



**Advance Australia Fair:
Addressing Systemic Discrimination
and Promoting Equality**

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About the Human Rights Law Centre

The Human Rights Law Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

Contents

1.	Overview and Summary	1
2.	The Case for Strong and Effective Equality Laws	3
2.1	The benefits of a more equal society	3
2.2	The costs of inequality	4
2.3	The extent of inequality	6
3.	Deficiencies in Current Federal Anti-Discrimination Law	7
3.1	Non-compliance with human rights standards	7
3.2	Current laws are reactive, complaints-based and adversarial	8
3.3	Current laws fail to actively promote equality or address systemic discrimination	10
4.	Recommendations for a More Equal Australia	10
4.1	Recommendation 1 - The introduction of a positive duty to promote equality and eliminate discrimination	11
4.2	Recommendation 2 - The enactment of a legal right to equality before the law	16
4.3	Recommendation 3 - Redrafting of the Temporary Special Measures provisions	22
4.4	Recommendation 4 - Provision for Representative complaints	28
4.5	Recommendation 5 - Improved Institutional and reporting frameworks	31
4.6	Recommendation 6 - Expansion of the powers of the Commission	34

1. Overview and Summary

1. There are four Federal statutes governing discrimination law: the *Racial Discrimination Act 1975* (Cth); the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth). The *Australian Human Rights Commission Act 1986* (Cth) governs, amongst other things, the procedure for obtaining redress in discrimination matters.¹
2. In April 2010, the Federal Government announced its intention to streamline the Federal anti-discrimination Acts into a single comprehensive law (**Consolidation Project**).² The Federal Government stated:

A single Act will address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations. It will also provide the opportunity to review the complaints handling process and the related role and functions of the Australian Human Rights Commission. Importantly, there will be no diminution of existing protections currently available at the Federal level.³
3. The Federal Government has indicated that the exposure draft legislation for the consolidated anti-discrimination law (herein **Consolidated Act**) will be released sometime in 2011.
4. The Consolidated Act should strengthen and modernise Australia's Federal anti-discrimination laws. In this paper, the Human Rights Law Centre (**HRLC**) focuses on the need for the law to contribute to a more equal society by recognising and addressing systemic discrimination.
5. In order for the law to effectively eliminate barriers to equality, it must recognise and address the systemic discrimination that is entrenched in institutions, policies and practices. Systemic discrimination creates and perpetuates disadvantage for whole groups of people and is not effectively addressed through individual complaints.⁴ If we recognise and respond to systemic discrimination, we will address the causes as well as the symptoms of inequality, thereby ensuring that discrimination does not occur in the first place and creating a fairer, more just and more inclusive Australia.

¹ see part IIB

² Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsey Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

³ Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsey Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

⁴ For example, universal airline policies of prohibiting guide dogs on board aircrafts would not be effectively addressed through individual complaints. The resolution of a complaint between an individual and a duty holder (for example, a particular airline) merely results in a settlement (often confidential) and is confined to the circumstances of the individual's complaint, rather than requiring changes to discriminatory policies or procedures.

6. This paper explores how the reactive nature of the current regime does little to address systemic discrimination and promote substantive equality and makes a series of recommendations designed to ensure that the Consolidated Act is an effective tool in addressing systemic discrimination.
7. Section 2 provides the case for stronger Federal anti-discrimination laws, including the benefits of equality, and the nature, extent and costs of inequality.
8. Section 3 provides an overview of the current Federal anti-discrimination law, and the limitations of the current complaints-based model.
9. Section 4 of the paper sets out six recommendations to address some of the deficiencies identified with the current reactive, complaints-based model, namely:
 - (a) the incorporation of a positive duty to promote equality and eliminate discrimination (section 4.1);
 - (b) the incorporation of a legal right to equality before the law (section 4.2);
 - (c) a redrafted provision concerning temporary special measures (section 4.3);
 - (d) provision for representative complaints (section 4.4);
 - (e) improved institutional and reporting frameworks (section 4.5); and
 - (f) expansion of the powers of the Australian Human Rights Commission (**Commission**) (section 4.6).
10. Each of these recommendations is accompanied by a detailed analysis of the issue or problem, identification of the gap in current Federal anti-discrimination laws, and a discussion of ways to improve the law in the Consolidated Act.
11. This paper does not cover all issues that must be addressed if the Consolidated Act is to more effectively address discrimination and promote equality. Issues including the simplification of the definitions of discrimination, the broadening of protected attributes and improving access to justice for people who have experienced discrimination are not addressed here, but are covered in other submissions provided to the Attorney Generals Department. Links to some of these submissions are available at: www.equalitylaw.org.au
12. Finally, the HRLC would like to thank Clayton Utz, a leading Australian law firm, for their substantial assistance in researching and drafting this submission.

2. The Case for Strong and Effective Equality Laws

2.1 The benefits of a more equal society

13. Equality is a fundamental social and economic good. There is strong evidence to demonstrate that equality makes communities more cohesive and economies more prosperous.⁵
14. The final report of the United Kingdom's Equalities Review Panel, which was established to investigate the causes of persistent discrimination and inequality in British society, found that:⁶

The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies. In the poorest areas of unequal societies, the quality of social relations and the social fabric are stretched to breaking point.

...

There are substantial benefits to be gained from living in a more equal society. Gaps in educational attainment, employment rates, or other opportunities impoverish us all. Research shows that not only does absolute poverty in itself reduce our productivity; so does the size of the gap between those at the top of society and those at the bottom. On several measures, that gap creates a drag on economic performance. This does not mean that the answer is to hold back those at the top or to sacrifice prosperity; but it does require focused effort on those who seem rooted to the bottom of the pile... A more equal society would put scarce resources to better use: the more evenly resources are distributed, the more likely they are to be used where they are most needed and provide higher returns. In this way, they generate improved well-being, quality of life, social progress and consumption. (Footnotes omitted)

15. Similarly, according to VicHealth:⁷

⁵ See, for example, K Pickett and R Wilkinson, *The Spirit Level: Why More Equal Societies Almost Always Do Better*, Bloomsbury, 2009; United Kingdom Department for Communities and Local Government, *Fairness and Freedom: The Final Report of the Equalities Review*, February 2007, available at <http://www.communities.gov.uk/publications/corporate/fairnessfreedom>; VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>; Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians*, June 2010, available at http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690 and B Link and J Phelan, 'Conceptualising Stigma', *Annual Review of Sociology*, 2001, vol 27, pp 363-385.

⁶ United Kingdom Department for Communities and Local Government, *Fairness and Freedom: The Final Report of the Equalities Review*, February 2007, available at <http://www.communities.gov.uk/publications/corporate/fairnessfreedom>, p 19.

⁷ VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>, p 8.

As well as affecting individuals, discrimination has the potential to harm us all by undermining harmonious community relations and social cohesion, compromising productivity and placing an unnecessary burden on our health, welfare and legal systems.

16. From a business perspective, diversity policies (policies aimed at preventing discrimination and harassment and promoting equality in the workplace) can lead to improved efficiency, productivity and profits by attracting more talented and loyal employees and reducing absenteeism⁸.
17. From a government perspective, there are efficiency gains to be made as the cost of remedying the causes of discrimination is lower than that of alleviating the problems caused by discrimination.⁹ In the case of discrimination in education and employment, the government has significant direct costs of spending more to support those who do not have the skills to work or who have been shut out of the labour market.
18. From a human rights perspective, the rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties.¹⁰ In addition, non-discrimination constitutes a basic and general principle relating to the protection of all human rights.¹¹ Enacting laws that effectively address discrimination and promote equality is therefore central to the Australian Government's fulfilment of its international human rights obligations.

2.2 The costs of inequality

19. From an individual perspective, discrimination and inequality prevents all Australians from having a fair chance in life and from reaching their full potential. The importance of having

⁸ For a detailed discussion see European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Continuing the Diversity Journey: Business Practices, Perspectives and Benefits*, October 2008, available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=153&furtherPubs=yes>, p 12.

⁹ Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians*, June 2010, available at http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690, p 33.

¹⁰ See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (**ICCPR**), arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3 (**ICESCR**), art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**), Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (**CRPD**), art. 5.

¹¹ Human Rights Committee, General Comment 18, *Non-discrimination*, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

strong anti-discrimination laws is demonstrated by the direct relationship between the prevalence of discrimination and important lifestyle indicators. For example:

- (a) **Physical health** – Reduced physical health has been attributed to links between inequality and discrimination and stress.¹² Chronic stress has been shown to affect the cardiovascular and immune systems.¹³ Individuals may also manage this stress by engaging in behaviours that are damaging to health such as smoking and alcohol abuse.¹⁴ Inequality has also been linked to more rapid ageing.¹⁵ Studies in America have shown that people living in more equal states live around 4 years longer than those in more unequal states.¹⁶ Discrimination can also increase the incidence of drug and alcohol abuse, obesity, mental health problems, suicide and teenage pregnancy rates.¹⁷
- (b) **Mental health** – A recent study by the Victorian Equal Opportunity and Human Rights Commission found that discrimination can lead to increased stress levels and the internalisation of negative stereotypes and evaluations, which in turn can lead to poor self esteem and mental health¹⁸. Likewise, a VicHealth study found that racial discrimination causes higher rates of mental illness, such as depression.¹⁹ Mental illness is more common in countries with higher rates of inequality.²⁰
- (c) **Violence and crime** – According to the Victorian Equal Opportunity and Human Rights Commission, societies with higher rates of inequality experience higher rates of

¹² See K Pickett and R Wilkinson, The Equality Trust, <http://www.equalitytrust.org.uk/why/evidence/physical-health>.

¹³ Ibid.

¹⁴ VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>, p 29.

¹⁵ See K Pickett and R Wilkinson, The Equality Trust, <http://www.equalitytrust.org.uk/why/evidence/physical-health>.

¹⁶ Ibid.

¹⁷ See K Pickett and R Wilkinson, The Equality Trust, <http://www.equalitytrust.org.uk/why/evidence>.

¹⁸ See also Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians*, June 2010, available at http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690.

¹⁹ VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>.

²⁰ See K Pickett and R Wilkinson, The Equality Trust, <http://www.equalitytrust.org.uk/why/evidence/mental-health>.

crime and violence. VicHealth has also found that racial discrimination can be linked to peer violence and in some cases, to large-scale community conflicts such as the Cronulla riots in December 2005.

- (d) **Education, employment and productivity** – Discrimination has been found to be a factor in the disproportionate rates of unemployment, early school leaving, poor educational outcomes and involvement in the criminal justice system amongst those from particular cultural groups.²¹

20. The effects of discrimination are far-reaching. Discrimination can be intergenerational, contributing to the disadvantage faced not only by the generation affected but to the social and economic prospects of future generations.²² Discrimination can also contribute to the apprehensions and fears of those who may not be directly subjected to discrimination but come from similar backgrounds from those who are or have been subjected to it.²³

2.3 The extent of inequality

21. Despite the benefits of creating a more equal society highlighted above, inequality exists at alarming levels for a number of groups of people in Australia. This submission does not consider the nature and extent of inequality in Australia. However, some indicative examples are set out below:

- (a) Women still earn significantly less than men, are more likely to be unemployed and are significantly more likely to experience harassment and violence in their lifetime.²⁴
- (b) Indigenous Australians are one-third less likely to receive appropriate medical care than non-Indigenous Australians.²⁵
- (c) Nearly two in every five people with a non-English speaking background has been treated with disrespect or called names or insulted on the basis of their ethnicity.²⁶

²¹ VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>, p 20.

²² Ibid., p 19.

²³ Ibid.

²⁴ See Australian Human Rights Commission, *2008 Sexual Harassment National Telephone survey* at http://www.hreoc.gov.au/sexualharassment/serious_business/index.html.

²⁵ Cunningham J 2002 'Diagnostic and Therapeutic Procedures among Australian Hospital Patients Identified as Indigenous' *Medical Journal of Australia*, Vol 176, no 2, pp 58-62

²⁶ VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* Victorian Health Promotion Foundation, Melbourne, 2007, available at <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/More-than-Tolerance.aspx>, p 11.

- (d) People with disabilities experience high rates of unemployment and where employed, they are likely to be paid less than able-bodied people.²⁷

3. Deficiencies in Current Federal Anti-Discrimination Law

3.1 Non-compliance with human rights standards

22. Current Federal anti-discrimination laws are based on the international human rights agreements developed through the United Nations system. While these anti-discrimination laws have made an important contribution to addressing discrimination in Australia, they have been widely criticised as falling short of obligations under the international human rights system in a number of areas. In 2009, the United Nations' Human Rights Committee, the treaty body responsible for monitoring State parties' compliance with the International Covenant on Civil and Political Rights, noted that:²⁸

the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law.

23. The Committee on Economic, Social and Cultural Rights, the treaty body responsible for monitoring State parties' compliance with the International Covenant on Economic, Social and Cultural Rights, has also commented that:²⁹

the State party's anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights.

24. Similar criticisms have been made by the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women.³⁰
25. High-level government reports commissioned over the last two decades have also recognised shortcomings in our anti-discrimination laws and called for greater legal protection of equality.³¹ For example, the National Human Rights Consultation Report recently noted that:

²⁷ Human Rights and Equal Opportunity Commission, *Workability II: Solutions: People with Disability in the Open Workplace*, 2005, Sydney, available at http://www.hreoc.gov.au/disability_rights/employment_inquiry/final/index.htm.

²⁸ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, Ninety-fifth Session, 16 March - 3 April 2009, CCPR/C/AUS/CO/5.

²⁹ Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, Forty-second session, 4 - 22 May 2009, IC.12/AUS/CO/4.

³⁰ Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Australia*, CEDAW/C/AUS/CO/7, 30 July 2010 [25]; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, CERD/C/AUS/CO/15-17, 27 August 2010 [10].

³¹ See for example Constitutional Commission, *Final Report of the Constitutional Commission* (1988); Australian Law Reform Commission, *Equality before the Law*, ALRC 69 (1994); Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008).

...[a] large number of submissions focused on the inadequacies of anti-discrimination legislation and recommended that the Federal Government audit and amend anti-discrimination legislation to ensure that it complies with Australia's human rights obligations.³²

3.2 Current laws are reactive, complaints-based and adversarial

26. A significant limitation of the current Federal anti-discrimination model is that it relies heavily on the capacity of individuals to assert their rights through adversarial legal proceedings. Generally, any investigation into alleged unlawful discrimination first requires the aggrieved person/s to make the complaint to the Commission in writing, alleging unlawful discrimination under one of the Federal anti-discrimination statutes.³³ Once the Commission receives a written complaint, it will inquire into the complaint and attempt conciliation.³⁴ The Commission also has the power to terminate the complaint on a range of grounds.³⁵
27. If the matter is not resolved at the Commission, and the aggrieved person wishes to continue with the complaint, an application may be filed in the Federal Magistrates Court or Federal Court. The aggrieved person is required to commence proceedings in Court within 60 days of the issue of a termination notice by the Commission.³⁶
28. Proceeding with complaints to the Federal Magistrates Court or Federal Court of Australia places a heavy burden on individuals who face the very real risk of an adverse costs order. The losing party in court will ordinarily be required to pay legal costs to the successful party. As was observed by McHugh J in *Oshlack v Richmond River Council*,³⁷ this risk inhibits some applicants from bringing to court otherwise meritorious cases. In a situation where the likely legal costs and disbursements incurred by an opponent might be reasonably assumed to be at least \$17,000³⁸ very few applicants are in a position to take the personal risk of an adverse costs order.
29. The complaints procedure is burdensome and risky, and deters many people making complaints of discrimination. Studies show that the number of cases of discrimination and harassment that go unreported is significantly high. For example:

³² National Human Rights Consultation Committee Report (September 2009), Recommendation 4

³³ section 46P

³⁴ section 46PF

³⁵ section 46PH

³⁶ section 46PO

³⁷ (1998) 193 CLR 72 [90]

³⁸ See Table 3.3A of 'A Strategic Framework for Access to Justice in the Federal Civil System' Report by the Access to Justice Taskforce, Commonwealth Attorney General's department, September 2009, at p 42, where it was reported that the estimated median FY2008 professional fees and disbursements are \$17,025 in the Federal Magistrates Court, and \$105,468 in the Federal Court

- (a) 93% of participants in a survey conducted by the Commission reported feeling there had been an increase in racism, abuse and violence against their ethnic or religious community.³⁹ Nevertheless the number of formal complaints of racial discrimination and racial hatred received by the Commission over the measured period did not increase. Survey participants also indicated that they were more likely to complain about these experiences to their families, friends or their local ethnic or religious community organisation than to police or government organisations. The reluctance to complain was due to fear of victimisation, lack of trust in authority, lack of knowledge about the law and complaints processes, the perceived difficulty in making a complaint and the perception that outcomes were unsatisfactory.
- (b) The Commission's 2008 Sexual Harassment National Telephone Survey⁴⁰ showed that, despite the widespread prevalence of sexual harassment,⁴¹ only 16% of those who experienced sexual harassment in the previous five years in the workplace formally reported or made a complaint. This is compared to 32% in 2003. The reasons for not complaining included the perception that the sexual harassment was not serious enough, fear of a negative response, lack of faith in the complaint process and resort to self-help.
30. The current system does little to respond to those unreported incidences of discrimination. While the Commission does have the power to conduct inquiries on its motion, as explored below, this power is rarely utilised.
31. Furthermore, in emphasising the complaints-based system, the current legislation promotes individual rights, but not collective responsibility. Promotion of and education in anti-discrimination laws may assist in developing community awareness and fill this gap. This, in

³⁹ The project was launched in March 2003 by Dr William Jonas AM, the Acting Race Discrimination Commissioner, to learn more about Arab and Muslim Australians' responses to racism and abuse and their experiences and understanding of the complaints processes. The empirical and qualitative research component of the project involved 1,475 self-complete questionnaires distributed in New South Wales and Victoria between August and November 2003. The 25 multiple-choice and open-ended questions asked about people's experiences and responses to racism, abuse and violence. 186 questionnaire responses were received in total.

⁴⁰ The telephone survey was conducted between July and September 2008 with the aim of investigating the nature and extent of sexual harassment in Australian workplaces. 2,005 telephone interviews were conducted with people aged 18 to 64. The sample of the survey respondents was representative of the Australian population in age, gender and area of residence. See www.hreoc.gov.au/sexualharassment/serious_business/index.html.

⁴¹ 22% of women respondents and 5% of men respondents reported that they had experienced sexual harassment in the workplace in their lifetime. The prevalence of sexual harassment may be higher than these figures suggest because of the lack of understanding about what sexual harassment is. That is, 22% of respondents who said that they had not experienced sexual harassment then went on to report having experienced behaviours that may in fact amount to sexual harassment under the *Sex Discrimination Act 1984* (Cth).

addition to greater coordination between government departments and the private sector in developing anti-discrimination policy, will promote collective responsibility.⁴²

3.3 Current laws fail to actively promote equality or address systemic discrimination

32. Australia's Federal anti-discrimination laws establish a proscriptive, negative-based standard which prohibits discriminatory conduct instead of requiring non-discriminatory or other positive conduct.⁴³ For Federal anti-discrimination laws to be fully effective, they must include provisions that promote substantive, as well as formal, equality.⁴⁴
33. Formal equality is based on the idea that persons should be given the same rights and opportunities regardless of their physical and social differences. This traditional approach to discrimination has dominated public discourse and preoccupied governments. However, it operates on the false premise that all people are the same and therefore will be affected by laws, policies and practices in the same way. As such, the formal equality approach is limited. It fails to acknowledge that Australia's culture and laws are inevitably influenced by historically dominant groups, and rather than challenge existing inequality, a formal equality approach can operate to reinforce inequality.⁴⁵ The continuing barriers to access to justice such as the complexity of the legal system and the high costs of litigation are an example of this.
34. By contrast, a substantive equality approach pays attention to the particular needs of different groups and includes measures to address those needs in a way that will achieve an equitable outcome. It recognises that not all groups start from a level playing field, and that treating all people the same way may not result in equality for all.

4. Recommendations for a More Equal Australia

35. The Consolidated Act should address the identified deficiencies in the current anti-discrimination legislation and reflect international human rights standards. This section sets out recommendations to ensure that the Consolidated Act addresses systemic discrimination and promotes substantive equality.

⁴² For an example from the UK, see Prime Minister's Strategy Unit (2005) *Improving the Life Chances of Disabled People*, London (March 2005).

⁴³ Institute for Cultural Diversity, *Human Rights Commission calls for comment on UN submission*, 2 June 2010, http://www.culturaldiversity.net.au/index.php?option=com_content&view=article&id=544:human-rights-commission-calls-for-comment-on-un-submission&catid=20:human-rights-consultation-processes&Itemid=26#_edn9.

⁴⁴ *Ibid.*

⁴⁵ Equal Opportunity Review, *An Equality Act for a Fairer Victoria* (2008), 35.

4.1 Recommendation 1 - The introduction of a positive duty to promote equality and eliminate discrimination

(a) What does a positive duty to promote equality and eliminate discrimination mean?

36. Current anti-discrimination laws allow inequality to continue until it is challenged by a complaint of discrimination. A positive duty promotes equality by requiring certain conduct, rather than by punishing misconduct. The attraction of a positive duty to promote equality and eliminate discrimination is that it is proactive. That is, it is preventive rather than remedial. It goes a long way to relieve the individual burden presently placed on lone complainants to enforce human rights under the present Federal anti-discrimination laws.
37. Many public and private bodies already take positive measure to promote equality, either as best practice or to avoid being found vicariously liable for discrimination under existing laws. Examples include:
- (a) a health service introducing an outreach program targeted towards people with certain types of disabilities who are less likely to access existing services; and
- (b) a taxi company outlining a consistent and high level of service to be enjoyed by all users, including people with disabilities.
38. However, the introduction of the positive duty to promote equality and eliminate discrimination will go one step further. Unlike the vicarious liability provisions, the duty will operate regardless of whether a discrimination dispute is brought or a proceeding has commenced. This has the benefit of the Commission ensuring that the measures in place are appropriate, respected and more than simply box-ticking.
39. Compliance with a positive duty to promote equality and eliminate discrimination can mean having policies aimed at preventing discrimination and providing comprehensive training for staff. Larger organisations may need to demonstrate a more sophisticated approach to compliance management than small businesses.

EXAMPLE: Section 15 of the *Equal Opportunity Act (Vic) 2010* provides the following examples of how its positive duty may be complied with:

- A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
- A large company undertakes an assessment of its compliance with the *Equal Opportunity Act (Vic) 2010*. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

(b) The current gap in Federal anti-discrimination laws

40. As discussed in section 2.2 above, Australia's Federal anti-discrimination laws are reactive and complaints-based. That is, they rely on individuals to bring complaints to the Commission in order to assert their right to equality, and to comply with fixed, complex legal standards.
41. There are some examples of a positive duty under the *Disability Discrimination Act*. In the educational context for example, the *Disability Standards for Education 2005* impose an obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities.⁴⁶ More explicitly, the *Disability Standards for Accessible Public Transport 2002* established a timetable for ensuring minimum physical accessibility in relation to matters such as access paths, ramps and boarding devices, allocated spaces and manoeuvring areas, handrails, doorways, and the provision of information.
42. Following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the *Disability Discrimination Act 1992* was amended to make 'explicit the positive duty to make reasonable adjustments for a person with disability'.⁴⁷ The duty has been incorporated into the definitions of both direct and indirect discrimination (s 5(2) and s 6(2), respectively). In effect, the amendments provide a cause of action for a failure to make reasonable adjustments. What is described as a positive duty is still limited in the sense that there is not a proactive obligation on service providers or government agencies to ensure that existing structural features that may disadvantage people with disability are removed or altered.⁴⁸
43. While the *Racial Discrimination Act*, *Sex Discrimination Act* and *Age Discrimination Act* do not contain positive duties to promote equality and eliminate discrimination, they do set out the defence of reasonable preventative action, which provides a defence for employers that can show that they have taken 'reasonable precautions' to prevent unlawful behaviour from occurring.⁴⁹ The positive obligation provisions have the advantage of providing a clearer, simpler mechanism to ensure that public and private bodies examine their policies and practices and promote proactive compliance.

(c) The positive duty in other jurisdictions

⁴⁶ See Part 3 and paras 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c) and 7.2(6)(c).

⁴⁷ Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), 8 [35].

⁴⁸ See AHRC 'Improved rights protection for people with disability' (2009) at http://www.hreoc.gov.au/legal/publications/improved_dda2009.html.

⁴⁹ *Age Discrimination Act 2004* (Cth) s 57(4); *Disability Discrimination Act 1992* (Cth) s 123(4); *Racial Discrimination Act 1975* (Cth) s 18A(2); *Sex Discrimination Act 1984* (Cth) s 106(2).

44. A positive duty is consistent with emerging international practice. A number of comparable jurisdictions, such as South Africa, United Kingdom, Canada and the United States, have incorporated a proactive positive duty to equality into anti-discrimination laws.⁵⁰

EXAMPLE: Positive duty - s 75, Northern Ireland Act 1998

Section 75 of the *Northern Ireland Act 1998* imposes a duty on specified public authorities to have 'due regard to the need to promote equality of opportunity' in all dealings across all the equality grounds, including disability, age, sexual orientation and also political belief, in carrying out their public functions.⁵¹

In practice, this requires bodies to identify how their functions will impact on equality of opportunity, overcome any negative impact, monitor the impact of policies, and consult with members of affected groups.

45. Northern Ireland's positive duty has created a new openness on the part of policy makers to a greater range of perspectives from diverse groups. This has reportedly brought about shifts in consultation, monitoring and policy assessment procedures and encouraged greater public access to information and public services, particularly for minority ethnic groups and people with disabilities.⁵²
46. Similar beneficial results have been measured in relation to the positive duties incorporated in the *Race Relations Amendment Act 2000* (UK). Evaluation of this duty has revealed that around two-thirds of authorities subject to the obligation and 89% of central government consider that the positive duty has been beneficial.⁵³
47. Section 15 of the *Equal Opportunity Act 2010* (Vic) also includes a positive duty aimed at encouraging proactive self-regulation. The Act requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The Victorian Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people.

(d) Recommendations for reform

(i) Action Plans

⁵⁰ s 75 and Schedule 9 *Northern Ireland Act 1998* (UK); *Fair Employment and Treatment (NI) Order 1998*; *Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equity Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equal employment opportunity* (US).

⁵¹ C. McCrudden, 'The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis', in *Equal Rights and Human Rights – Their Role in Peace Building* (Committee on the Administration of Justice, 1999), 11-23.

⁵² See above.

⁵³ Commission on Racial Equality / Schneider Ross, *Towards racial equality: an evaluation of the public duty to promote race equality and good race relations in England and Wales*, 2003.

48. An effective way positive duties can be implemented and monitored is through the use of Action Plans. Action Plans assist organisations to develop and specify the steps that need to be taken to comply with anti-discrimination laws. Action Plans can be powerful compliance measures, directing compliance efforts to obtaining outcomes and cultural change.⁵⁴
49. In developing Action Plans, organisations should be actively engaged to consult with stakeholders, review their policies and practices, identify barriers to equality, and plan strategies to eliminate the barriers.
50. Action Plans are mandatory for Victorian public sector bodies under the *Disability Act 2006* (Vic).⁵⁵ In contrast, Action Plans under the *Disability Discrimination Act* are voluntary and can be developed by any organisation, not just public sector bodies under the *Disability Discrimination Act*.
51. More recently, the *Equal Opportunity Act 2010* (Vic) provides for Action Plans to be developed voluntarily by a person or organisation to improve compliance with their obligations under the Act. The Act also provides for Action Plans which meet minimum requirements to be registered on a publicly accessible register. An advantage of having Action Plans publicly available is that organisations developing Action Plans can benefit from others' work and experience.
52. In the United Kingdom, these plans are referred to as 'equality schemes'. For example, the *Sex Discrimination Act 1975* (UK)⁵⁶ outlines the requirement for public authorities to prepare and implement 'gender equality schemes'. The schemes must outline how the authority will address the requirements of the legislation. There is also a requirement that the scheme be published and reviewed. The authority must report annually on the actions that have been taken to achieve the objectives of the scheme.

(ii) Public Procurement

53. Another area in which the Federal Government would have significant impact in enhancing equality is through the consideration of the equality practices of private contractors in public procurement processes.⁵⁷
54. In the financial year 2009/10, Australian Government procurement contracts alone accounted for almost \$42,700 million dollars.⁵⁸ The economic significance of public procurement gives

⁵⁴ AHRC, Submission to Discussion Paper, January 2008.

⁵⁵ s38, Victorian *Disability Act 2006*.

⁵⁶ *Sex Discrimination Act 1975* (UK) (Public Authorities) (Statutory Duties) Order 2006 (No. 2930).

⁵⁷ For more information see Equality and Diversity Forum, *Public Procurement and Equality: Steps Towards a Standard Tendering Framework*, 2008, available at <http://www.edf.org.uk/news/PublicProcurementReport.pdf>.

public authorities and its agencies real leverage in the market and provides impetus for public authorities working to promote equality to use their purchasing power to ensure that private sector organisations with which they contract do the same.

55. To meet its equality duties, public authorities should ensure that when they spend public money they is not supporting unlawful discrimination but are encouraging and supporting the promotion of race, disability and gender equality and helping to redress social problems. Likewise, introducing equality requirements in public procurement requires private contractors bidding for government contractors to improve corporate management by requiring the implementation of equal opportunities best practice. Equality practices in procurement can serve as an effective tool to combat structural discrimination which traditional anti-discrimination law has not been able to affect.⁵⁹

(e) Recommendation for the Consolidated Act

56. The Consolidated Act should include a positive duty on public and private organisations to take reasonable steps to eliminate discrimination, harassment and victimisation, and to promote equality.
57. The positive equality duty should:
- (a) apply to both public and private organisations;
 - (b) apply to all grounds of discrimination, as well as sexual harassment and victimisation;
 - (c) include a requirement to take 'reasonable and proportionate' measures to eliminate discrimination, which takes into account an organisation's size, nature, circumstances and resources, as well as the practicality and cost of the measures;
 - (d) be sustainable, outcome-oriented and backed up by enforcement mechanisms;
 - (e) not make the Commission's power to investigate dependent upon first receiving a complaint; and
 - (f) allow remedial action to be taken to address discrimination where necessary.
58. The Commission, in consultation with other stakeholders, should also create standards or best-practice guidelines to assist the implementation and assessment of positive duties.⁶⁰ The

⁵⁸ Department of Finance and Deregulation, *Statistics on Commonwealth Purchasing Contracts, Australian Government*, 2010. This figure reflects contractual information reported in accordance with the *Guidance on Procurement Publishing Obligations*, and does not represent actual expenditure.

⁵⁹ P.E. Morris, *Legal Regulation of Contract Compliance: An Anglo-American Comparison* (1991) 19 *Anglo-American Law Review* 87-144, 87-90.

⁶⁰ The UK's Equality and Human Rights Commission recently issued a series of guides for public authorities on the UK's new public sector equality duty. The guides cover what public authorities should do to meet the duty,

standards should include strategies for effective self-regulation, including periodic assessment and monitoring.

4.2 Recommendation 2 - The enactment of a legal right to equality before the law

(a) *What is equality before the law?*

59. The right to equality before the law requires all individuals to be treated equally by the law and to be afforded equal protection of the law. Equality before the law is therefore concerned with operation and effects of laws rather than the acts of individuals.⁶¹ It requires all laws enacted by the government to be non-discriminatory.⁶²

60. Protecting the rights to equality before the law and equal protection of the law without discrimination are the focus of Australia's obligations under the International Covenant on International and Civil and Political Rights (**ICCPR**). Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

61. The right to equality before the law is also the focus of specific international human rights instruments on which our Federal anti-discrimination laws are based. For example:

- (a) Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (on which the *Racial Discrimination Act* is based);
- (b) Article 2(c) and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (on which the *Sex Discrimination Act* is based); and
- (c) Article 12 of the Convention on the Rights of Persons with Disabilities.

EXAMPLE: Equality before the law - Article 26, ICCPR

*Young v Australia*⁶³

Mr Young was in a same sex relationship with his partner, a war veteran, for 38 years. Following his partner's death, Mr Young applied for a pension under section 13 of the

including legal requirements and recommended actions. See: <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>.

⁶¹ *Mabo v Queensland* (1989) 166 CLR 186 per Deane J at 230; *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514 per Goldberg and Hely JJ at 523 [34].

⁶² UN Human Rights Committee, General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

⁶³ UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).

Veteran's Entitlement Act 1986 (Cth) (**the Act**) which awarded pension benefits to surviving dependents of military service personnel.

The Repatriation Commission refused Mr Young's application for a pension stating that Mr Young was not a dependant as defined by the Act. Under the Act, 'dependent' was defined as a person legally married to another person or living in a marriage-like relationship with a person of the opposite sex.

Mr Young submitted a communication to the UN Human Rights Committee, which found that the effect of the law was to deny Mr Young equal treatment before the law because of his sexual orientation in breach of Article 26 of the ICCPR.

(b) The gap in Federal anti-discrimination laws

62. The right to equality before the law is not protected in the *Sex Discrimination Act*, the *Disability Discrimination Act* or the *Age Discrimination Act*.⁶⁴
63. The failure to guarantee the right to equality before the law in these Acts represents a significant gap in the protection of human rights in Australia. This has been identified by human rights organisations and prominent inquiries over several years.⁶⁵ It also means that Australia is not currently complying with its obligations under international human rights instruments.⁶⁶

(i) The Racial Discrimination Act

64. The *Racial Discrimination Act* is the exception of the four Federal anti-discrimination laws. Section 10 of the *Racial Discrimination Act* provides for a general right to equality before the law.
65. Section 10 is enlivened when, because of a law or a provision of a law, persons of a particular race, colour or national or ethnic origin do not enjoy a particular human right or enjoy it to a limited extent. In these circumstances, section 10 operates to eliminate the inequality and enhance the enjoyment of the human right by the disadvantaged persons.⁶⁷
66. Section 10 may operate to:

⁶⁴ This is despite the right to equality before the law being stated as an object of the *Disability Discrimination Act* (s 3(b)) and the *Age Discrimination Act* (s 3 (b)). The preamble to the *Sex Discrimination Act* states that: '...every individual is equal before the law and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy.' However, the preamble to the *Sex Discrimination Act* has no legal effect.

⁶⁵ For example see Australian Human Rights Commission, *Submission to the Enquiry into the Effectiveness of the Sex Discrimination Act 1984*, 2008 at [207-208]; Productivity Commission, *Review of the Disability Discrimination Act 1992* (Cth), (2004) at 233.

⁶⁶ For example, Article 2(c) and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 12 of the Convention on the Rights of Persons with Disabilities.

- (a) extend the enjoyment of rights under State, Territory and other Federal laws where those laws otherwise fail to make a right universal;⁶⁸
 - (b) invalidate a State law that would otherwise operate to discriminate against people of a particular race by denying them rights or freedoms;⁶⁹ and
 - (c) repeal racially discriminatory Commonwealth legislation.
67. To make a claim under the equality before the law provision of the *Racial Discrimination Act*, the following must be proved:
- (a) as a result of a Commonwealth, State or Territory law;
 - (b) a person of a particular race, colour or national or ethnic origin;
 - (c) suffers prejudice which amounts to exclusion from or impairment of a human right or fundamental freedom.⁷⁰
68. Section 10 may be enlivened even though a law on its face applies equally to all individuals.⁷¹ In this way it is concerned not just with formal equality but with substantive equality, that is, the practical operation and effect of a law.⁷²
69. The right to equality before the law in section 10 has proved effective in allowing individuals to challenge laws and government action that has the effect of discriminating against a person because of the person's race, colour or national or ethnic origin.

EXAMPLE: Equality before the law - Section 10, *Racial Discrimination Act*

*Mabo v Queensland*⁷³

In 1985, the Queensland Government enacted the *Queensland Coast Islands Declaratory Act 1985 (the Act)*. The effect of the Act was to extinguish traditional legal rights possessed by the Miriam people (the original inhabitants of the Murray Islands) in or over the Murray Islands and to deny them any right to compensation in respect of that

⁶⁷ *Mabo v Queensland* (1989) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 217.

⁶⁸ *Gerhardy v Brown* (1985) 159 CLR 70 per Mason J at 98.

⁶⁹ By virtue of s 109 of the Australian Constitution which provides: 'When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. See for example *Mabo v Queensland* (1989) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 216.

⁷⁰ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514 per Goldberg and Hely JJ at 523 [35].

⁷¹ *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 at 319.

⁷² *Mabo v Queensland* (1989) 166 CLR 186 per Deane J at 230.

⁷³ (1989) 166 CLR 186.

extinguishment.⁷⁴ At the same time, the Act confirmed all legal rights which took their origin from the relevant statutory law of Queensland, being the Crown lands legislation.⁷⁵

A majority of the High Court held that the Act discriminated against the Miriam people because it sought only to extinguish the native title rights held by the Miriam people whilst leaving intact the rights of those whose rights in and over the Murray Islands that were sourced from Queensland law.⁷⁶

The practical effect of the Act was that the Miriam people enjoyed their human right of ownership and inheritance of property to a 'more limited' extent than others who enjoy the same human right.⁷⁷ This resulted in a breach of the right to equality before the law as provided for in section 10 of the *Racial Discrimination Act*.

(c) Equality before the law in other jurisdictions

70. The right to equality before the law is protected in other jurisdictions. For example, in Canada the right to equality before the law is protected in the *Canadian Charter of Rights and Freedoms*, which forms a part of the Constitution of Canada.⁷⁸
71. The principle of equality before the law is also protected in some state and territory legislative regimes in Australia. For example, in Victoria equality before the law is protected through section 8 of the *Charter of Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**).⁷⁹
72. The Victorian Charter is a statutory Human Rights Act which ensures human rights protection for all individuals in Victoria. It operates in addition to and alongside separate anti-discrimination laws in Victoria.⁸⁰
73. The right to equality before the law in the Victorian Charter operates differently to section 10 of the *Racial Discrimination Act*. Under the Victorian Charter, human rights, including the right to equality before the law and equal protection of the law without discrimination, are protected in the following ways:
- (a) The Minister responsible for a Bill must prepare and table a Statement of Compatibility setting out whether and how the Bill is compatible with human rights;

⁷⁴ *Mabo v Queensland* (1989) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 213.

⁷⁵ *Mabo v Queensland* (1989) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 214 - 215.

⁷⁶ *Mabo v Queensland* (1989) 166 CLR 186 per at 23.

⁷⁷ *Mabo v Queensland* (1989) 166 CLR 186 per Brennan, Toohey and Gaudron JJ at 218; Deane J at 231-232.

⁷⁸ s 15, *Canadian Charter of Rights and Freedoms*.

⁷⁹ The right to equality before the law is also protected in the Australian Capital Territory by virtue of s 8 of the *Human Rights Act 2004* (ACT).

⁸⁰ In Victoria, the relevant anti-discrimination legislation is the *Equality Opportunity Act 2010* (Vic).

- (b) the Victorian Charter requires the Parliament's Scrutiny of Acts and Regulations Committee to consider any Bill introduced into parliament and to inform parliament whether the legislation is incompatible with human rights;⁸¹
- (c) Courts and decision makers must interpret statutory provisions in a way that is compatible with human rights, including the right to equality before the law;⁸²
- (d) the Supreme Court can issue a 'declaration of inconsistent interpretation' if it considers that a statutory provision cannot be interpreted consistently with a human right.⁸³ However, a declaration of inconsistent interpretation will not affect the validity of the legislation, create any legal right or give rise to any civil cause of action.⁸⁴

74. The Victorian Charter does not establish an independent cause of action for breach of the right to equality before the law. Such a claim can only be raised in the context of other proceedings.⁸⁵

(d) Recommendations for reform

75. Many prominent inquiries and human rights organisations have identified the deficiency in the protection of the right to equality before the law in current Federal anti-discrimination legislation and have advocated ways to address the problem.
76. In 2008, the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs conducted an inquiry into the effectiveness of the *Sex Discrimination Act* in eliminating discrimination and promoting gender equality (**the Senate Inquiry**). The report of the Senate Inquiry recommended that the *Sex Discrimination Act* be amended to include a general equality before the law provision modelled on section 10 of the *Racial Discrimination Act*.⁸⁶
77. Similarly, in their submission to the Senate Inquiry, the Commission recommended the inclusion of a right to equality before the law within the body of the *Sex Discrimination Act* in terms similar to section 10 of the *Racial Discrimination Act*.⁸⁷
78. The Australian Law Reform Commission (**ALRC**) made a similar recommendation in the report of their inquiry into the effects of Federal laws on the right of women to equality before the

⁸¹ s 30, *Charter of Rights and Responsibilities Act 2006* (Vic).

⁸² s 32, *Charter of Rights and Responsibilities Act 2006* (Vic).

⁸³ s 36, *Charter of Rights and Responsibilities Act 2006* (Vic).

⁸⁴ s 36(5), *Charter of Rights and Responsibilities Act 2006* (Vic).

⁸⁵ s 36(5), *Charter of Rights and Responsibilities Act 2006* (Vic).

⁸⁶ Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Recommendation 9 at 11.25.

⁸⁷ Australian Human Rights Commission, *Submission to the Enquiry into the Effectiveness of the Sex Discrimination Act 1984*, 2008 at [208].

law.⁸⁸ Part I of the report recommended that the *Sex Discrimination Act* be amended to include an equality before the law provision based on section 10 of the *Racial Discrimination Act*.⁸⁹

However the ALRC also noted that:

...there is a need for a guarantee of equality with a broader definition and a comprehensive operation unconstrained by the particular areas of application and range of exemptions under the [Sex Discrimination Act].⁹⁰

79. Accordingly, in Part II of the report, the ALRC advocated the enactment of a separate Equality Act that guarantees a broader entitlement to equality in law in the following terms:

The Equality Act should define 'equality in law' to include equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.⁹¹

80. Whilst the terms of reference of the ALRC enquiry were limited to that of women's equality, the ALRC acknowledged the strength of arguments for a general equality guarantee and took the opportunity to draw this issue to the attention of the Government.⁹²

(e) Recommendation for the Consolidated Act

81. As identified above, the right to equality before the law is not currently protected by the *Sex Discrimination Act*, the *Disability Discrimination Act* or the *Age Discrimination Act*.

82. This represents a gap in the protection of human rights in Australia and inadequate compliance with our current international human rights obligations. It is also inconsistent with protection afforded to the right to equality before the law in section 10 of the *Racial Discrimination Act*.

83. One of the stated purposes of a Consolidated Act is to 'address current inconsistencies' in Federal anti-discrimination laws.⁹³ Further, the Federal Government has guaranteed that the Consolidated Act will not result in 'diminution of existing protections currently available at the Federal level'.⁹⁴

⁸⁸ ALRC, *Equality Before the Law: Justice for Women*, ALRC 69.

⁸⁹ The ALRC made this recommendation subject to the removal of the current exemptions in the *Sex Discrimination Act*: ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, 3.21.

⁹⁰ ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, 3.21.

⁹¹ ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part II, Recommendation 4.3.

⁹² ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part II, 4.24.

⁹³ Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

⁹⁴ Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

84. Accordingly, it is recommended that the Consolidated Act include an equality before the law provision on similar terms to section 10 of the *Racial Discrimination Act* which would apply to all attributes protected by the Consolidated Act.⁹⁵

4.3 Recommendation 3 - Redrafting of the Temporary Special Measures provisions

(a) What are Temporary Special Measures?

85. Temporary special measures are measures or policies which focus on actively alleviating the discrimination or disadvantage suffered by certain groups of people. They are 'positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life'.⁹⁶ Special measures are an essential component to achieving substantive equality and eliminating discrimination.

86. Temporary special measures have several essential characteristics, including that they are a measure or form of positive action that:⁹⁷

- (a) addresses an inequality suffered by a section or group within society;
- (b) is taken for the sole purpose of securing the 'advancement' of some or all members of that section or group within society;
- (c) is designed and implemented in consultation with the affected communities on demonstrated evidence of 'need';
- (d) is fair, legitimate and proportionate to address the demonstrated need for the measures; and
- (e) is temporary and will be discontinued when the objectives for equality are achieved.

87. Temporary special measures are an important feature of substantive equality, as opposed to formal equality. Whereas models of formal equality aim to treat individuals in the same way, in order to achieve equal opportunities, temporary special measures take into account the differences of individuals and groups and try and remove barriers that are created by systemic or long-standing discrimination, to ultimately achieve more equal outcomes.

EXAMPLES: Temporary special measures in practice

⁹⁵ Whilst beyond the scope of the current Consolidation Project, to ensure the right to equality before the law is comprehensively protected in Australian law, the Federal Government should enshrine a broader right to equality before the law and equal protection of the law without discrimination in separate human rights legislation at the Federal level, in terms similar to the Victorian Charter, with the ultimate aim being protection of the right to equality before the law in the Australian Constitution.

⁹⁶ Rebecca Cook in Ineke Boerefijn et al (eds), 'Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women', Transnational Publishers, New York, 2003, 119.

⁹⁷ CERD Committee, General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (August 2009).

A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.

A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.⁹⁸

(b) Temporary special measures under current Federal anti-discrimination laws

88. Each of the four Federal anti-discrimination laws either acknowledges or provides some guidelines for the use of temporary special measures.
89. Whilst none of the statutes contains a faultless example of a framework for temporary special measures, section 7D of the *Sex Discrimination Act 1984* addresses most of key elements.

7D Special measures intended to achieve equality

(1) A person may take special measures for the purpose of achieving substantive equality between:

- (a) men and women; or
- (b) people of different marital status; or
- (c) women who are pregnant and people who are not pregnant; or
- (d) women who are potentially pregnant and people who are not potentially pregnant.

(2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).

(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:

- (a) solely for that purpose; or
- (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one

(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

(c) The gap in current Federal anti-discrimination laws

⁹⁸ Example extracted from section 12, *Equal Opportunities Act (Vic) 2010*.

90. The existing temporary special measures provisions have several deficiencies which blunt their potential efficacy.
91. One problem is the inconsistent approaches to temporary special measures that are adopted by the different statutes. Under the *Age Discrimination Act*, temporary special measures are addressed in section 33 under the description of 'positive actions'. The different terminology for temporary special measures is confusing and the section fails to specify an effective timeframe for the use of a positive action.
92. The *Racial Discrimination Act* takes a cursory approach by simply referring to the special measures described in article 4 of the *International Convention of the elimination on all forms of racial discrimination* as being exempt from the statutory prohibition on racial discrimination. In a third approach, section 45 of the *Disability Discrimination Act* adopts an unnecessarily narrow strategy of itemising particular measures and circumstances that will not be considered unlawful.
93. The inconsistent approaches easily lead to confusion as to what temporary special measures are and how ideally they should operate.
94. Moreover, the *Age Discrimination Act*, the *Racial Discrimination Act* and the *Disability Discrimination Act* frame the use of temporary special measures as excepted or exempt conduct. This negatively frames the use of temporary special measures as a form of conduct rather than recognising them as a means for realising substantive equality. A positive duty to address discrimination should be the rule, not an exception.
95. Another key difficulty under the Federal statutes is how a measure is 'deemed' a special measure. For example, under section 7D of the *Sex Discrimination Act*, an assessment must be made as to whether the measure in question was taken for the purpose of achieving substantive equality.
96. It is the subject of considerable confusion whether special measures under the *Racial Discrimination Act* require consent of the affected communities. Although the requirement for consent is not expressly referred to in the International Convention on the Elimination of all Forms of Race Discrimination, or the *Racial Discrimination Act*, it has nevertheless been viewed as essential if a measure can meaningfully be declared as being for the 'advancement of certain racial or ethnic groups' as required by the definition of special measures.⁹⁹ At the very least, participation of the affected group is a minimum requirement.¹⁰⁰ Moreover, Justice

⁹⁹ see Article 1(4) ICERD and section 8 of the RDA

¹⁰⁰ Committee on the Elimination of Racial Discrimination, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (5 August 2008) [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/696149E128473FAFC125749C004A5160?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/696149E128473FAFC125749C004A5160?OpenDocument).

Brennan in *Gerhardy v Brown*, in setting down a test for deciding whether a law applying to only one race could be classified as a special measure, emphasised the need for consultation with the beneficiaries:¹⁰¹

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.

97. This view is consistent with the right to self-determination under Articles 1 of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which are concerned with the right of people to have a say in matters relating to their own welfare.
98. However, the Federal government ignored this approach when it introduced the Emergency Response legislation in the Northern Territory in 2007. Although described as a ‘special measure’, the Commonwealth did not consult with or formally seek the consent of the affected people in Aboriginal communities affected by the measures.
99. Unfortunately, these weaknesses are symptomatic of the current ad hoc approach that temporary special measures have received under the current Federal legislative structure. Four different arrangements for temporary special measures in four statutes inherently limits their use to those discrete areas of discrimination. This isolates each of the approaches from one another and fails to accommodate instances of intersectional or compound discrimination.

(d) Temporary special measures in other jurisdictions

100. Temporary special measures have been widely adopted in other domestic and international jurisdictions. Victoria's *Equal Opportunity Act* provides an exemplary framework for the use of temporary special measures in an Australian context, discussed in more detail below.
101. One of the most common temporary special measures in other countries is the use of quotas in the workplace, particularly to address gender imbalances. The use of quotas has been encouraged through legislation adopted in many international jurisdictions, including Canada, the UK and Germany. Norway has taken the further step of legislatively hard-coding percentage quotas for female representation on the boards of public companies.¹⁰²

¹⁰¹ (1985) 159 CLR 70

¹⁰² Gender Equality Act and Public Limited Companies Act. For more detail, see Human Rights Law Resource Centre, *A Human Right Approach to Equality for Women in the Workplace: Submission to the Review of the Equal Opportunity for Women in the Workplace Act 1999*, October 2009.

102. Australia historically has not supported the use of quotas as a means of addressing gender imbalances in the workplace.¹⁰³ However, Australia's Sex Discrimination Commissioner recently indicated that while progress has been made in Australia without quotas, it may be necessary to use quotas in order to reach a 'critical mass' and accelerate the achievement of substantive equality in the workplace.¹⁰⁴

(e) Recommendations for reform

103. The use of temporary special measures is considered a necessary, flexible and universal approach to addressing substantive equality. It is counter-productive to limit the use of temporary special measures in a manner which cannot operate to address intersectional or compound discrimination. Perhaps the most important step forward for addressing the use of temporary special measures on a Federal level will be including a uniform, comprehensive framework within a single legislative instrument.

104. This approach would:

- (a) overcome any confusion caused by the inconsistent approaches to temporary special measures currently used on a Federal level; and
- (b) ensure there are no restrictions to utilising temporary special measures to address all forms of discrimination including:
 - (i) gaps or areas of discrimination that are not currently addressed by the Federal anti-discrimination laws;
 - (ii) where certain groups of the population have traditionally been subjected to extensive structural discrimination; and
 - (iii) instances where temporary special measures will be required to interact or concurrently address multiple forms of discrimination (including compound and intersectional discrimination).

(f) Recommendation for the Consolidated Act

105. Some recommendations can be made for addressing temporary special measures under the Consolidated Act. The recommendations are aimed at creating broad guidelines for a single and over-arching framework for using temporary special measures.

106. A convenient starting point for temporary special measures provisions under the Consolidated Act can be found in section 12 of the *Equal Opportunities Act (Vic) 2010*. Section 12 contains a clear and relatively comprehensive framework addressing the key elements required.

12 Special measures

¹⁰³ Human Rights Law Resource Centre, *A Human Right Approach to Equality for Women in the Workplace: Submission to the Review of the Equal Opportunity for Women in the Workplace Act 1999*, October 2009.

¹⁰⁴ Elizabeth Broderick, *Quotas could build critical mass*, *Australian Financial Review*, 18 November 2010, 67.

- (1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.
- (2) A person does not discriminate against another person by taking a special measure.
- (3) A special measure must—
- (a) be undertaken in good faith for achieving the purpose set out in subsection (1); and
 - (b) be reasonably likely to achieve the purpose set out in subsection (1); and
 - (c) be a proportionate means of achieving the purpose set out in subsection (1); and
 - (d) be justified because the members of the group have a particular need for advancement or assistance.
- (4) A measure is taken for the purpose set out in subsection (1) if it is taken—
- (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes.
- (5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.
- (6) A person who undertakes a special measure has the burden of proving that the measure is a special measure.
- (7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.¹⁰⁵

107. It is important for the Consolidated Act to distinguish temporary special measures as a means of achieving substantive equality rather than considering them as 'positive discrimination' or discriminatory conduct which may be exempt under a statute. This will involve temporary special measures being recognised under stand-alone provisions, without limiting the types of measures or labelling measures as a category of discriminatory conduct that is not prohibited.
108. The Consolidated Act should move away from the Federal Government being responsible for deeming legislation or policies as temporary special measures. An independent body with

¹⁰⁵ The examples provided in section 12 of the *Equal Opportunities Act (Vic) 2010* were not extracted here. The *Equal Opportunity Bill 2010* Explanatory Memorandum also provides some useful information as to how section 12 aims to provide a comprehensive framework for temporary special measures under the *Equal Opportunities Act*.

specialised understanding of discrimination policies would be best suited to this role. It is recommended that the Commission be designated the governing body to make any declaration whether a measure is a special measure for the purposes of the Consolidated Act.

4.4 Recommendation 4 - Provision for Representative complaints

(a) *What are representative complaints?*

109. As discussed above, current Federal anti-discrimination laws are essentially based on an individual complaint model. This means that it is largely the responsibility of individuals to attempt to address the discrimination they experience.
110. The obstacles faced by individuals in bringing discrimination complaints are well documented.¹⁰⁶ They include:
- (a) difficulties in trying to obtain legal representation;
 - (b) the potential financial costs involved in bringing the complaint;
 - (c) the very real risk of crippling adverse costs orders; and
 - (d) the emotional stresses involved in pursuing a complaint.¹⁰⁷
111. As a result of these difficulties, many instances of discrimination never result in complaints.¹⁰⁸
112. One way of relieving individuals of the burden of bringing discrimination complaints is to allow representative complaints. Representative complaints typically allow a representative body, such as a public interest organisation or advocacy body, to make a complaint of discrimination on behalf of a person or class of persons who have suffered discrimination.
113. In addition to relieving individuals, representative complaints also have the capacity to produce positive outcomes that reach beyond the circumstances of one individual and lead to the achievement of systemic change and substantive equality.
114. Accordingly, public interest organisations with a legitimate interest in particular subject matter should be allowed to commence and pursue discrimination proceedings of behalf aggrieved persons, particularly where the claim involves a systemic problem that affects a wide class of persons.¹⁰⁹

¹⁰⁶ See the discussion at 2.2 (b) above.

¹⁰⁷ See for example Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008), [11.50].

¹⁰⁸ Equal Opportunity Review Final Report, *An Equality Act for a fairer Victoria*, (June 2008), 142.

¹⁰⁹ Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008), Recommendation 21.

(b) The gap in current Federal anti-discrimination laws

115. To make a complaint of discrimination under Federal anti-discrimination laws a person must first make a complaint to the Commission¹¹⁰. If the complaint is not resolved by the Commission, the person can then choose to pursue the complaint further by commencing proceedings in the Federal Court or the Federal Magistrates Court.¹¹¹
116. The question of who is allowed to bring a discrimination complaint (also known as ‘standing’) is governed by the AHRC Act. The AHRC Act does, in fact, permit an organisation to make a complaint to the Commission on behalf of another person.¹¹² That is, technically, a representative complaint of discrimination can be made by an organisation to the Commission on behalf of an individual or group. However, if the complaint is unresolved by the Commission, it is extremely difficult for the representative body to proceed with the matter to Court once that complaint is terminated by the Commission. Unless the representative body is itself ‘aggrieved’ by the discrimination, it will not be an ‘affected person’ for the purposes of s 46PO(1) of the *Australian Human Rights Commission Act 1986*, and may not bring proceedings before the Court. The situation is further complicated by s 33D(1) of the *Federal Court of Australia Act 1976*, which provides that only a person who has a ‘sufficient interest’ to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding against the respondent on behalf of other persons who have the same or similar claim against the respondent.
117. This results in the anomalous situation whereby an organisation is able to make a representative complaint to the Commission but is not able to pursue the complaint in the Federal Court. Rather, it is up to the aggrieved person or persons on behalf of whom the representative complaint is made, to pursue their claim through the Courts on their own.

EXAMPLE: *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*¹¹³

In this case a disability rights organisation lodged a representative complaint of discrimination on behalf of its members in relation to bus stops that allegedly contravened the *Disability Standards for Accessible Public Transport 2002*.

When the organisation attempted to commence proceedings in the Federal Court the Court held that it lacked the required standing to pursue the complaint. The Court held that only an aggrieved person could commence such proceedings, and that whilst the organisation's members may be aggrieved persons, the organisation itself could not be so described.

¹¹⁰ section 46P

¹¹¹ section 46PO

¹¹² s 46P(2)(c) AHRC Act.

¹¹³ (2007) 162 FCR 313.

118. This aspect of the current law has resulted in significant confusion for representative bodies, and has the following disadvantages:
- (a) The knowledge that a complaint lodged with the Commission by a representative body cannot in practice proceed to a judicial determination can affect the willingness of a respondent to conciliate the complaint before the Commission. As a result matters which should be resolved, are not.
 - (b) There is too great a burden placed upon an individual to bear the responsibility and personal costs risk for often complex and litigation with an uncertain outcome. The risk for an individual complainant in commencing Court proceedings over a matter of public policy is disproportionate to the remedy that the individual may achieve if successful. As a result, meritorious matters which are in the public interest often do not proceed to a judicial determination, and discrimination continues.
 - (c) The system is inefficient, as it requires the same or similar matters to be litigated over and over again by each individual 'person aggrieved'.
 - (d) The Court's power to achieve systemic change is severely restricted, as its capacity to make orders that a respondent undertakes a specific reasonable course of conduct to remedy discrimination is limited to 'any reasonable act or course of conduct to redress any loss or damage suffered by an applicant'.¹¹⁴

(c) Representative complaints in other jurisdictions

119. Most jurisdictions allow for representative complaints of discrimination to be made on behalf of others, at the Court/Tribunal hearing stage. For example, both Victorian and NSW anti-discrimination legislation expressly permit representative complaints.¹¹⁵

(d) Recommendation for the Consolidated Act

120. The standing provisions in regard to lodging a representative complaint of discrimination with the Commission and lodging a complaint in the Federal Court are inconsistent.
121. As the law currently stands, the inconsistency could be addressed by amending s 46PO(1) of the AHRC Act to make the standing requirements for lodging an application with the Federal Court or the Federal Magistrates Court consistent with the requirements for lodging a complaint with the Commission.¹¹⁶ This would allow a representative complaint to be made to the Commission by an organisation and pursued in the Federal Court.

¹¹⁴ *Australian Human Rights Commission Act 1986* (Cth) s46PO(4)(b)

¹¹⁵ s 87A *Anti-Discrimination Act 1977* (NSW); s 114 and s124 *Equal Opportunity Act 2010* (Vic).

¹¹⁶ As set out in subsection 46P(2) of the AHRC Act: Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008) Recommendation 20.

122. The Consolidated Act should expressly allow representative proceedings to be brought and pursued by public interest-based organisations. These recommendations are consistent with the recognition of both the Commission and the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs that public interest organisations should have standing to commence pursue representative discrimination complaints on behalf of complainants.¹¹⁷

4.5 Recommendation 5 - Improved Institutional and reporting frameworks

(a) *What are institutional and reporting frameworks?*

123. Institutional and reporting frameworks refer to the measures necessary for the Federal Government to collect, collate, manage and analyse data in relation to inequality. Data is important both in order to:
- (a) identify where systemic and structural discrimination is occurring and what remedial action is required to address it; and
 - (b) analyse the effectiveness of remedial actions already taken.
124. The European Commission's 2007 report, *Measuring Discrimination - Data Collection and EU Equality Law*, identifies that such data is fundamental to the following areas:
- (a) policy and legal development;
 - (b) enforcement of law through litigation and monitoring;
 - (c) awareness raising and sensitising;
 - (d) research; and
 - (e) internal workplace and service delivery.
125. Data collection can be useful for:
- (a) government action such as law-making, policy, education and compliance auditing;
 - (b) public and private institutions, by assisting in identifying and targeting workplace inequality and inequality in service delivery; and
 - (c) individuals, by providing an enhanced awareness of rights and use of statistics to support individual discrimination complaints.
126. Given the utility of such data to government, private bodies and individuals, a fundamental aspect of institutional and reporting frameworks is that any data collected be accessible to all

¹¹⁷ See for example, Australian Human Rights Commission, *Submission to the Enquiry into the Effectiveness of the Sex Discrimination Act 1984*, 2008 at [584-595]; Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008) [11.50-11.51], AHRC.

these parties. Therefore, any such framework will necessarily include both the collection of data and the analysis and accessible presentation of that collected data.

127. Obviously, the scope of institutional and reporting frameworks could vary greatly. A necessary aspect of any framework is to ensure that the right balance is struck between obtaining necessary data and limiting the amount of cost that is required for compliance.

(b) The gap in Federal anti-discrimination laws

128. The AHRC Act does provide for a report into Aboriginal and Torres Strait Islander (**ATSI**) circumstances to be prepared and tabled in Parliament by the ATSI Commissioner.¹¹⁸

129. However this power is not currently conferred on any other Commissioner under the AHRC Act. Further, current Federal anti-discrimination legislation does not provide for any type of reporting by public or private bodies, either by mandate or voluntarily.

130. If such data were to be collected, there would also be a concurrent need for the legislation to provide for the analysis and publication of the data.

(c) Institutional and reporting frameworks under the current law and in other jurisdictions

131. Some current practices under Federal legislation as well as some international jurisdictions provide examples of institutional and reporting frameworks of varying scopes in relation to the collection, analysis and presentation of data.

(i) Collection of data

132. The United Kingdom has developed a mechanism called the Equality Measurement Framework (**EMF**) which is managed by the Equality and Human Rights Commission. It is not a performance measurement framework, but rather a mechanism to collect data in relation to various aspects of life, such as health, physical security, education and learning and standard of living. The aim of the framework is to identify three aspects of inequality: inequality of outcomes, process and autonomy. The EMF collates relevant data, and has a web-based tool to allow the data to be interrogated.

133. Under the *Employment Equity Act 1995* in Canada, specified employers in both the public and private sector are required to collect and analyse data about their workforce to identify under-representation of defined groups (including women, people with disabilities, and aboriginal people), and to identify the employment barriers to those defined groups.

134. In Australia, the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (**EOWWA**) requires employers with 100 or more employees to develop and implement an equal opportunity for women in the workplace program. If the required employers do not submit their

¹¹⁸ *Australian Human Rights Commission Act 1986* (Cth) - s46(c)(1)(a).

workplace plan to EOWA, their name may be published, and they may become ineligible to tender for Federal Government contracts or industry assistance grants.¹¹⁹

135. Recently announced reforms of the EOWWA represent an increased focus on outcomes, rather than just programs and processes. Under these reforms, businesses will be required to report on the figures of gender composition of their organisations and their boards, on their employment conditions, and whether they have flexible work practices for men and women.
136. Similar workplace programs are run in public agencies in NSW and Queensland, through which data is collected on employees who are members of target groups.¹²⁰

(ii) Analysis and presentation of data

137. The Equality and Human Rights Commission in the United Kingdom publishes a triennial review which reports on the progress that the United Kingdom is making towards enhanced equality in society. The first triennial review was published in 2010 and reported not just on the progress made, but also on gaps in available data which had made analysis more difficult¹²¹.
138. In Australia, in 2002 the Council of Australian Governments commissioned the Productivity Commission to prepare an annual report into Indigenous disadvantage, which is titled *Overcoming Indigenous Disadvantage: Key Indicators*.¹²² Using collected data, the report aims to identify:
- (a) where Government policies will have greatest impact;
 - (b) the effect of Government policies which are implemented; and
 - (c) where further work is needed.

(d) Recommendation for the Consolidated Act

139. The lack of any type of reporting by public or private bodies under the Federal anti-discrimination legislation leads to a resulting lack of reliable data to measure discrimination occurring in contravention of these Acts in Australia.
140. As a consequence, it is more difficult to:
- (a) identify where systemic and structural discrimination is occurring, in order to take positive remedial action to address it; and
 - (b) analyse the effectiveness of positive remedial action already taken.

¹¹⁹ [www.eowa.gov.au/Reporting And Compliance/What Happens if my Report does not Comply/List of Non Compliant Organisations.asp](http://www.eowa.gov.au/Reporting%20And%20Compliance/What%20Happens%20if%20my%20Report%20does%20not%20Comply/List%20of%20Non%20Compliant%20Organisations.asp).

¹²⁰ *Anti-Discrimination Act 1977* (NSW) - s122J; *Equal Opportunity in Public Employment Act 1992* (Qld) - s7.

¹²¹ <http://www.equalityhumanrights.com/key-projects/how-fair-is-britain/>.

¹²² See for example: http://www.pc.gov.au/_data/assets/pdf_file/0003/90129/key-indicators-2009.pdf.

141. Accordingly, it is recommended that the Consolidated Act include a mandatory workplace program, similar to the program under EOWWA, to be implemented by all of the following:
- (a) government agencies;
 - (b) large companies; and
 - (c) all higher education institutions.
142. As with the implementation of EOWWA, if a relevant employer fails to report on its workplace program, their name should be published and they should be unable to tender for Federal Government contracts and industry assistance grants.
143. In addition, in order for the resulting information collected to be accessible, the Consolidated Act should require each of the Human Rights Commissioners to publish a report, as the ATSI Commissioner is currently mandated to do. Similar to the reports prepared by the Productivity Commission, these reports should include analysis of where a change in policy is required, the effect of any currently policies, and where any further work is needed and should be published on a 3-yearly basis.

4.6 Recommendation 6 - Expansion of the powers of the Commission

(a) Current powers of the Commission - benefits and limitations

144. Under the current laws the Commission can investigate discrimination and human rights breaches, either upon receipt of a complaint from a member of the public or on its own motion. The Commission is able to investigate breaches on its own motion through the use of its amicus curiae, intervention and public inquiries powers.

(i) Amicus Curiae

145. Section 46PV of the AHRC Act gives Special-Purpose Commissioners¹²³ an amicus curiae ('friend of the Court') function. The role of amicus curiae is to provide special assistance to the Federal Court and Federal Magistrates Court in resolving issues raised by a case and to draw attention to aspects of the case that might otherwise have been overlooked in the hearing of unlawful discrimination applications.
146. There are a number of benefits of the Commission appearing as amicus curiae. It can make the Court aware of the broader social implications of the issues raised in proceedings, and it can contribute positively to the development of anti-discrimination jurisprudence. The Commission can seek to achieve these benefits without the risk of an adverse costs order, as amicus curiae is not considered a party to the proceedings.

¹²³ A special-purpose [Commissioner](#) means: (a) the Aboriginal and [Torres Strait Islander](#) Social Justice [Commissioner](#); (b) the [Disability Discrimination Commissioner](#); (c) the [Human Rights Commissioner](#); (d) the [Race Discrimination Commissioner](#); and (e) the [Sex Discrimination Commissioner](#). See section 46PV (3).

147. However, the use of the amicus curiae power generally has a number of limitations. It is subject to the discretion of the Court as it must seek leave to appear. Moreover, the power is limited to presenting arguments and written submissions. The Commission has no ability to call evidence or cross-examine witnesses.
148. Additional limitations that exist in relation to the Commission's amicus curiae power include:
- (a) its operation is confined to proceedings in the Federal Court and the Federal Magistrates Court; and
 - (b) the Commission cannot lodge an appeal in its capacity as amicus curiae.

(ii) Intervention power of the Commission

149. The Commission has the power to intervene, with leave of the Court, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment.¹²⁴ The Commission has been granted leave to appear as an intervener in 59 cases since 1988,¹²⁵ including cases involving medical treatment of children, sterilisation of young women with a disability, pre-employment medical examination, sexual harassment and immigration cases.
150. The purpose of intervening is to provide the Court with specialist human rights knowledge in cases which involve human rights issues of general principle and public importance which may affect to a significant extent persons other than the parties before it.
151. The Commission's power to intervene is again limited to the discretion of the Court as leave to intervene must be granted. Also, the Commission has no power to intervene in human rights matters at a state level. This restriction hinders the Commission's ability to address widespread and systematic discrimination.

(iii) Public Inquiries

152. Under the AHRC Act, the Commission has the power to inquire into acts and practices that may be inconsistent with or contrary to human rights in order to raise the profile of important human rights issues.¹²⁶
153. The Commission has conducted a variety of inquiries into human rights issues of national importance, including the forcible removal of Aboriginal and Torres Strait Islander children

¹²⁴ Section 11(1)(o) *AHRC Act*.

¹²⁵ Australian Human Rights Commission, *Summary of interventions by the Australian Human Rights Commission*, available at http://www.hreoc.gov.au/legal/submissions_Court/guidelines/table_interventions.html.

¹²⁶ This power stems from the Commission's statutory responsibilities of public awareness and education in ss 11(1)(g) and 11(1)(h) of the AHRC Act, as well as policy and legislative development in ss 11(1)(j) and 11(1)(k) of the AHRC Act.

from their families, the discrimination faced by people with disability in the workplace, and the rights of children in immigration detention centres.

154. Unfortunately, because of the restrictive way this power is defined in the AHRC Act, the Commission's inquiry power is effectively limited to actions done by or on behalf of the Federal Government. This limits the Commission's ability to conduct formal inquiries into systemic and widespread human rights issues concerning state or territory laws or bodies other than the Federal Government.
155. A further limitation is that, although the Commission can report to the Attorney General on human rights breaches by the Federal Government, its recommendations are not binding or enforceable in the Courts.

(b) Recommendations for reform

156. The Consolidated Act should expand the *amicus curiae*, intervention and public inquiry powers of the Commission to strengthen the Commission's ability to address systematic discrimination.

(i) Amicus curiae and intervention powers

157. These powers should be expanded to allow the Commission or the Special-Purpose Commissioner to intervene, as of right, in all cases that raise significant human rights or equality issues.¹²⁷
158. The powers should also be expanded to include a function for a Special-Purpose Commissioner to appear as *amicus curiae* in appeals from discrimination decisions made by the Federal Court and Federal Magistrates Court.

(ii) Inquiry power

159. The biggest impediment to the effectiveness of the Commission's inquiry power is the lack of enforceability of the Commission's findings and recommendations as there is no obligation on the government to respond to the Commission reports that are tabled in Parliament.
160. The Federal Government should be required to provide a response to the Commission's reports indicating how the government intends to address the Commission's recommendations. This could be achieved by including a new provision in the Consolidated Act that requires the Attorney-General to table a response to the Commission's reports in Parliament within a set period, for example six months after the report is tabled.
161. Moreover, the Commission's formal inquiry function should be expanded in the Consolidated Act to empower it to inquire into human rights issues or concerns, regardless of where in

¹²⁷ See, for example, the intervention powers of the Victorian Equal Opportunity and Human Rights Commission set out in section 40 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Australia they occur and regardless of whether they occur under a state, territory or Federal law. This would allow the Commission to address a broader range of systemic human rights issues across Australia.

(c) New powers for the Commission

162. As well as strengthening its existing amicus curiae, intervention and inquiry powers, the Consolidated Act should include new powers for the Commission to allow it to effectively investigate and enforce its findings on issues such as systemic discrimination.

(i) Empower the Commission to investigate human rights breaches

163. The Commission's power should be expanded to expressly allow the Commission to institute proceedings in its own name or jointly with individuals where there is a common question of fact or law affecting a number of persons.

164. The Human Rights Commissions in New Zealand, Canada and the United Kingdom all have the power to initiate investigations into unlawful discrimination and where necessary, seek enforcement of human rights obligations by a Court or a tribunal. In the UK, despite a system based on individual complaints, provision is still made for commissions to investigate and support complaints through litigation.¹²⁸

165. Further, the circumstances in which the Commission may conduct investigations and inquiries at its own motion should also be outlined. For example, in Victoria where section 127 of the *Equal Opportunity Act 2010 (Vic)* expressly allows the Victorian Commission to conduct an investigation into any matter relating to the operation of the Act that raises an issue that is serious in nature, concerns a possible contravention of the Act, and that relates to a class or group of person if the investigation would advance the objectives of the Act.¹²⁹

(ii) Enforceable undertaking

166. The Consolidated Act should permit the Commission to enter into a written agreement or undertaking with a person or body providing that certain actions will be taken to ensure compliance with anti-discrimination and human rights laws. Since an undertaking requires agreement, its scope is less restricted. This provides the opportunity for undertakings to include actions that achieve systemic outcomes.

167. The exercise of this power should not be reliant on an individual or representative lodging a complaint. Rather, it should depend on cooperation and reflect a facilitative approach, to avoid the need for more formal actions.

168. An example of such undertakings can be seen in section 144 of the *Equal Opportunity Act 2010 (Vic)* which gives the Victorian Commission the power to engage directly with duty

¹²⁸ s16, *Equality Act 2006 (UK)*.

holders and require compliance or an enforceable undertaking to address the discrimination. An undertaking can be used after an investigation to provide that the person will take or stop taking certain actions in order to comply with the *Equal Opportunity Act 2010* (Vic). The Commission can apply to Victorian Civil and Administrative Tribunal to have an undertaking enforced.¹³⁰

169. Likewise in the UK, the Equality and Human Rights Commission may make an agreement with a person not to commit an unlawful act and to take positive steps to avoid an unlawful act¹³¹ and agreements are enforceable through the County Court.¹³²

(iii) Compliance Notices

170. The Consolidated Act should permit the Commission to issue a notice where it has conducted an investigation or an inquiry and found a breach. The notice should set out the details of the offending behaviour and the steps to be taken to prevent the unlawful conduct. A notice should also require the production of an action plan and the monitoring of the plan.

171. In Victoria, s 146 of the *Equal Opportunity Act 2010* (Vic) gives the Victorian Commission the power to issue a compliance notice where it believes that an unlawful act has occurred. This notice requires that the person take certain actions to remedy the unlawful act. The Victorian Commission can apply to Victorian Civil and Administrative Tribunal to have a compliance notice enforced.¹³³

172. Similarly, the EHRC in the United Kingdom has the power to issue an 'unlawful act notice' to a person where there is reason to believe that the person has committed an unlawful act. The notice may set out the steps that must be taken to prevent unlawful conduct or make recommendations for action by the person.¹³⁴ The EHRC may also apply to the Courts for an order for compliance or an injunction restraining the person from committing an unlawful act.¹³⁵

(iv) Financially support the Commission to properly carry out its functions

173. The Commission's capacity to fulfil its statutory functions is often constrained by insufficient funding. It does not have the capacity to undertake new functions in addition to its existing ones. Therefore, if the Commission is granted new functions in the new Consolidated Act the

¹²⁹ See ss 128 and 129 re public inquiries.

¹³⁰ s 147 *Equal Opportunity Act 2010* (Vic).

¹³¹ s23, *Equality Act 2006* (UK).

¹³² s24, *Equality Act 2006* (UK).

¹³³ s 147 *Equal Opportunity Act 2010* (Vic).

¹³⁴ *Equality Act 2006* (UK), s 21.

¹³⁵ *Equality Act 2006* (UK), s 24.

Federal Government will need to ensure that sufficient additional resources are provided to the Commission to enable it to carry out those functions.