/leisure; media; and incitement to discrimination and vilification. A Bill of Rights also sets out the enjoyment of civil/political rights. Section 46 of the RDO defines the offense of serious vilification. This targets intentional public incitement of hatred/serious contempt/severe ridicule toward a person or group on the grounds of race; such activity consists of threatening physical harm or incite-

ment of another to commit such harm toward a person/group or their property. The punishment for this offense includes a fine at level 6 and imprisonment for 2 years.

**Ireland** The ESA covers: disposal of goods and provision of services (Section 5), disposal of premises and the provision of accommodation (Section 6), educational establishments (Section 7), discriminating clubs (Section 8), and prohibited advertising (Section 12). The EEA covers only one area: employment. Section 42 stipulates that public bodies are obliged to »have regard to the need to« eliminate discrimination, promote equality of opportunity and treatment, and protect the human rights of staff and service users.

**Republic of South Africa** As set out in Section 29, PEPUDA covers employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, provision of goods, services and facilities, clubs, sport, and associations. The EEA 1998 covers one area: employment

**USA** The CRA covers a single area: employment.

In summary, almost all anti-racial discrimination laws cover employment, access to goods and services, media and advertising, education, housing, and accommodation. The scope of protection from racial hatred in the RDA 1975 goes beyond speech to include gestures and images as well as memes. The Brazilian BSRE is unique in specifically covering police violence toward African-Brazilian youth. The Cuban constitution provides no explicit detail on the scope of protection, but simply guarantees human rights to all.

## Access and Support

This indicator assesses the extent to which people can use the law. Are there institutions or organizations that support claimants? What resources do they have to do this? Are these statutory or non-statutory? Who monitors enforcement to ensure the law works as intended?

**Australia** Part III of the RDA 1975 creates the office of a Race Discrimination Commissioner in Section 19 with a maximum tenure of 7 years (Section 30). Section 20 lists the functions of the Commission as being: promotion of understanding and acceptance of, and compliance with, this Act; development and conduct and promotion of research and educational programs; preparation and publication of guidance on compliance with the RDA; intervention in cases; and investigations. Section 29

gives the Governor General the responsibility to appoint the Race Discrimination Commissioner.

**Brazil** Chapter 4 BSRE creates the National System for the Promotion of Racial Equality (Sinapir). Article 48 describes Sinapir's role: to promote racial equality, policymaking, and development, and implement affirmative action. Chapter 5 covers funding. In relation to enforcement, Article 52 creates a Permanent Ombudsmen for the Defense of Racial Equality to receive and forward complaints and monitor implementation. Article 53 guarantees victims access to the Permanent Ombudsman, the Public Defender, the Public Prosecutor's Office, and the Judiciary Branch in all instances. Article 55 speaks of »public civil action ... pursuant to Law 7347 of July 24, 1985.«

**Canada** Under Section 26 HRA, monitoring and enforcement is supported by the Canadian Human Rights Commission (Part II). The Commissioners are appointed for a term of 7 years. The Commission's powers, duties, and functions include dealing with complaints of discriminatory practices, public education, research and studies into human rights, policy development, and reviews of existing legal instruments. Section 48 creates the Canadian Human Rights Tribunal. Section 49(1) allows the Commission to ask the Tribunal to institute an inquiry into the complaint at any stage.

**Cuba** The Constitution does not specify an enforcement body to tackle racial discrimination.

**Great Britain and Northern Ireland** Part 1 of the Equality Act 2006 created the Equality and Human Rights Commission. Section 20 gives the Commission the power to investigate whether an unlawful act has been committed and whether requirements or undertakings have been complied with. Section 21 allows the Commission to issue an »unlawful act notice« to the subject of an investigation. Chapters 2 and 3 set out the jurisdiction of the civil courts and employment tribunals. Part VII, Section 42 of the Race Relations (Northern Ireland) Order 1997 created the Equality Commission for Northern Ireland. The Commission is tasked with working to eliminate discrimination and promoting equality of opportunity, and good relations, between persons of different racial groups as well as regularly reviewing the order. Under Section 43, the Commission may give financial or other assistance to organizations seeking to further these goals. Section 44 allows the Commission to conduct research and educational activities, Section 45 allows it to issue guidance and draft codes of practices, and Section 46 gives it the authority to conduct formal investigations.

**Hong Kong** Part 7 of the RDO creates a Commission. Section 59 sets out its functions and powers, which are to work toward the elimination of discrimination and promote equality of opportunity and harmony between persons of different racial groups generally and to work toward the elimination of harassment and vilification. Its responsibilities also include resolving complaints and conducting formal investigations (Sections 64–66), drafting codes of practice (Section 63) and ongoing reviews of the RDO. Section 59(3) allows the Commission to »become a member of or affiliate to any international body concerned (whether in whole or in part) with the elimination of discrimination.« The Commission may make recommendations and formal reports following their investigations (Section 67).

**Ireland** The Irish Human Rights and Equality Commission Act 2014 created the Irish Human Rights and Equality Commission. The Commission has the responsibility to provide information to the public and in general review human rights and equality law, making proposals for amendment where necessary. It is also tasked with drafting codes of practice (Section 31) and carrying out equality reviews and equality action plans (Section 32). Under Section 33, the Commission may issue »substantive notices« to individuals to acquire information, and Section 35(1) gives it the power to conduct inquiries into any »serious violation« or »systemic failure« of human rights or equality of treatment obligations. Upon discovering a breach of the Act, the Commission may issue an »Equality and human rights compliance notice« under Section 36. Failure to comply with such a notice can, according to Section 36(7), result in either a summary conviction to a class C fine or imprisonment for a maximum of 1 year, or both. Under Section 41, the Commission may institute legal proceedings.

**Republic of South Africa** Section 184 of the country's 1996 Constitution creates the South African Human Rights Commission. Its functions include the promotion of respect for human rights and a culture of human rights; (b) the promotion, protection, development, and attainment of human rights; and (c) monitoring and evaluation of respect for human rights in the Republic. The Commission has the power to investigate and secure redress of human rights violations, conduct research, and educate (Section 2). Section 28 of the EEA created a Commission for Employment Equity. Section 30 sets out its functions, which include drafting codes, regulations, and policy; conducting research; setting benchmarks as well as making awards »recognising achievements of employers in furthering the purpose of this Act« (2). The Commission may also hold open hearings at which members of the public may submit written or make oral representations (Section 32).

**USA** The Equal Employment Opportunity Commission (EEOC) is established under the Securities and Exchange Commission (2000e-4. [Section 705]). The Commission has a General Counsel who is responsible for all EEOC litigation, along with the At-

torney General (b.1-2). The EEOC has its own official seal »which shall be judicially noted« (d). In addition to delivering an annual report to Congress on the »causes and means« of eliminating discrimination, the Commission is tasked with making recommendations for further legislation (e). Section G lists its powers, which include *inter alia* co-operation with public and private agencies and individuals; payment of witnesses (as if they were court witnesses); providing technical support to persons; conciliating between employers and employees; conducting technical studies; intervening in civil action; and conducting educational and outreach activities, including in other languages. Under Section J, the Commission is to establish its own Technical Assistance Training Institute to provide »technical assistance and training regarding the laws and regulations enforced by the Commission.« Section K establishes a revolving fund known as the »EEOC Education, Technical Assistance, and Training Revolving Fund« in the USA Treasury to pay the costs (including administrative and personnel expenses) of providing education, technical assistance, and training related to laws administered by the Commission. Fees are to be charged for the provision of these services.

In summary, apart from Cuba, all acts considered create a specific body to oversee discrimination and support claimants. These bodies have varying degrees of power and profile. The EEOC in the USA is the most authoritative: having its own official seal raises it to the level of any other public body. All bodies have a wide range of tasks including regular review of the law, publication of codes/guidance, proposing amendments where necessary, and providing support to litigants. The EEOC is the only body with additional explicit statutory funding for training and education. Appointment procedures vary, but in many cases the Commissioner(s) is/are political appointee(s).

## Legal Education, Training, and Use of Law

This indicator evaluates the extent to which the law is incorporated into legal training so that it forms an integral part of the education of all legal professionals. Does the law school curriculum include any mandatory education on race and racism? Is this a part of professional training? Use of an anti-racial discrimination law will be influenced by the existence of a cadre of lawyers confident in its use; this confidence will only emerge through education and training. Lawyers' and complainants' confidence in using the law is visible in its rates of usage and success.

**Australia** The NSW Department of Education produced a report<sup>5</sup> on anti-racism education advice for schools. The NSW Government website claims: »The Department of Education is committed to eliminating racism through educating students, teachers, parents and involving the whole school community« (NSW Government ND). The law is used regularly, with at least one case every year. However, most complaints are unsuccessful (see Box 1).

Box 1. Australian Law on Race Discrimination – Case Law

- *Caves v Lewi Chan* (No 2) [2010] FMCA 817 (race discrimination in membership). **Claimant won**
- *Trapman v Sydney Water Corporation and Ors* [2011] FMCA 398 (race discrimination – discriminatory jokes). **Claimant won**
- *Ibrahim v Australian Dental Council* [2012] FMCA 612 (race discrimination in complaints). **Claimant lost**
- *Maloney v The Queen* [2013] HCA 28 (race discrimination – law restricting possession of alcohol on Palm Island). **Claimant lost**
- *Liafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (race discrimination – discontinuation of Samoan services by Church of Jesus Christ of Latter-day Saints Australia). **Claimant won**
- *Jin v Queensland* [2015] FCCA 2982 (race discrimination – application to study). **Claimant lost**
- *Maiocchi v Royal Australian & New Zealand College of Psychiatrists* [2013] FCA 1046 (race discrimination). **Claimant lost**
- *Prins v News Corp Australia* [2018] FCCA 3597 (race or ethnic origin discrimination in emails). **Claimant lost**
- *Payne v Long* [2020] FCAFC 170 (race discrimination – challenge to use of positive action in admissions to study). **Claimant lost**

**Canada** Legal education and training vary across states. There is evidence of a decolonial approach to education in the Ontario Equity and inclusive education strategy, which states that: »Education is based on the principles of acceptance and inclusion of all students. Students see themselves reflected in their curriculum, their physical surroundings, and the broader environment, in which diversity is honored and all individuals are respected.«<sup>6</sup> There has been at least one case of

5 Available at: <https://education.nsw.gov.au/teaching-and-learning/curriculum/multicultural-education/anti-racism-education>

6 <https://www.ontario.ca/page/ontarios-equity-and-inclusive-education-strategy-2009>

race discrimination every year for the last 10 years. Many are brought on multiple grounds. These are, however, usually lost or only partially won (they are not claims of intersectional discrimination). The case on systematic discrimination suggests the presence of lawyers who will try to develop legal protection through case law (see Box 2).

#### Box 2. Relevant Canadian Case Law

- *Ayangma v. Canada (Attorney General)* 2010 FC 1194 (race discrimination in promotions and dismissal). **Claimant lost**
- *Valookaran v. Royal Bank of Canada* 2011 FC 276 (national or ethnic origin, color, religion, family status, and disability discrimination). **Claimant lost**
- *Keith v. Canada*, 2012 FCA 117 (national origin and age discrimination in requirement to be Fellow of the Royal College for a specific post). **Claimant lost**
- *Chaudhary v. Smoother Movers* 2013 CHRT 15 (race, national or ethnic origin, color, and sex discrimination and harassment during course of employment). **Claimant lost**
- *Davis v. Canada Border Services Agency* 2014 CHRT 34 (race, age, and sex discrimination in border control). **Claimant won** case of discrimination based on race.
- *Wilson v. Canada Border Services Agency*, 2015 CHRT 11 (race and sex discrimination in employment at Canadian Border Services Agency). **Claimant lost**
- *Phipps v. Canada Post Corporation* 2016 FCA 117 (race, color, national or ethnic origin discrimination). **Claimant lost**
- *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.* 2017 CHRT 36 (race, national or ethnic origin, and religion discrimination in employment). **Claimant won**
- *Blackbird v. Maskwacis Health Services* 2018 FC 239 (race, national or ethnic origin discrimination). **Claimant lost**
- *Davison v. Canada* 2019 FC 877 (systematic racial discrimination in the federal recruitment process to senior positions in the Canadian Human Rights Commission). **Claimant lost**
- *Dulce-Crowchild v. Tsuut'ina Nation* 2020 CHRT 6 (race, national or ethnic origin discrimination in relation to termination of employment). **Claimant lost**

**Cuba** Article 44 of the constitution provides a general guarantee: »The State's institutions educate all, from the earliest age, in the principle of the equality of human beings.« A multi-sectoral policy has been proposed to eliminate racial discrimination. The main activities include changes and updates to curricula, and publications that deal with racial discrimination and African heritage in Cuba (UN CERD 2016). This would also include training for specialists, public officials, social communicators,

and law enforcement. Educational activities were a focus during the International Decade for People of African Descent; greater attention is now paid to Cuba's African heritage in curricula in all education systems; there is a continued focus on anti-racist education and the fight against racial discrimination in specialized subjects and the humanities at all levels of education. The Aponte Committee's activities to reduce racism are complemented by Ministry of Education and Ministry of Higher Education actions to introduce issues related to discrimination and prejudice into the curricula. There has been a systematic increase in the number of teachers and researchers from the different bodies of the Ministry of Education and the teacher training universities joining the various postgraduate modules on race. The influence of indigenous and African culture in shaping Cuban culture is increasingly on offer in the universities and other cultural institutions of each region. Significant results and high levels of training have been achieved in those fields. The current review revealed the significant existence of racism in Cuba over the last 10 years.

**Great Britain and Northern Ireland** The study of ARDL is not compulsory in secondary schools, colleges, or university. Human rights courses are common among LLB Law degrees and are optional at the university level. Cases involve indirect and direct discrimination as well as intersectional discrimination. There is a good rate of success compared with other countries (see Box 3).

#### Box 3. Great Britain's and Northern Ireland's Relevant Case Law

- *Ministry of Defence v DeBique* [2010] IRLR 471 (indirect race and sex discrimination case challenging the Army's requirement for a soldier to be available on duty 24/7 due to childcare responsibilities, which immigration rules made difficult for a single mother to satisfy). **Claimant won**
- *G v St Gregory's Catholic Science College* [2011] EWHC 1452 (indirect race and sex discrimination claim in which a boy was refused admission to the school because of his braided hairstyle). **Claimant won**
- *Royal Bank of Scotland v Morris* [2011] UKEAT 0436\_10\_1910 (direct race discrimination in relation to an accusation of »playing the race card«). **Claimant won**
- *London Borough of Hackney v Sivanandan and others* [2013] EWCA Civ 22 (race and sex discrimination in appointment to a post). **Claimant won**
- *Hounga v Allen and another* [2014] UKSC 47 (race discrimination in employment of an undocumented worker). **Claimant lost**
- *Tirkey v Chandok and another* (novel case of race and caste discrimination involving a claim that a female worker was discriminated against based on her caste. The Employment Appeal Tribunal (EAT) held: Although caste is not mentioned in the Equality Act, it does fall under »ethnic or national origins«). **Claimant won**

- *Taiwo v Olaige and another* [2014] Civ 279 (race discrimination in relation to migrant domestic workers who were vulnerable because of their precarious immigration status. Their treatment did not constitute direct or indirect race discrimination). **Claimant lost**
- *Home Officer (UK Border Agency) v Essop and Naeem v Secretary of State for Justice* [2017] UKSC 27 (indirect race discrimination in relation to passing a Core Skills Assessment as a prerequisite to promotion to certain civil service grades). **Claimant won**
- *SL v ABC* [2018] UKEAT 2207865/2017 (race and disability discrimination in relation to an appraisal). **Claimant lost**  
*Mander v Royal Borough of Windsor and Maidenhead* [2019] EWFC B64 (race discrimination in adoption – Sikhs told that their adoption application could not progress because there were only white British children and priority would be given to white British adopters). **Claimant won**
- *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73 (race discrimination in employment). **Claimant lost**

**Hong Kong** Cultural sensitivity training is provided to government officials and public authorities in relation to the application of equal opportunities under the Basic Law, The Hong Kong Bill of Rights Ordinance (HKBORO) and the RDO. The Civil Service Training and Development Institute of the Civil Service Bureau organizes seminars for government officers at different ranks. These include seminars organized in collaboration with the EOC and/or non-governmental organizations (NGOs), on the RDO, and on enhancing staff sensitivity and understanding of race-related issues – particularly the appreciation of cultural differences and awareness of the special needs of ethnic minorities. The government also provides learning resources to promote awareness in recognizing and valuing racial diversity and equal opportunities via the Cyber Learning Centre Plus website. For example, cultural sensitivity training is provided to new recruits of the Correctional Services Department. The department also provides staff with occasional training on ethnic minority languages including Nepali, Urdu, Vietnamese, Indonesian, and Punjabi. All new recruits to the Immigration Department are required to receive training relating to the RDO. Likewise, all Hong Kong Police Force officers are trained on the requirements of the RDO and related guidelines on racial equality during basic and in-service training at Police College (UN CERD 2017). There have been only a few cases in the last 10 years, although the Equal Opportunities Commission (EOC) recorded dealing with 120 files in 2019 (see Box 4) (EOC 2016a).

## Box 4. Hong Kong's Relevant Case Law

- *Guruprit v. Secretary for Justice and another* [2016] HKDC 626<sup>7</sup> was the first case to be decided by the District Court under the Racial Discrimination Ordinance. The claim of racial discrimination was **dismissed** – it did not fall under RDO as the police did not provide a service. The case highlights the gap in protection under RDO.
- A further complaint on race discrimination in relation to a job as a tutor was **settled** through early conciliation.<sup>8</sup>
- Management of premises: racial harassment in housing – **settled** through early conciliation.
- Provision of goods, facilities or services: racial discrimination alleged through use of Chinese language only by mobile phone service provider and use of racially derogatory language and racial stereotyping («Black people« were trouble makers) – **settled**.

**Ireland** A consultation was carried out to develop recommendations on promoting anti-racism and interculturalism in the education sector (Republic of Ireland Department of Justice 2002). The National Council for Curriculum and Assessment, which was established on a statutory basis in 2001, led to developments in the curriculum and assessment and to support in implementing changes resulting from this work.<sup>9</sup> Cases have included definitions of an ethnic group, education, employment, and immigration status. None of the cases was successful (see Box 5).

## Box 5. Ireland's Relevant Case Law

- *Fitzgerald Vs Minister for Community, Equality and Gaeltacht Affairs: [2011] IEHC180* (race discrimination in treatment by local council authority of »member of the farming community,« which are not technically an ethnic group). **Claimant lost**
- *Stokes v Christian Brothers High School Clonmel and anor* [2015] ISEC13 (indirect race discrimination against »Irish Travelers« in a secondary school that gave preferences to boys whose fathers had attended the school). **Claimant lost**

7 Singh ARJUN by his next friend Singh Anita *Guruprit v. Secretary for Justice and another* [2016] HKDC 626; dceo 9/2011 (30 may 2016)

8 Conciliated cases by the EOC: <https://www.eoc.org.hk/en>

9 <https://ncca.ie/en/>

- *Diop v Transdev Dublin Light Rail and another* [2019] IEHC 849 (racial profiling and discrimination during ticket control on board a train). **Claimant lost**
- *Road Safety Authority v AB* Record Number: 2020/001550 (race discrimination in refusal to provide a learner driver permit because residency status was not proven). **Claimant lost**

**Republic of South Africa** There have been a variety of cases over the last 10 years in South Africa, covering a range of issues from policing to employment to hate speech (see Box 6).

Box 6. Relevant Case Law in South Africa

- *Osman v Minister of Safety and Security and Others* (EC09/2008) [2010] ZAEQC 1 (race discrimination when armed police refused to provide assistance). **Claimant lost**
- *Moosa v Phumelela Gaming and Leisure Limited* (61600/2012) [2014] ZAEQC 1 (race discrimination due to absence of any Black race callers). **Claimant lost**
- *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and* (race and religion discrimination in hate speech about the Jewish community). **Claimant won**
- *Nelson Mandela Foundation Trust and another v Afriforum NPC and others* (EQ02/2018) [2019] 4 All SA 237 (race discrimination found in any gratuitous display of South Africa's former national flag, besides being racist and discriminatory, demonstrates a clear intention to be hurtful, to be harmful and incite harm, and to promote and propagate hatred against Black people in contravention of Section 10(1) of the Equality Act). **Claimant won**
- *Gordhan v Malema and another* (EQJHB 5/2019) [2020] 1All SA 417 (race discrimination in speech made to a crowd). **Claimant lost**

**USA** Education on racial discrimination is not compulsory in the curriculum for under 18s. However, Critical Race Theory is common in some further educational institutions. A wide range of university courses in law, sociology, and women's studies focus on race, racism, and racial discrimination. Many cases of race discrimination have been tried, mainly at the state level, but very few have been successful (see Box 7).

## Box 7. Relevant Case Law in the United States

- *Anderson v Durham No 09–1758* (race discrimination in dismissal and racially hostile environment). **Claimant lost**
- *MOCHA Soc’y Inc v City of Buffalo No 11–2184* (direct and indirect race discrimination in employment). **Claimant won**
- *Vance v Ball State University* (racial harassment in creating hostile workplace environment). **Claimant lost**
- *Abrams v Dept of Public Safety No 12–111-cv* (race and color discrimination in employment). **Claimant lost**
- *Kalamazoo County Road Commission et al., petitioners v. Robert deleo No 13–1516* (race, national origin, and age discrimination in employment). **Claimant lost**
- *Green v Brennan (2016) 578 US* (race discrimination in dismissal). Remanded the case to determine the precise date
- *Abrego v Wilkie No 17–3413* (gender and race discrimination in dismissal). **Claimant lost**
- *Mackney v Board of Trustees of the California State University No 72198* (race discrimination in sport). **Claimant lost**

In summary, there is little evidence that legal education and training on race and racism are seen as mandatory to tackling racial discrimination, whether in isolation or within the larger field of human rights law. The constitutional guarantee in Cuba is unique and exemplary. Other jurisdictions seem to be paying greater attention to this at the state (if not the national) level. Hong Kong appears to make a great effort to ensure that public employees are aware of the RDO.

The limited education on race and racism may explain the low use and success rate of these cases. There is a clear link between knowledge of discrimination law and public confidence in using it. A lack of education can also influence lawyers’ willingness to use the law and how judges interpret it. The focus of individual cases differs across jurisdictions, but mainly concern employment. However, there are interesting cases concerning hair, caste, and adoption in the UK. Most noticeable is the absence of any cases in Cuba and a very low number in Hong Kong and Ireland. The USA seems to have the most (and the most varied) cases.

## Exceptions, Justifications, Remedies, and Sanctions

This indicator captures areas that fall beyond the scope of ARDL. A common justification is a genuine occupational qualification – where is this used? Is positive action

presented as an exception? Remedies and sanctions can also indicate the extent to which discrimination is condemned – arguably a harsher remedy indicates greater social condemnation.

**Australia** Exceptions are set out in Part II RDA. Section 8(2) states that positive action, or acts intended to confer benefits for charitable purposes or to enable such benefits to be conferred on persons of a particular race, color or national or ethnic origin, are lawful. This can include measures introduced to increase the participation of under-represented groups.

Section 9(3) gives an exception in relation to discrimination in the employment, or application for employment, of a person on a (non-Australian) ship or aircraft if that person was engaged, or applied, for that employment outside Australia. Sections 12(3) and 15(5) provide exceptions in relation to housing and employment where the person accused of discrimination is a relative.

In relation to racial hatred, Section 18(d) includes a general exception that makes lawful things »done reasonably and in good faith« even if done in public. Such things include the use of racially offensive language by a character in artistic works or performances, academic and scientific debate, objective news reports, or expressions of genuinely held beliefs. Section 6(b) provides that Chapter 2 of the Criminal Code applies to all offenses against the Act. Further detail is given in Section 27 and includes the imposition of 10–100 penalty units and in some cases, imprisonment.

**Brazil** Article 1 BSRE, para VI provides an exception for affirmative action: this is not considered discrimination, and is both recognized and promoted. It makes lawful »programs and special measures adopted by the State and the private initiative to correct racial inequalities and to promote equal opportunities.« Sanctions and remedies are varied and linked with other statutes such as Articles 3 and 4 of Law No. 7716, 1989 (imprisonment of 2–5 years) and Articles 3 and 4 of Law No. 9029, 1995 (financial penalties, bar from access to public funds, reinstatement or compensation).

**Canada** Section 15 HRA lists exceptions, including a »bona fide occupational requirement« that can be used to make lawful any »refusal, exclusion, expulsion, suspension, limitation, specification or preference« in relation to an employment decision. There are also exceptions related to the refusal of employment due to statutory minimum or maximum age limits and any reasonable discrimination proscribed by guidelines issued by the Canadian Human Rights Commission pursuant to Subsection 27(2). The list also includes special leave or benefits related to pregnancy or childbirth for women or special leave or benefits to help employees take care of their children. It also refers to a lawful »bona fide justification« in relation to the denial of any goods, services, facilities, or accommodation.

For the use of a bona fide occupational requirement or justification, it must be established that »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.«<sup>10</sup>

Section 16(1) explicitly provides for positive action, allowing »special« programs and designed to prevent disadvantages »by improving opportunities respecting goods, services, facilities, accommodation or employment« in relation to a protected group. Section 53 sets out remedies including the reinstatement of rights (reversal of the disadvantage), introduction of remedial measures, and financial compensation.

**Cuba** Section 42 of the Constitution vaguely refers to a remedy for violating the principle in Article 41: »the violation of this principle is proscribed and is sanctioned by law.« Article 45 further states that the »exercise of these rights of the people are only limited by the rights of others, collective security, general well-being, respect for public order, the Constitution, and the laws.« The Criminal Code provides more details. Article 295 establishes the offense of infringement of the right to equality and imposes a prison term of 6 months to 2 years or a fine of 200–500 accounting units (cuotas), or both, on any person who discriminates against another person or encourages or incites discrimination, either by making remarks or performing actions that are offensive to that person's sex, race, color or national origin, or by obstructing or preventing that person, with the same motives, from exercising and enjoying the right to equality enshrined in the Constitution.

**Great Britain and Northern Ireland** Under EqA 2010, exceptions are set out for services and public functions (Schedule 2), premises (Schedule 5), equality of terms (Schedule 7), work (Schedule 9 includes occupational requirements), schools and further and higher education (Schedule 11 and 12), and associations (Schedule 16). Schedule 23 lists general exceptions. A justification for direct age discrimination is permitted in Section 13(2) if »A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.« Action taken by a religious organization or an organization with a religious ethos may not be unlawful under EqA 2010.

Sections 158 and 159 allow positive measures to be taken in relation to recruitment/promotion and in general where a need is demonstrated. Article 149 sets out a PSED that obliges public organizations to be proactive in preventing discrimination and promoting equality.

Remedies are to be sought in the civil courts (Section 119); damages awarded may include compensation for injured feelings (whether or not they include compensation on any other basis). For cases related to employment, under Section 124

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10 Canadian Human Rights Act (RSC, 1985, c H-6) s 15(2)

the tribunal may: (a) make a declaration about the rights of the complainant and respondent on the related matter, (b) order the respondent to pay compensation to the complainant, or (c) make an appropriate recommendation.

Under the Race Relations (Northern Ireland) Order 1997, exceptions for racial discrimination are found in Sections 8 (genuine occupational qualifications for employment in entertainment, art, restaurants, or personal services), 11 (seafarers), 12 (partnerships), 23 (small dwellings), and 24 (foster carers). Section 53 includes remedies and sanctions, including an order declaring the rights of the complainant and respondent, financial compensation, and removal of the adverse effect.

**Hong Kong** Part 3 RDO establishes a genuine occupational qualification in relation to work and employment. There are exceptions for cemeteries in Section 33 (allocation and provision of goods/facilities/services) and for culture/sport/leisure in Section 37 (exceptions for club memberships, but this does not cover arrangements made by reference to color). Under Hong Kong's Bill of Rights (1991),<sup>11</sup> exceptions included the armed forces and persons detained in penal establishments, juveniles under detention, immigration legislation, and persons without the right to abode. The offense of »serious vilification« (Section 46) is punishable by a fine at level 6 and imprisonment for 2 years.

Section 70 contains other remedies for claims of discrimination/harassment and vilification. Civil proceedings are pursued in the District Court. Remedies range from an order for the respondent to stop the unlawful act to payment of punitive or exemplary damages to the claimant (Section 70(4)). The Court has the power to provide any remedy that is available under the RDO. Damages for discrimination/harassment/Section 45 acts may include compensation for injury to feelings. Sections 71–79 state that only the Commission can bring actions under Sections 42–44; application must be made to the District Court (Section 76(3)). Individuals may apply for an injunction, and if Section 42 is invoked a financial penalty may also be imposed (Section 76(5)–(6)).

The case law demonstrates that the burden of proof is at the level of a civil claim: claims must be »proved by the plaintiff on the balance of probabilities« (unlike criminal claims, which must be proved beyond a reasonable doubt). The case law also provides evidence of the reversal of the burden of proof: »Where the claimant adduces evidence from which discrimination can be inferred, the court will then look to the defendant for evidence or explanations to indicate whether or not discrimination in fact occurred« (EOC 2014).

11 Available at: [https://www.elegislation.gov.hk/hk/cap383?pmc=1&xpid=ID\\_1438403137079\\_003&m=1&pm=0](https://www.elegislation.gov.hk/hk/cap383?pmc=1&xpid=ID_1438403137079_003&m=1&pm=0)

**Ireland** Under ESA Section 3(3), treating a person who is 18 or younger less favorably or more favorably than another, regardless of the other person's age, is not regarded as unlawful discrimination on the basis of age. Section 5 lists situations in which discrimination in the provision of goods and services is lawful, including: services provided by a club to its members; cosmetic/aesthetic services offered to different genders where physical contact is required; pension and insurance services; religious goods and services; sports facilities and events; maintenance of dignity and the provision of privacy; promotion of bona fide special interests; dramatic performances or entertainment; rules on age related to adoption and fostering; a disposal of goods by will or gift; or services targeted to specific groups. Section 6 contains similar exceptions in relation to housing. Section 7 provides exceptions for single-sex schools and religious education. Discrimination on the grounds of nationality is permissible in relation to fees, admissions, and financial support. Section 9 stipulates that clubs may lawfully discriminate if they use quotas to promote equality on their board or committee, or undertake other actions to achieve equal involvement in club matters.

Section 24 ESA promotes mediation as a remedy, or where this fails, a private investigation. Under Section 27, a finding of discrimination can result in an order for compensation for the effects of discrimination, or an order that a person or persons specified in the order take a specified course of action. The maximum amount of compensation is set at the highest level that can be awarded by the District Court in civil cases in contract.

Section 24 EEA 1998 permits »measures to promote equal opportunity for men and women,« especially by removing existing inequalities. Section 25 allows sex to be used as a genuine occupational qualification in employment. Section 26 allows employers to provide benefits for women in connection with breastfeeding and maternity, and for sex to be used as a determining factor in relation to personal services provided at home, such as care for the elderly. Section 27 allows for sex to be used as a determining factor in relation to employment in the national police and prison service. Section 34 lists exceptions related to benefits and remuneration relation to family status, age, and disability. Section 35 allows for specific remuneration and special treatment for disabled workers.

EEA 1998 Section 37 sets out further general exceptions, including to maintain/protect the religious ethos of a religious organization (1) or to allow for preferences relating to an occupational qualification (2–4). Section 37(5) excludes employment in a private household, and 37(6) specifically exempts employment in the Irish Defence Forces, the Garda Síochána (national police service), and the prison service.

Remedies under EEA 1998 Section 82 may take the form of an order for compensation, for equal treatment, for equal remuneration, or for a specific course of

action to be taken. Section 98 also provides for the reinstatement or re-engagement of persons dismissed, including due to victimization.

**Republic of South Africa** PEPUDA Section 21 lists the remedies that may be given by the Equality Courts in any combination. These include: an interim order; a declaratory order; an order making a settlement between the parties to the proceedings an order of court; an order for the payment of any damages relating to financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question; an order for the payment of damages in the form of an award to an appropriate body or organization; an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment; an order to make specific opportunities and privileges unfairly denied in the circumstances available to the complainant; an order to implement special measures to address the unfair discrimination, hate speech or harassment; an order directing the reasonable accommodation; an order that an unconditional apology be made; an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court; an appropriate order of a deterrent nature, including a recommendation to the appropriate authority, to suspend or revoke an individual's license; a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order; an order directing the clerk of the Equality Court to submit the matter to the Director of Public Prosecutions with jurisdiction over the possible institution of criminal proceedings; an appropriate order of costs against any party to the proceedings; and an order to comply with any provision of the Act. The Constitution (Section 9(2)) and PEPUDA both recognize and permit positive action.

EEA 1998 Chapter III sets out affirmative action in relation to employment, Chapter V defines the sanctions and remedies. Under Section 36 a written undertaking to comply can be requested and obtained from an employer. Section 37 allows a compliance order to be imposed on an employer if the undertaking is not forthcoming. The compliance order must be displayed at the work premises. In the face of non-compliance, this may ultimately become an order of the Labour Court. Sections 39 and 40 explain how an employer may register their objections against this and appeal it.

**USA** Exceptions/justifications are found in Section 703(e) CRA, which states that it is not an unlawful employment practice to use a bona fide occupational qualification »reasonably necessary to the normal operation of that particular business or enterprise.« Places of learning may also employ persons of a specific religion where the institution exists to promote a particular religion. Employment in national se-

curity is also exempted, as are »bona fide seniority or merit systems of pay and conditions.« Unequal pay between women and men is also permissible where it is compatible with the Fair Labour Standards Act 1938 (29 U.S.C. 206(d)). Title VII does not apply to preferential treatment given to businesses or individuals on or near Indian reservations.

Section 706 of the CRA 1964 explains enforcement and sanctions. This section requires the EEOC to initially use private informal methods (»conference, conciliation, and persuasion«). Violation of private discussions can result in a misdemeanor and either a fine of \$1,000 or imprisonment for up to 1 year. If voluntary compliance is not possible, a civil action may be brought; remedies include an order to cease the unlawful employment practice; an order for affirmative action such as reinstatement or hiring of employees, with or without back pay. Such orders are only possible for discrimination on the grounds of race, color, religion, sex, or national origin or in violation of Section 704(a). Under Section 707, the Attorney General may also commence a civil action if in his or her opinion the case is of general public importance. Section 717 Title VII of the CRA requires federal agencies to take proactive steps to ensure equal employment opportunities for all their employees and applicants.

In summary, positive or affirmative action is an increasingly uncontroversial aspect of ARDL. Yet its application is not widespread, even where it is lawful. The idea of a public sector equality duty, as seen in the UK and Ireland, imposes a positive obligation on public bodies to prevent racial discrimination and promote racial equality.

Aside from provisions for positive/affirmative action and genuine occupational qualifications, there is a huge variety in the range of exceptions and remedies provided across the sample. This can be explained by the different cultural and political contexts within which these laws were created, as well as the different types of laws used to create this protection. Exceptions are given in relation to many different activities – from employment on ships and aircraft to private housing and promoting membership in clubs. It is unclear when, if ever, these exceptions are reviewed.

The use of criminal law to provide a remedy is as common as the use of civil law. This, however, limits the effectiveness of the law as criminal convictions require a higher level of proof than civil offenses. The burden of proof in a civil case is that claims must be »proved by the plaintiff on the balance of probabilities,« while in criminal cases, claims must be proved beyond a reasonable doubt. Remedies are to be sought in civil or criminal courts, or usually before a tribunal in the case of employment.

Criminal convictions are punished by a fine, imprisonment or both. Remedies under civil law include the reinstatement of rights (reversal of the disadvantage), introduction of remedial measures, and financial compensation. The variety of remedies under the RSA PEPUDA gives significant flexibility in how to bring about social change.

## Social Salience

This indicator refers to the extent to which a country has a wider social discourse on racism and discrimination. Does the media report on racial discrimination and harassment? Are there NGOs drawing attention to the problem? Are there agencies collecting data that is disaggregated by race/ethnicity? Is there any academic scholarship on race and racism? The goal is to identify whether (and how) racism and discrimination is part of the common social consciousness and national conversation.

**Australia** The international media (Tuala 2019) highlights racism in Australia, including in sport (Khalil 2020; Cully 2020); considerable attention is paid to the fate of indigenous Australians (Henriques-Gomes 2020). There are numerous national NGOs working to tackle racial discrimination.<sup>12</sup>

**Brazil** The Brazilian Institute of Geography and Statistics collects racial/ethnic data. Definitions are based on this data. The value of social action is also recognized in the law. Article 7(1) of the BSRE specifically refers to the »expansion and strengthening of the participation of social movements leaders to protect the health of afro-Brazilian people in positions of social participation and control of the SUS.«

**Canada** The international media focuses on racism and discrimination in Canada (Gerster 2019; Shaheen 2019; O'Neill 2020; Bayoumi 2019). There are numerous national NGOs and civil society organizations that are active in the field of racism,<sup>13</sup> including one that focuses on Black women.<sup>14</sup>

**Cuba** International media outlets highlight racism in Cuba and report on national programs to eliminate African-Cuban racism (Fogel 2020; Marsh 2019; Bodenheimer 2020; Gleibermann 2016; Hawkins 2017). In addition, Cuba has regional and national human rights organizations<sup>15</sup> that work to promote racial and ethnic equality for descendants of Africans and indigenous communities, highlighting the structural racism experienced by members of the African-Cuban community; ›Blacks, mulattos and mestizos‹ represent 30 % of the population (IACHR 2020). The UN CERD has highlighted racism in Cuba (CERD 2018a, 2020). There has been

12 Home pages available at: <https://www.australiansagainstracism.org/>; <https://alltogethernow.org.au/>; <https://www.reconciliation.org.au/>; <https://www.cmy.net.au/>

13 Home pages available at: <https://blackyouth.ca/>; <https://indigenousandawarenesscanada.com/>; <https://www.blacklegalactioncentre.ca/>; <https://blacklivesmatter.ca/>; <https://blacklivesmattervancouver.com/>; <https://stopracism.ca/>.

14 <https://blackwomeninmotion.org/our-story>

15 <https://minorityrights.org/minorities/afro-cubans/>; <https://raceandequality.org/cuba>

a recognition of the need to raise awareness of the African legacy in the Cuban culture. Cuba has a National Statistics and Information Office that collects race/ethnic data. In addition, there is evidence that international scholars study the experience of racism in Cuba (Hansing and Hoffman 2019; Clealand 2013).

**Great Britain and Northern Ireland** Both national and international media cover stories about racism and racial discrimination (Lucas 2020; Owen 2015; BBC 2020a, 2020b; Mason 2020). There are many national NGOs working to tackle racism<sup>16</sup> as well as a statutory body, the Equality and Human Rights Commission.

**Hong Kong** National and international media outlets report on racial discrimination in Hong Kong (Lee and Candela 2020; South China Morning Post 2018a, 2018b, 2019; Yeung 2020). The UN Committee on the Elimination of Racial Discrimination (CERD) covers racism in China in its periodic reports (UN CERD 2018b). There is some evidence of a scholarly debate on racism in Hong Kong: Faculty at the Hong Kong Law School sent a submission on racism to the UN CERD (CCPL 2018). Crabtree and Wong (2013) detail the reluctance in Hong Kong to adopt specific legislation prohibiting racial discrimination and highlight the general dissatisfaction with the effectiveness of the RDO from NGOs and political parties, especially in its scope. The EOC produces its own annual reports on racism in Hong Kong: it handled 120 cases in 2019 covering land and housing, financial services, and healthcare (EOC 2016a, 2016b, 2020).

**Ireland** Limited attention is paid to racism in Ireland by the national and UK media (Cachia 2020; Lally 2020). Only one national statutory agency<sup>17</sup> works on the issue of race and racism.

**Republic of South Africa** National and international media carry stories on race and racism (Dean 2020; White 2020; Allie 2020; Burke 2020). There is one national statutory agency working to tackle race and racism.<sup>18</sup>

**USA** National and international media pays significant attention to racism and discrimination in America (BBC 2019). In addition to events such as the 2020 election (BBC 2020c) and the killing of George Floyd (BBC 2020d) in the international media, national media also carry stories of relevant regulation (Holt and McGrogan 2020)

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16 <https://www.runnymede.org/>; <https://raceequalityfoundation.org.uk/>; <https://www.rota.org.uk/CORE>; <https://www.ukren.org/>; <https://www.standuptoracism.org.uk/>; <https://www.cre.r.scot/>; <https://www.blackthrive.org.uk/>;

17 <https://inar.ie/>

18 <https://www.arnsa.org.za/home>

and case law (Camera 2020). There are numerous national and state-level NGOs across the country.<sup>19</sup> Data on the living and working conditions of racialized and indigenous groups is collected on a regular basis.

In summary, most countries have a variety of organizations to educate the public and support victims of racial discrimination. While the extent to which these bodies are well resourced and funded was beyond the scope of this review, this of course greatly affects their effectiveness. The amount of media attention paid to the issue in the international (if not national) media is also a key determinant of impact. In Hong Kong it is noteworthy, given the pressures there, that academics are also active in promoting ARDL. Yet media attention on race and racism is conspicuously low in Ireland. The value of social action is only explicitly mentioned in Brazilian law. Cuba appears to have the most widespread network of organizations tackling racism; some countries, such as Ireland and RSA, have only one. Not all countries collect racial data, which is an obstacle to effectively tackling racial discrimination – data is required to both target interventions and measure change. Perhaps surprisingly, Cuba has a National Statistics and Information Office that collects race/ethnic data.

Table 1 summarizes the best and worst practices revealed in this assessment, focusing on practical outcomes for intended beneficiaries, based on specific indicators that can be used in the future to monitor and measure racial equality in Germany.

Table 1: Best and Worst Practices, by Indicator

	Best	Worst
<b>Vision</b>	Australia: refusal to hire an individual because of their visa status is novel Brazil: African-Brazilian women explicitly protected Canada: protects pardoned criminals from discrimination	Hong Kong: state actors <i>per se</i> are excluded

19 <https://www.raceforward.org/>; <https://advancementproject.org/home/>; <https://www.naacp.org/>; [https://www.knowyourrightscamp.com/?form=KnowYourRightsCamp&utm\\_source=l-o-redirect](https://www.knowyourrightscamp.com/?form=KnowYourRightsCamp&utm_source=l-o-redirect); <https://blacklivesmatter.com/>; <https://www.livefreeusa.org/ourcalling>

<p><b>Defini-tions</b></p>	<p>Brazil: includes behavioral and systemic discrimination, which goes beyond individual behavior to also target institutional racism Ireland: the human rights duty raises the status to a fundamental value RSA: PEPUDA Chapter 1 Section viii contains an open list that includes intersectional discrimination</p>	<p>Cuba: no definitions are given. This may be due to legal protection being anchored in the Constitution, which must apply to all citizens in the same way.</p>
<p><b>Relevance</b></p>	<p>Australia: protection of racial hatred includes memes Brazil: protection from police violence (especially Afro-Brazilian youth and their reintegration) is exemplary.</p>	<p>Cuba: the constitution provides no explicit detail on the scope of protection, but simply guarantees human rights to all Hong Kong: excludes public bodies from the scope of the law Ireland: excludes police from scope of protection</p>
<p><b>Access &amp; support</b></p>	<p>Brazil: significant support for complainants; victims are guaranteed access Hong Kong: the Commission may sign up to international bodies concerned with the elimination of discrimination RSA: the Commission holds open hearings allowing members of the public to make written or oral representations USA: the EEOC has its own official seal and its own funded training institute</p>	<p>Cuba: no monitoring body Hong Kong (CCPL 2018): Provision in the Basic Law and the Bill of Rights do not fall under the EOC's jurisdiction, so the complainant must cover the cost of court proceedings; there is an exemption with respect to nationality and immigration status; restrictive nature of the definitions present in the legal instrument. Lack of widespread knowledge on how to file a complaint (EOC 2016b).</p>
<p><b>Legal education &amp; training</b></p>	<p>Cuba: coordinated focus on educational activities at all levels to increase attention on African heritage. There has been a systematic increase in the number of postgraduate modules on race and African culture on offer in the universities and other cultural institutions of each region.</p>	<p>UK: very little education on race in the curriculum at any level Ireland and Australia stress multi-cultural education, but this is not necessarily anti-racist education</p>

<b>Excep- tions, justifica- tions, remedies &amp; sanctions</b>	UK: the PSED RSA: wide variety of remedies gives judges flexibility to tackle racial discrimination using different approaches	Australia, Brazil, Cuba: use criminal law to provide a remedy Australia: exception in relation to <i>racial hatred</i> Ireland: EEA exempts employment in the Irish Defence Forces, Garda Síochána (national police service), and prison service
<b>Social salience</b>	Hong Kong: academics actively promote anti-racial discrimination Brazil: law states value of social action Cuba: wide network of organizations tackling racism and collecting race/ethnic data	Ireland: media attention to race and racism is conspicuously low. Only one statutory NGO exists to do this work in Ireland and South Africa

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