



Realising the Right to Equality

The Human Rights Law Centre's Recommendations for the
Consolidation and Reform of Commonwealth Anti-
Discrimination Laws

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About the Human Rights Law Centre

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We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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1. Introduction

1.1 Scope of this submission

This submission responds to the Discussion Paper¹ released by the Federal Attorney-General's Department in September 2011 regarding the consolidation of Federal anti-discrimination laws into a single, Consolidated Act. This consolidation project forms part of the Federal Government's proposed National Human Rights Action Plan. The legislation currently under consideration includes the *Australian Human Rights Commission Act 1986* (Cth) (**AHRCA**), *Age Discrimination Act 2004* (Cth) (**ADA**), *Disability Discrimination Act 1992* (**DDA**), *Racial Discrimination Act 1975* (Cth) (**RDA**) and the *Sex Discrimination Act 1984* (Cth) (**SDA**).

The Human Rights Law Centre (**HRLC**) welcomes the Federal Government's guarantee that the consolidation project will not result in the diminution of any existing protections currently available at the Federal level.² The consolidation project should be used as an opportunity to strengthen and modernise Australia's Federal anti-discrimination laws by adopting global best-practice standards to promote substantive equality and eliminate discrimination.

The HRLC submits that the most effective way to promote equality and eliminate discrimination is through a human rights framework. This approach is also consistent with the recommendations of the National Human Rights Consultation Committee which, in 2009, recommended that the Federal Government audit and amend legislation – particularly anti-discrimination legislation – to ensure compliance with Australia's international human rights obligations.³

A human rights approach requires that legislation, regulation, monitoring and reporting systems be developed with a focus on positive measures to achieve *substantive* equality. As the Committee on Economic, Social and Cultural Rights explains, substantive equality is concerned 'with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.⁴ In addition to equal opportunities, substantive equality is concerned with equal outcomes. In order to achieve substantive equality, Australia must work to eliminate those forms of discrimination that have become institutionalised in laws, policies, practices and social structures – otherwise known as systemic discrimination.

While the Federal anti-discrimination laws have made an important contribution to addressing discrimination in Australia, they have been widely criticised as falling short of obligations under international human rights law in a number of areas. In 2009, the Human Rights Committee (**HRC**),

¹ Consolidation of Commonwealth Anti-Discrimination Laws, Discussion Paper, Attorney-General's Department (September 2011).

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 National Human Rights Consultation Committee, *National Human Rights Consultation Report*, (2009), [Recommendation 4].

⁴ The Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [7].

the treaty body responsible for monitoring State parties' compliance with the International Covenant on Civil and Political Rights, noted that:⁵

[T]he rights to equality and non-discrimination are not comprehensively protected in Australia in federal law.

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:⁶

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

A human rights framework can inform and guide domestic policy in complex areas such as discrimination and equality. The international human rights framework has been at the forefront of recognising the more insidious forms of discrimination, including indirect, systemic and compounded discrimination.

The HRLC submits that drawing on the experience and expertise reflected in international human rights standards will enhance the effectiveness of the Consolidated Act and will assist Australia to meet its obligations under international human rights law. Therefore, this submission discusses the right to equality under international human rights law and makes recommendations on how the Consolidated Act can better comply with Australia's human rights obligations and, by extension, contribute more effectively to equality, participation and social inclusion in Australia.

This submission does not attempt to address each question raised in the discussion paper. We have narrowed our focus to those questions to which Australia's human rights obligations are most relevant.

1.2 Applicable international human rights obligations

Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.⁷

Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality.⁸ These obligations arise under the International Covenant on Civil and Political Rights (**ICCPR**); International Covenant on Economic, Social and Cultural Rights (**ICESCR**); International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Convention on the

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

⁶ Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, Forty-second session, 4 - 22 May 2009, J.C.12/AUS/CO/4.

⁷ 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).

⁸ See, eg, International Covenant on Civil and Political Rights (**ICCPR**) arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights (**ICESCR**); Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**); Convention on the Elimination of Racial Discrimination (**CERD**); Convention on the Rights of Persons with Disabilities (**CRPD**), art. 5.

Elimination of All Forms of Discrimination against Women (**CEDAW**); Convention on the Rights of Persons with Disabilities (**CRPD**); and the Convention on the Rights of the Child (**CRC**).

For example, Article 2(2) of ICESCR requires that State Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The Committee on Economic, Social and Cultural Rights has confirmed that this obligation extends to the requirement to ensure substantive equality.⁹

The ICCPR, Article 2(1), provides that States Parties are obligated to respect and ensure the rights in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 26 of the ICCPR further provides that:

[a]ll persons are equal before the law and are entitled without any 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.

The rights to equality and freedom from discrimination bring with them a guarantee that individuals will have the right to effective protections and remedies before courts and tribunals, as discussed below in section 7.1.

Enacting laws that effectively address discrimination and promote equality is, therefore, central to the Australian Government's fulfilment of its international human rights obligations.

1.3 Summary of recommendations

The HRLC makes the following recommendations for the Consolidated Act, as discussed in more detail throughout this submission.

Recommendation 1: The objects clause of the Consolidated Act should unequivocally reflect the aims of promoting substantive equality and eliminating discrimination. The objects clause should also make clear that the Consolidated Act is intended to be interpreted in accordance with Australia's international human rights obligations.

Recommendation 2: The Consolidated Act should include a unified test for discrimination incorporating the elements of direct and indirect discrimination. These forms of discrimination should not be treated as mutually exclusive.

Recommendation 3: The Consolidated Act should include a stand-alone obligation to make reasonable adjustments for persons with protected attributes.

Recommendation 4: The Consolidated Act should expressly prohibit attribute-based harassment in all areas of public life covered by the legislation.

⁹ UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].

Recommendation 5: The Consolidated Act should prohibit vilification on the basis of all protected attributes.

Recommendation 6: The Consolidated Act should include a shifting burden of proof, so that a rebuttable presumption arises once the complainant establishes a *prima facie* case of discrimination.

Recommendation 7: The Consolidated Act should include a positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

Recommendation 8: The Consolidated Act should include a single special measures provision. The provision should be framed in a positive way and should incorporate international legal principles.

Recommendation 9: Special measures should not require specific authorization. Rather, establishing the existence of a special measure should provide a defence to a discrimination complaint.

Recommendation 10: The Consolidated Act should adopt broad definitions of the ‘gender identity’ and ‘sexual orientation’ attributes. Intersex status and gender expression should also be protected.

Recommendation 11: The Consolidated Act should include ‘religious belief or activity’ as a protected attribute.

Recommendation 12: The Consolidated Act should include ‘criminal record’ as a protected attribute.

Recommendation 13: The Consolidated Act should include ‘political opinion’, ‘nationality’, and ‘industrial activity’ as protected attributes.

Recommendation 14: The Consolidated Act should include ‘social status’ as a protected attribute. ‘Social status’ should be defined to mean a person’s status as homeless, unemployed or a recipient of social security payments.

Recommendation 15: The Consolidated Act should include a person’s ‘status as a victim of domestic or family violence’ as a protected attribute.

Recommendation 16: The Consolidated Act should include ‘family and carer responsibilities’ as a protected attribute. This attribute should be defined broadly.

Recommendation 17: The Consolidated Act should contain a general characteristics extension. Specific protections for pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal should also be maintained.

Recommendation 18: The Consolidated Act should contain a non-exhaustive list of protected attributes and, to that end, should prohibit discrimination on the basis of a person’s ‘other status’.

Recommendation 19: The Consolidated Act should provide specific protections against intersectional discrimination.

Recommendation 20: The Consolidated Act should include an 'equality before the law' provision in similar terms to section 10 of the *Racial Discrimination Act 1975* which would apply to all protected attributes.

Recommendation 21: The Consolidated Act should protect against discrimination in political, economic, social, cultural or any other field of public life.

Recommendation 22: Persons performing voluntary work in an area of public life should be fully protected from discrimination.

Recommendation 23: The Consolidated Act should not contain blanket exemptions for clubs and member-based associations.

Recommendation 24: The Consolidated Act should apply to all partnerships regardless of size.

Recommendation 25: The Consolidated Act should state that discrimination is not unlawful if the discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose. At the very least, if a general exceptions clause is not adopted, the current exceptions should be subject to a public, transparent and principled review.

Recommendation 26: The right to be free from discrimination on the grounds of sexual orientation and gender identity should only be limited where discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

Recommendation 27: Religious bodies that wish to rely on an exemption or exception to excuse the operation of the Consolidated Act should be required to publicly disclose and lodge a notice to that effect with the Commission, on a case-by-case basis.

Recommendation 28: The Commission's formal inquiry functions should be expanded to empower it to inquire into any human rights issues or concerns arising in Australia.

Recommendation 29: The Federal Government should be required to respond, within a specified timeframe, to any report provided to it by the Commission following an inquiry or investigation.

Recommendation 30: The Commission should be empowered to investigate human rights abuses across the private sector and each state and territory.

Recommendation 31: The Commission should be empowered to enter into enforceable undertakings and issue compliance notices for breaches of human rights.

Recommendation 32: The Commission and Special-Purpose Commissioners should be empowered to intervene, as of right, in all cases that raise significant human rights or equality issues.

Recommendation 33: Special-Purpose Commissioners should also be empowered to appear as amicus curiae in appeals to the High Court from discrimination decisions made by the Federal Court and Federal Magistrates Court.

Recommendation 34: The Consolidated Act should make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

Recommendation 35: The Consolidated Act should establish a no-costs jurisdiction for discrimination complaints.

Recommendation 36: The Consolidated Act should encourage Courts to make corrective and preventative orders, in addition to financial awards to victims of discrimination. Guidance should be provided about the scale of financial awards to ensure that awards made by the courts adequately reflect the seriousness of the harm caused by unlawful discrimination.

Recommendation 37: Legal aid bodies, community legal centres and the Commission must be adequately funded and supported to ensure the effective operation of the Consolidated Act.

1.4 Glossary

The following defined terms and acronyms are used throughout this submission.

<i>Age Discrimination Act 2004</i> (Cth)	ADA
Australian Human Rights Commission	Commission
<i>Australian Human Rights Commission Act 1986</i> (Cth)	AHRCA
Convention on the Elimination of All Forms of Discrimination against Women	CERD
Convention on the Rights of Persons with Disabilities	CRPD
<i>Disability Discrimination Act 1992</i> (Cth)	DDA
<i>Equality Act 2010</i> (UK)	UK Act
<i>Fair Work Act 2009</i> (Cth)	FWA
Human Rights Law Centre	HRLC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR

International Convention on the Elimination of All Forms of Racial Discrimination	CERD
<i>Racial Discrimination Act 1975</i> (Cth)	RDA
<i>Sex Discrimination Act 1984</i> (Cth)	SDA
United Nations Human Rights Committee	HRC
ILO C156 Workers with Family Responsibilities Convention, 1981	Workers with Family Responsibilities Convention

2. Objects of the Consolidated Act

The Consolidated Act should aim to eliminate discrimination, promote the right to equality and strive towards the realisation of substantive equality in Australia in line with our international human rights obligations. As discussed in more detail below, the HRLC recommends that the Consolidated Act seek to achieve these goals by, among other measures, prohibiting discrimination in all areas of public life and imposing a positive obligation on the public and private sector to eliminate discrimination and promote substantive equality.

The Consolidated Act should clearly and unequivocally express these aims in its objects clause.

The objects of the Consolidated Act will have a real impact on how the legislation is framed and interpreted. This is because, pursuant to the *Acts Interpretation Act 1901* (Cth), courts and tribunals are required to prefer ‘the interpretation that would best achieve the purpose or object of the Act’.¹⁰ This means a court or tribunal may actively look for and apply an interpretation that promotes the purpose or objects of the act.¹¹

As the University of Cambridge explains in its submission, broad statements about the aims of equality and non-discrimination provide little guidance to courts and tribunals applying these principles. For this reason, objects clauses must contain statements about the extent of the government’s commitment to realising equality and how this is to be achieved.¹² The *Equal Opportunity Act 2010* (Vic) provides a good example of how this may be achieved.¹³

The HRLC submits that the Consolidated Act’s objects clause should refer to the human rights treaties to which Australia is a party and expressly state that the Consolidated Act is intended to be interpreted in a manner which is consistent with these international human rights obligations. An express statement to this effect would assist courts and tribunals to understand the scope and degree of

¹⁰ *Acts Interpretation Act 1901* (Cth), s 15AA.

¹¹ See also *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [388-389].

¹² University of Cambridge, submission to the Attorney General of the Commonwealth of Australia in relation to the consolidation of federal anti-discrimination laws, *Equality for all: Submission on Australia’s proposed reform of anti-discrimination legislation*, 18 March 2011, 14.

¹³ *Equal Opportunity Act 2010* (Vic), s 3.

Australia's commitment to eliminating discrimination and promoting substantive equality. It would also enable the Consolidated Act to respond to ongoing developments in international human rights law.

Further, to ensure that the Consolidated Act gives effect to Australia's international human rights obligations, those aims and objects must be expressed unequivocally. Currently, the ADA, DDA and SDA mention the aim of eliminating discrimination and promoting equality only 'as far as possible'. The SDA also refers to giving effect to 'certain provisions' of CEDAW.¹⁴ These qualifiers have been the subject of criticism in the past. For example, in response to the 2008 Senate Committee's inquiry into the SDA, the Commission noted that the numerous qualifications in the SDA result in 'a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA'.¹⁵ The HRLC agrees that the objects of the Consolidated Act should reflect an unqualified commitment to Australia's international human rights obligations.

Recommendation 1:

The objects clause of the Consolidated Act should unequivocally reflect the aims of promoting substantive equality and eliminating discrimination. The 'objects' clause should also make clear that the Consolidated Act is intended to be interpreted in accordance with Australia's international human rights obligations.

3. Meaning of Discrimination

3.1 The legal test for discrimination

The HRLC agrees that, in order to provide effective protections against discrimination, the legal test for discrimination needs to be simplified. The HRLC supports a unified test for discrimination, which includes both:

- a description of direct discrimination incorporating the elements of detriment and causation; and
- a description of indirect discrimination incorporating the existence of relevant factual circumstances (e.g. a condition, requirement or practice)¹⁶; which disadvantage or would¹⁷

¹⁴ *Sex Discrimination Act 1984* (Cth), s 3(a).

¹⁵ Human Rights and Equal Opportunity Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act (2008)* [102].

¹⁶ The expression 'relevant circumstances' is preferred to the phrase 'condition, requirement or practice', which has been narrowly interpreted by the Courts. See Human Rights and Equal Opportunity Commission, submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Effectiveness of the *Sex Discrimination Act 1984* (Cth) in *Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008, 73 -76.

¹⁷ The term 'would' discriminate is specifically preferred to alternative constructions which refer only to the disadvantage or harm already caused. See Equal Rights Trust, *Declaration on the Principles of Equality*, 2008, 7.

disadvantage¹⁸ a group of people with one or more of the relevant protected attributes; and which is not reasonable in the circumstances.

The proposed test set out in the Discrimination Law Experts' Group submission¹⁹ and the test contained in the ACT's Anti-Discrimination legislation²⁰ broadly fulfil these criteria.

For reasons already noted in the Discussion Paper – including its complexity, uncertainty and unpredictability – the HRLC does not support a concept of direct discrimination which imports a formal 'comparator test'. While comparisons may still be useful during the evidentiary process in many cases, legitimate claims of discrimination should not be frustrated due to an inability to identify an appropriate comparator.

Protections from indirect discrimination should be sufficiently broad to respond to harm that would be suffered by a protected group as a consequence of discrimination; as well as circumstances in which it may be difficult to identify a the offending 'condition, requirement or practice'.²¹ The question of whether the relevant factual circumstances are 'reasonable' should be considered within a human rights framework. That is, whether the factual circumstance giving rise to the discrimination complaint (e.g. the relevant condition, requirement or practice) is a necessary and proportionate means of achieving legitimate end or purpose.²²

The Consolidated Act should also clarify that descriptions of 'direct' and 'indirect' discrimination are not mutually exclusive. In other words, a complainant should not be required to particularise their complaint as one form of discrimination to the exclusion of the other. Such distinctions lead to unnecessary complexity, therefore making it difficult for complainants to enforce their rights to equality and non-discrimination.

The definition of discrimination should also refer to discrimination on the basis of a protected attribute or a *combination* of protected attributes in order to specifically address intersectional discrimination. We discuss intersectional discrimination in more detail below.

Recommendation 2:

The Consolidated Act should include a unified test for discrimination incorporating the elements of direct and indirect discrimination. These forms of discrimination should not be treated as mutually exclusive.

[Art 5] <<http://www.equalrightstrust.org/endorse/index.htm>>; Australian Human Rights Commission, submission to the Attorney General of the Commonwealth of Australia, *Consolidation of Commonwealth Discrimination Law*, 6 December 2011, 14 [46].

¹⁸ The term 'disadvantage' is specifically preferred to a construction which refers to a person's inability to comply.

¹⁹ Discrimination law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011, 9.

²⁰ See, e.g., *Discrimination Act 1991* (ACT), s 8.

²¹ See Human Rights and Equal Opportunity Commission above n 16.

²² For a further discussion of these principles see paragraph 6.1 below.

3.2 Failure to make reasonable adjustments

As noted in the Discussion Paper, the DDA definition of discrimination explicitly includes a failure to make reasonable adjustments for a person with a disability.²³ The obligation is constrained by the notion of ‘reasonableness’ and the defence of ‘unjustifiable hardship’.

Although failing to make reasonable adjustments is not explicitly proscribed in other federal anti-discrimination laws it is, nonetheless, implicit in the concept of indirect discrimination as explained in the Discussion Paper.²⁴ This is because a failure to make reasonable adjustments – or treating all people alike – can impact unfairly on people with a protected attribute, giving rise to indirect discrimination. Given that such treatment already constitutes discrimination, a stand-alone obligation would simply clarify the existing rights and obligations of parties.

For example, a school’s refusal to provide an Auslan interpreter for a deaf student may constitute indirect disability discrimination (by imposing an unreasonable condition or requirement that the student access education in English) or a failure to make reasonable adjustments for the child with a disability. Similarly, a failure by a mining company to provide women’s toilets on-site could be characterised as indirect sex discrimination against women (by imposing an unreasonable condition that disadvantages female employees) or a failure to make reasonable adjustments for female employees.

In order to make rights and obligations clearer and achieve consistency, the Consolidated Act should include a stand-alone provision which explicitly states that a failure to make reasonable adjustments for a person with any protected attribute constitutes discrimination. A contravention of this provision should enable a complaint of discrimination to be made.

Recommendation 3:

The Consolidated Act should include a stand-alone obligation to make reasonable adjustments for persons with protected attributes.

3.3 Attribute-based harassment

The HRLC submits that the Consolidated Act should prohibit individual harassment and vilification on the basis of all protected attributes and in all areas of public life.

Harassment

As noted in the Discussion Paper, express protections against harassment vary considerably among Australian jurisdictions. The DDA, for example, deals with disability-based harassment in the context of employment, education and the provision of goods and services, while the ADA and RDA do not

²³ *Disability Discrimination Act 1992* (Cth), s 5 - 6.

²⁴ Above n 1. [58]

deal explicitly with harassment in any context. The SDA deals with 'sexual harassment' as unwelcome conduct of a sexual nature, but does not deal with sex-based harassment more broadly.

Nonetheless, as the Australian Human Rights Commission (**Commission**) notes in its submission, any harassment based on a protected attribute will constitute unlawful discrimination.²⁵ This principle is well-established in domestic case law. It is also consistent with international principles of human rights. For example, the International Declaration on Principles of Equality provides that:

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

For these reasons, the HRLC agrees with the Commission that the Consolidated Act should expressly prohibit attribute-based harassment in all areas of public life.

Recommendation 4:

The Consolidated Act should expressly prohibit attribute-based harassment in all areas of public life covered by the legislation.

Vilification

The HRLC also submits that prohibitions on vilification ought to be extended to cover all protected attributes (currently only the RDA covers vilification).

The same rationale that underpins these protections on the basis of race – namely the aim of 'prohibiting behaviour which affects not only the individual but the community as a whole'²⁶ – is equally important for all protected attributes. Failing to extend these protections to all attributes protected under the Consolidated Act would establish an unnecessary and unjustified hierarchy.

Recommendation 5:

The Consolidated Act should prohibit vilification on the basis of all protected attributes.

3.4 Burden of proof

A significant limitation of Australia's Federal anti-discrimination laws is that they are reactive and complaints-based, meaning that, in order to enforce human rights, an individual must bring a complaint to the Commission.

²⁵ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law*, 6 December 2011 [75].

²⁶ Second reading speech, *Racial Hatred Act 1995* (Cth), 15 November 1994, [3336].

Furthermore, once a complaint is made, the individual complainant also bears the onus of proving, on the basis of complex legal tests, that the unlawful discrimination occurred.²⁷ For example, in direct discrimination claims, the complainant must prove they experienced unfavourable treatment on the basis of, or because of, the protected attribute. As noted in the Discussion Paper, this is problematic because 'it requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair.'²⁸ This is a reason why a significant number of discrimination claims fail, are never brought, or are resolved at conciliation on the basis of settlement arrangements that do not accurately reflect the seriousness of the issue.

More effective models exist in the *Fair Work Act 2009* (Cth) (**FWA**) and in comparative jurisdictions overseas.²⁹ In the FWA, for example, once a *prima facie* case for unlawful adverse action (including discrimination) is established by the complainant, the respondent bears the onus of proving that its conduct was not done because of a prohibited reason.

Similarly, the *Equality Act 2010* (UK) (**UK Act**) provides that '[i]f there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred', unless the respondent shows that it did not contravene the provision.³⁰ The England and Wales Court of Appeal has commented that the law makes 'good sense given that a complainant can be expected to know how or why he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.'³¹

The HRLC supports the introduction of a shifting onus of proof in the Consolidated Act consistent with the model adopted in the general protections provisions of the FWA and the UK Act.

Recommendation 6:

The Consolidated Act should include a shifting burden of proof, so that a rebuttable presumption arises once the complainant establishes a *prima facie* case of discrimination

²⁷ Save that, in indirect discrimination cases, the respondent bears the onus of proving that condition, requirement or practice that was otherwise discriminatory was reasonable in the circumstances.

²⁸ Above n 1. [52].

²⁹ Above n 1. [50]

³⁰ *Equality Act 2010* (UK), s 136. The UK adopted the shifting burden of proof to respond to EU Directives on this issue, as noted by the University of Cambridge, above n 12. [36].

³¹ *Igen Ltd v Wong* [2005] EWCA Civ 142.

3.5 A positive duty

In accordance with international human rights law, Australia has a positive duty to provide effective protections against discrimination, which incorporates an obligation to strive towards achieving substantive equality.³²

The HRC has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.³³ The UN High Commissioner for Human Rights has also described Australia's obligations under Article 2(2) of the ICESCR as a duty to 'detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them'.³⁴

One way for Australia to better achieve this objective is to impose a positive duty on both the public and private sectors.

Benefits of a positive duty

The attraction of a positive duty to promote equality and eliminate discrimination is that it is proactive, rather than reactive. In other words, it would promote equality by requiring beneficial conduct rather than by punishing misconduct.

Imposing a positive duty would also go a long way to relieving the individual burden presently placed on individual complainants to enforce their human rights. The proactive promotion of equality also seeks to reduce the overall harm caused by discrimination in the community, instead of merely providing redress after the damage has already been done. In other words, a positive duty recognizes that 'prevention is better than cure'.³⁵

The introduction of a positive obligation to promote equality and eliminate discrimination would encourage duty holders to examine their existing policies and practices with a view to proactive compliance. It would also simplify and streamline the positive duties already imposed under federal laws.

It is anticipated that the introduction of a positive duty would not require duty-holders to develop entirely new systems. As a matter of best-practice, many organisations already have compliance frameworks in place for eliminating discrimination and identifying possible areas of non-compliance. For example, many employers already have policies, process and training in place designed to promote equality. In part, these measures may be designed so that the employer can rely on the 'reasonable precautions' if a discrimination complaint is made against it.³⁶ Those same employers

³² ICCPR art 26.

³³ Human Rights Committee, General Comment 18 above n 7 [10]. See also Human Rights Committee, General Comment 28, Equality of Rights between Men and Women [11].

³⁴ UN Council on Economic, Social and Cultural Rights, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

³⁵ This comment was also made on the introduction of the *Equal Opportunity Act 2010* (Vic): second reading speech, 10 March 2010 [785].

³⁶ The Reasonable precautions defence, which is available under each of the federal anti-discrimination acts, prevents an employer from being vicariously liable if it can establish that it took all 'reasonable precautions' to prevent unlawful discrimination from occurring in the workplace.

would also have processes and systems in place to ensure that reasonable adjustments are made for persons with a disability. Depending on the organisation, they may also have an employment opportunity or workplace diversity program in place. The introduction of a positive duty would bring aspects of compliance together in a streamlined way. It would encourage duty holders to engage in a due diligence exercise and extend those existing frameworks, where necessary, to better promote diversity and inclusiveness.

Framing the positive duty

In order to meet Australia's international legal obligations the positive duty should apply across the public and private sectors.

Historically, Australia's anti-discrimination laws have not distinguished between the public and private sectors. Introducing such a distinction would not only lead to inconsistent outcomes, it would also open the door to unnecessary complexities in identifying what is 'public' and what is 'private'.

In framing a positive duty, regard should be had to ensure that it:

- places positive obligations to assess, monitor, consult and take remedial action to address discrimination where necessary;
- is sustainable and enforceable;
- takes into account the duty-holder's size and resources; and
- is normative, as opposed to a box-ticking exercise.

Compliance with a positive duty to promote equality and eliminate discrimination would, necessarily, be contextually dependent. Larger organisations would need to demonstrate a more sophisticated approach to compliance management than small businesses.

Positive duties under existing Australian laws

There are some examples of a positive duty under the DDA. For example, following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the DDA was amended to make 'explicit the positive duty to make reasonable adjustments for a person with disability'.³⁷ The duty has been incorporated into the definitions of both direct and indirect discrimination (sections 5(2) and 6(2) respectively). In effect, the amendments provide a cause of action for a failure to take positive action to make reasonable adjustments.³⁸

Commonwealth employers also have positive duties to promote equality by maintaining 'employment opportunity programs' or 'workplace diversity programs'.³⁹ Similarly, the *Equal Opportunity for Women*

³⁷ Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), 8 [35].

³⁸ Nonetheless, 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. See Commission 'Improved rights protection for people with disability' (2009) <http://www.hreoc.gov.au/legal/publications/improved_dda2009.html>.

³⁹ *Public Service Act 1999* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth).

in the Workplace Act 1999 (Cth)⁴⁰ imposes limited obligations on employers to develop and implement workplace programs to ensure equality of opportunity for women, although those protections are not particularly strong.

At the state level, section 15 of the *Equal Opportunity Act 2010* (Vic) 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.

Positive duties in comparative jurisdictions

The introduction of a positive duty would also be consistent with emerging international best-practice. A number of comparable jurisdictions, such as South Africa, the United Kingdom, Canada and the United States, have incorporated a proactive positive duty to equality into anti-discrimination laws.⁴¹

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.⁴²

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 considers that the positive duty has been beneficial.⁴³

Recommendation 7:

The Consolidated Act should include a positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

⁴⁰ Draft legislation replacing the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) is expected to be tabled in Parliament during 2012.

⁴¹ *Equality Act 2010* (UK), Part II, Chapter 1; *Northern Ireland Act 1998* (UK) s 75, sch 9; *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).

⁴² Christopher 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.

⁴³ Ross Schneider, Commission on Racial Equality, *Towards Racial Equality: An Evaluation of The Public Duty to Promote Race Equality and Good Race Relations in England and Wales*, 2003.

3.6 Special measures

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'.⁴⁴

Whereas models of formal equality aim to treat individuals in the same way, in order to achieve equal opportunities, 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.

Special measures are essential to achieving substantive equality and eliminating discrimination, thereby realising Australia's international legal obligations.

Special measures under international human rights law

Under international human rights principles, special measures must meet a number of requirements. Specifically, a special measure must:⁴⁵

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

The requirements of consultation and consent are often overlooked or misunderstood. Justice Brennan in *Gerhardy v Brown*, in considering whether a law applying to only one race could be classified as a special measure, emphasised the need for consultation with the beneficiaries as follows:⁴⁶

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.

⁴⁴ Rebecca Cook "Obligation to Adopt Temporary Special Measures under the Convention on the Elimination of all Forms of Discrimination against Women" 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.

⁴⁵ United Nations Committee on the Elimination of all forms of Racial Discrimination, General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (August 2009).

⁴⁶ (1985) 159 CLR 70.

The requirement for consent is also essential if a measure can meaningfully be declared as being for the 'advancement of certain racial or ethnic groups'.⁴⁷

Where a special measure involves restrictions or limitations being imposed on persons with a protected attribute – in contrast with merely offering special opportunities – the requirements of consultation and consent become particularly important. This was seen, for example, in the context of the 2007 Emergency Response legislation in the Northern Territory. Although described as a 'special measure', the Commonwealth did not consult with or formally seek the consent of the Aboriginal communities affected by the restrictive measures. Australia has since been criticised for this failing at an international level.⁴⁸

Deficiencies in existing models

As noted in our previous submission, *Advance Australia Fair*, the existing temporary special measures provisions in the Federal anti-discrimination are confusing, inconsistent and marred by a number of deficiencies.⁴⁹

For example, the ADA, which uses the language of 'positive actions', fails to specify an effective timeframe for the use of a positive action. The RDA takes a cursory approach by simply referring to the special measures described in article 4 of the CERD as being exempt from the statutory prohibition on racial discrimination. The DDA adopts an unnecessarily narrow strategy of itemising particular measures and circumstances that will not be considered unlawful. These inconsistent approaches easily lead to confusion as to what temporary special measures are and how they should operate.

Further, all of the federal anti-discrimination acts besides the SDA frame the use of temporary special measures as exemptions from unlawful discrimination, when they would be better framed within the positive obligation to achieve substantive equality.

A single special measures provision

In the interest of consistency and simplicity, the Consolidated Act should include a single special measures provision which takes into account all protected attributes. The provision should provide scope for special measures that are aimed at promoting substantive equality for people who experience disadvantage or inequality because of a protected attribute, or combination of protected attributes.

As discussed above, special measures recognise that some people who experience disadvantage need extra help – rather than equal treatment – to realise substantive equality. Special measures are about achieving equality rather than eradicating harmful discrimination. For these reasons, the special

⁴⁷ See e.g., CERD art 1(4); *Racial Discrimination Act 1975* (Cth) s 8.

⁴⁸ See, for example, Human Rights Council, Report of the Working Group on the Universal Periodic Review – Australia, 24 March 2011 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>>

⁴⁹ Human Rights Law Centre, submission to the Attorney General of the Commonwealth of Australia in relation to the consolidation of federal anti-discrimination laws, *Advance Australia Fair: Addressing systemic discrimination and promoting equality*, May 2011.

measures provisions should also be framed in a positive manner and within the context of a positive duty to promote equality.

The provision should be drafted in a manner that takes international human rights principles into account. For example, the Consolidated Act may set out the international legal criteria for special measures (as summarised above) and state that these criteria must be taken into consideration by a court when determining the existence of a special measure. At a minimum, consultation should be required where a special measure imposes restrictions, as opposed to additional opportunities, for the beneficiary group.

Proving special measures

In our previous submission, *Advance Australia Fair*, the HRLC submitted that an independent, specialised body such as the Commission should be responsible for declaring whether something is a special measure.

On reflection, and with the benefit of recent legal developments, the HRLC now submits that the Consolidated Act should adopt the model set out in the *Equal Opportunity Act 2010* (Vic). Under that act, duty holders are not required to seek permission from an independent body to enact special measures. Rather, if a person brings a discrimination complaint and the duty-holder can establish that the conduct or circumstances complained of constitute a special measure within the meaning of the act, the complaint must be dismissed.

Recommendation 8:

The Consolidated Act should include a single special measures provision. The provision should be framed in a positive way and should incorporate international legal principles.

Recommendation 9:

Special measures should not require specific authorisation. Rather, establishing the existence of a special measure should provide a defence to a discrimination complaint.

4. Protected Attributes

4.1 Protected attributes under international human rights law

Presently, Federal anti-discrimination laws prohibit discrimination on the basis of race, sex (including pregnancy, marital status and family responsibilities), disability and age. To give effect to Australia's

international human rights obligations, the Consolidated Act must expand on the list of protected attributes.

The HRC in 2009 expressed concern that the rights to equality and non-discrimination are not comprehensively protected under federal law and recommended that Australia 'adopt Federal legislation, covering all ground and areas of discrimination to provide comprehensive protection for the right to equality and non-discrimination'.⁵⁰ Similarly, the UN Committee on Economic, Social and Cultural Rights has recommended that Australia 'enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds'.⁵¹

Consistent with Australia's international human rights obligations, the Consolidated Act should contain a non-exhaustive list of protected attributes which, in addition to the attributes already protected, specifically includes the following:

- sexual orientation
- gender identity
- intersex status
- criminal record
- social status
- status as a victim of domestic/family violence
- religious belief/activities
- political belief/activity
- trade union membership/industrial activity
- family responsibilities
- characteristics which are extensions of other characteristics
- other status

Each of the attributes listed above are afforded specific protection under international human rights law, or fall into the legal category of 'other status', as discussed further below.

4.2 Sexual orientation, gender identity, gender expression and intersex status

The HRLC welcomes the Federal Government's commitment to include new protections from discrimination on the bases of sexual orientation and gender identity.

The term 'sexual orientation' is often used to encompass concepts such as homosexuality, heterosexuality, lesbianism and bisexuality. The HRLC supports a broad, inclusive definition which is not restricted to these binaries and labels. A conceptual definition which refers to person's sexual attraction to, and sexual activity with, person(s) of a particular gender or gender identity is preferable. While the focus of the definition should be on a person's self-identified sexual orientation, it should also extend to perceived or imputed sexual orientation, to cover circumstances where the discriminator bases their conduct on wrongful assumptions about a person's sexual orientation or gender identity.

⁵⁰ United Nations Human Rights Committee, Concluding Observations: Australia, UN CCPR, 59th session, 12 CCPR/C/AUS/CO/5 (2009).

⁵¹ United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations: Australia, UN CESR, 42nd session, [14], E/C.12/AUS/Co (2009).

The term 'gender identity' should also be defined broadly and conceptually to refer to a person's self-identification as male or female. It should also encompass gender expression. This refers to the way that a person expresses gender through their outward presentation, such as style of dress, haircut, make-up, mannerisms, tone of voice etc.

There should also be clear protections to ensure that Intersex persons are protected from discrimination. While organisations such as OII do not advocate for a third sex, they argue strongly for an inclusive definitions of 'sex' which are not predicated on a binary and would welcome an alternative to 'male' and 'female' where people can choose not to specify their sex.⁵² Protection may be achieved by expanding the definition of sex to include 'sex characteristics' or by including an additional protected attribute of 'Intersex status'. These additional protections are required because Intersex persons do not necessarily identify as 'Intersex' (choosing instead to identify, for example, as an Intersex man or Intersex woman) but may often suffer particular discrimination due to their status as Intersex persons, that is, the existence of sex characteristics that are neither completely male nor female. However, protection from discrimination on the basis of their gender identity is also required, particularly in situations where Intersex individuals choose not to identify as either a man or a woman. The HRLC recommends the Federal government engage in further consultation with the Intersex individuals and advocacy organisations in the development of these protections.

Recommendation 10:

The Consolidated Act should adopt broad definitions of the 'gender identity' and 'sexual orientation' attributes. Intersex status and gender expression should also be protected.

4.3 Religious belief/activity

Protection on the basis of religious belief or activity is a major area of discrimination not currently covered by federal anti-discrimination law, although recourse to the Commission is available in the area of employment by virtue of ILO 111.

Including religious belief and/or activity as an additional protected attribute in the Consolidated Act would reduce inconsistencies between Federal and State and Territory laws and strengthen protections for vulnerable communities within Australia in line with Australia's human rights obligations, including those arising under the ICCPR and ICESCR.

The volume of inquiries and complaints made to equal opportunity regulators in other Australian jurisdictions relating to religious discrimination and/or vilification also evidences the need for greater protections at the federal level. In particular, 'Islamophobia' and discrimination against people of Muslim backgrounds has been an increasing problem in Australia. This has been reflected in a number of recommendations made in the Universal Periodic Review of Australia by the Human Rights

⁵² Organisation Intersex Australia International Ltd, submission to the Attorney General of the Commonwealth of Australia, *Submission on the consolidation of anti-discrimination laws* [Recommendation 9]

Council and other reviews by United Nations treaty bodies. Considerable research exists which evidences the discrimination experienced by Muslim Australians, both on the basis of race and religion.⁵³

Recommendation 11:

The Consolidated Act should include 'religious belief or activity' as a protected attribute.

4.4 Criminal record

Persons with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.⁵⁴ This form of discrimination persists despite research demonstrating that a person's prior criminal record is an unreliable indicator of future behaviour and that discrimination is an impediment to rehabilitation, social reintegration and workforce participation.⁵⁵

Australia has ratified the International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*⁵⁶, which requires all parties to:

...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

In addition to specifying certain grounds of non-discrimination, the ILO 111 also leaves room for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including 'criminal record'.⁵⁷ Therefore, there is an obligation on Australian governments to pursue policies to ensure that discrimination on the ground of criminal record is eliminated.

⁵³See, eg, Scott Poynting, Report to the Human Rights and Equal Opportunity Commission, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2011* (19 April 2004) <http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf>; Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria (The Ongoing Impact of September 11 2001)* (11 December 2008) <http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf>.

⁵⁴Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform*, 2005 <http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf>.

⁵⁵UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young: 'Criminal careers of those born between 1953 and 1978', *Home Office Statistical Bulletin 4/2001*. See also: Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, 6; Australian Law Reform Commission 'Spent Convictions' 1987, (ALRC 37).

⁵⁶ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

⁵⁷*Human Rights and Equal Opportunity Commission Regulations 1989* (Cth). Other grounds of discrimination added by this regulation include: age; medical record; impairment; marital status; mental, intellectual or psychiatric disability; nationality, physical disability; sexual preference; and trade union activity.

International jurisprudence also indicates that discrimination on the grounds of criminal record is likely to be protected under the description 'other status', as discussed further below.⁵⁸ The European Court, for example, has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.⁵⁹

Despite these overarching human rights obligations, current protections from discrimination on the basis of a criminal record are insufficient and inconsistent. Federally, the AHRCA provides limited protection by providing a mechanism for complaints to the Commission. However, unlike other forms of unlawful discrimination at the Federal level, complainants who have experienced discrimination on the basis of their criminal record are unable to enforce their rights through the judicial system.

Protections at the state and territory level are inconsistent. For example, Victoria, New South Wales, South Australia and Queensland anti-discrimination laws do not prohibit discrimination on the basis of criminal record, while Tasmania, Western Australia, Northern Territory and the ACT make discrimination on the grounds of a criminal record unlawful subject to certain exceptions, which have been criticised for being too broad.⁶⁰ Spent convictions legislation also operates in some Australian states and territories, which in effect operates to prevent discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.⁶¹

In order to give effect to Australia's international human rights obligations, the Consolidated Act must comprehensively prohibit discrimination on the basis of criminal record.

Discrimination on the basis of a criminal record should only be permitted if such discrimination constitutes a reasonable, necessary and proportionate means of achieving a legitimate aim or purpose. The preferred approach would be to apply the general limitations clause, as discussed below. In the alternative, the protected attribute could be framed as 'irrelevant criminal record', although the same principles of reasonableness, necessity, proportionality and legitimacy should inform whether or not a person's criminal record is 'relevant' in the circumstance.⁶²

Recommendation 12:

The Consolidated Act should include 'criminal record' as a protected attribute.

⁵⁸ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, p 11; *Thlimmenos v Greece*, 6 April 2000, Application No.34369/97.

⁵⁹ See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

⁶⁰ PILCH Homeless Persons' Legal Clinic, *Discrimination in Employment on the Basis of Criminal Record*, Submission to the Human Rights and Equal Opportunity Commission Inquiry into Discrimination in Employment on the Basis of Criminal Record (February 2005),15-16.

⁶¹ In every Australian state and territory, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia the spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

⁶² PILCH Homeless Persons' Legal Clinic above n 60.

4.5 Political opinion, nationality and industrial activity

As is the case with criminal record discrimination and religious discrimination, discrimination against individuals on the basis of political opinion, nationality and industrial activity is covered by ILO 111.

These grounds are also enshrined in other international instruments. For example, Article 26 of the ICCPR refers to protection from discrimination on grounds that include religion, political or other opinion and national or social origin. These three attributes are also protected, variously, under the FWA and State and Territory discrimination laws.

To achieve consistency and compliance with international human rights law, these additional attributes should be included in the Consolidated Act.

Recommendation 13:

The Consolidated Act should include 'political opinion', 'nationality', and 'industrial activity' as protected attributes.

4.6 Social status

The Consolidated Act should prohibit discrimination and promote equality on the basis of 'social status'. For the purpose of this submission, we use the term 'social status' to include not only persons who are homeless, but also those who are at risk of – or recovering from – a period of homelessness. Accordingly, we define 'social status' to mean a person's status as homeless, unemployed or a recipient of social security payments.⁶³

Research has shown that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment. For example, a 2006 study by the PILCH Homeless Persons Legal Clinic found that amongst the 183 people experiencing homelessness that were surveyed, almost 70 per cent were treated unfairly in the area of accommodation, on the grounds of homelessness or social status. A further 60 per cent experienced unfair treatment on the same grounds in the area of goods and services.

Moreover, discrimination on the basis of homelessness is often compounded by other forms of discrimination, such as discrimination on the basis of a person's disability or status a victim of domestic/family violence. Indeed the Australian Government has recognised the many causes of homelessness in its White Paper, including long term unemployment, people experiencing issues relating to mental health and emotional wellbeing, substance abuse and family breakdown.⁶⁴

⁶³ Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

⁶⁴ Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), *The Road Home: A National Approach to Reducing Homelessness* (2008), Foreword, <www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm> (viewed 2 August 2009).

The Special Rapporteur on Adequate Housing has stated that:⁶⁵

...homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status.

Similarly, the Committee on Economic, Social and Cultural Rights acknowledges that:⁶⁶

A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

Undoubtedly, homelessness is a human rights issue. As referred to above, international human rights bodies acknowledge that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. The HRC has found a difference between employed and unemployed persons to constitute discrimination on the basis of 'other status'.⁶⁷

Despite the strong evidence that discrimination on the ground of social status is prevalent, it currently remains lawful in all Australian jurisdictions.

Social status discrimination in comparative jurisdictions

By contrast, a number of overseas jurisdictions provide legal protections against social status discrimination. For example, in New Zealand, the *Human Rights Act 1993* prohibits discrimination on the basis of 'employment status', which is defined as being unemployed, receiving an income support benefit or receiving accident compensation payments.⁶⁸

Similarly, the Canadian *Charter of Rights and Freedoms 1982*, which contains a non-exhaustive list of prohibited grounds of discrimination,⁶⁹ has been interpreted to provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor. Discrimination on the basis of 'source of income' is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term 'receipt of public assistance'.⁷⁰ The province of Québec has human rights legislation prohibiting discrimination on the ground of 'social condition'.

In the United States, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution – which provides equal protection of the law – has been interpreted as prohibiting discrimination on the basis of status, including socio-economic status and homelessness.⁷¹

⁶⁵ M Kothari, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (E/CN.4/2005/48), [3].

⁶⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, 2 July 2009 <<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>>

⁶⁷ *Cavalcanti Araujo-Jongens v Netherlands* (418/90).

⁶⁸ Human Rights Act 1993 (NZ) s 21 sub-s 2

⁶⁹ Article 15(1) provides that "Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination".

⁷⁰ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>>.

⁷¹ See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

In Europe, the right to freedom from discrimination on the grounds of 'social origin' is recognised in Article 14 of the European Convention on Human Rights (**ECHR**). Commentators have argued that the attribute of 'social origin' includes the ground of 'social status'.⁷² The United Kingdom's *Human Rights Act 1998* (UK) (**UK HRA**), which was enacted to give legislative effect to the ECHR, incorporates Article 14 of the ECHR provides equivalent protections against 'social origin' and, by extension, 'social status' discrimination.

Recommendation 14:

The Consolidated Act should include 'social status' as a protected attribute. 'Social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

4.7 Victim of domestic/family violence status

The Consolidated Act should include a person's 'status as a victim of domestic or family violence' as a protected attribute. As discussed below, this would assist Australia to improve substantive equality between the sexes, as required under international human rights law.

The United Nations Committee on the Elimination of Discrimination Against Women acknowledges that gender-based violence, such as domestic or family violence, is a form of discrimination of itself, which compounds other inequalities in public life. The Committee has said:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and **impair their ability to participate in family life and public life on a basis of equality**.⁷³ (Emphasis added).

For these reasons the Committee has called on all member states, including Australia, to take 'all legal and other measures that are necessary to provide effective protection of women against gender-based violence'.⁷⁴

The inclusion of 'status as a victim of domestic or family violence' as a protected attribute would play an important role in protecting Australians, especially women, from both the immediate and consequential harm resulting from domestic or family violence.

Such protections are especially important in the workplace. Financial independence is vital for many women trying to escape violent relationships. Hence, maintaining secure, paid employment often

⁷² See, for example, Lynch and Stagoll, above n 63.

⁷³ Committee on the Elimination of Discrimination Against Women, General Comment No. 19, 11th session, 1992 at paragraph 23.

⁷⁴ Committee on the Elimination of Discrimination Against Women, General Comment No. 19, 11th session, 1992 at paragraph 24(t).

provides a pathway for women out of domestic/family violence situations.⁷⁵ Research has shown, however, that victims of domestic/family violence tend to experience discrimination and inequality in the workplace.⁷⁶ A survey conducted by the Australian Domestic and Family Violence Clearinghouse found that being a victim of domestic/family violence limited workers' capacity to obtain secure employment. It also resulted in workers being tired, distracted, unwell or late, thereby limiting their ability to hold down jobs and progress in the workplace.⁷⁷ Many victims do not disclose the reasons for their decline in performance either for fear of the consequences or because they believe the information is not relevant in the employment context, which compounds the harm they suffer. Incorporating this protection in the Consolidated Act would encourage victims to speak-up about domestic/family violence within a protective framework.

Discrimination against victims of domestic/family violence is not limited to the workplace. Victims of domestic violence also tend to experience discrimination in access to goods and services and the provision of housing. Given that women are disproportionately affected by domestic/family violence, this type of discrimination contributes to the substantive inequalities that women experience in *all* aspects of public life. It also impacts on women's equal enjoyment of other rights, such as the right to health.⁷⁸

Including a person's 'status as a victim of domestic violence' as a protected attribute in the Consolidated Act would go some way towards realising women's rights and promoting substantive sex equality in Australia. The HRLC recommends that the Consolidated Act should include this new protected attribute. Domestic and family violence should be defined broadly to include both physical and non-physical forms of violence (such as emotional and economic abuse) perpetrated by a family member or other person who is in a domestic relationship with the victim.⁷⁹

Recommendation 15:

The Consolidated Act should include a person's 'status as a victim of domestic or family violence' as a protected attribute.

⁷⁵ Australian Law Reform Commission, *Family Violence – Commonwealth Laws, Discussion Paper No 76* (August 2011) at paras 14.11 – 14.13, available at: www.alrc.gov.au/publications/family-violence-and-commonwealth-laws0dp-76-summary.

⁷⁶ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law*, Working Paper, 12 December 2011. See also: Braaf and Meyreing, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011, < www.austdvclearinghouse.unsw.edu.au/financial_security.htm.>; VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (March 2010) 47; McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

⁷⁷ L McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

⁷⁸ E.g. research undertaken by VicHealth has shown that family violence is the leading contributor to death, disability and illness in women aged 15 – 44 years. See VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004), 8.

⁷⁹ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law*, Working Paper, 12 December 2011 at pp 16 – 17.

4.8 Family and carer responsibilities

The Consolidated Act should contain specific protections from discrimination on the basis of a person's family and carer responsibilities.

Under international human rights law, Australia has obligations to prevent discrimination against workers with family responsibilities. These obligations arise under both CEDAW and the *ILO C156 Workers with Family Responsibilities Convention, 1981 (Family Responsibilities Convention)*⁸⁰, which acknowledges that more traditional forms of discrimination – such as sex discrimination – do not adequately capture the problems faced by parents and carers, especially in the workforce.

Article 1 of the Family Responsibilities Convention provides that the 'Convention applies to men and women workers with responsibilities in relation to their dependent children where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity'. The Family Responsibilities Convention applies equally to men and women and extends to a person's need to care for any immediate family member who clearly needs care or support. These workers are referred to as 'workers with family responsibilities'. By ratifying this convention, Australia has agreed to create equality of opportunity and treatment by introducing policy measures that enable workers with family responsibilities to exercise their right to free choice of employment and to take account of their needs in terms and conditions of employment.⁸¹ Moreover, the needs of these workers are to be considered in community planning and development and in respect of community services such as child-care and family services and facilities.⁸²

Discrimination on the basis of family and carer responsibilities also entrenches inequalities between men and women. As the Commission noted in 2005:⁸³

While women bear the major responsibility for unpaid caring work, their ability to engage in the paid workforce will be artificially limited. This unequal burden will mean that paid work and family balance will continue to be a 'women's issue', resulting in women's continuing disadvantage and discrimination in the workplace. With work and family balance seen as a women's issue, fathers will have even less ability to obtain part time work or flexibility in their paid work to allow them to share unpaid caring work. Men will continue to be locked into a breadwinner role and excluded from participating actively as parents or carers, thus unfairly limiting their and their partners' range of choices.

Creating social and workplace structures that promote substantive equality for people with family and carer responsibilities (predominately women) is critical to achieving substantive gender equality.

Deficiencies in existing models

Commonwealth anti-discrimination laws provide only limited protections from discrimination on the basis of family and carer responsibilities. The SDA prohibits direct, but not indirect, discrimination on the basis of family responsibilities in the area of work.⁸⁴ This failure to protect against indirect

⁸⁰ Convention 156 was adopted by the ILO on 23 June 1981 and ratified by Australia on 30 March 1990.

⁸¹ Article 4, C156 Workers with Family Responsibilities Convention, 1981.

⁸² Article 5, C156 Workers with Family Responsibilities Convention, 1981.

⁸³ Australian Human Rights Commission, *Striking the Balance: Women, Men, Work and Family*, Discussion Paper, 2005, 5.

⁸⁴ *Sex Discrimination Act* (Cth), s 7A. The prohibition extends to characteristics generally pertaining or imputed to persons with family responsibilities.

discrimination ignores the insidious nature of social and employment structures, which contribute to substantive inequalities in the workforce. (In contrast, each Australian state and territory prohibits direct and indirect discrimination on the basis of family responsibilities or a similar attribute.)

The *Fair Work Act 2009* (Cth) (**FWA**) brought welcome but modest improvements in this area of discrimination. It prohibits 'adverse action' on the basis of a person's family or carer's responsibilities.⁸⁵ The definition of 'adverse action' incorporates some forms of discrimination, such as discrimination 'between the employee and other employees'.⁸⁶ However, because the FWA does not define discrimination, the extent of these protections is uncertain. It is not clear, for example, whether the FWA would provide protections against indirect discrimination.⁸⁷

The FWA also states that employer may only refuse a request for flexible working arrangements by somebody with parental responsibilities on 'reasonable business grounds'. This goes some way towards promoting flexible work practices that assist substantive equality. However, the right to request flexible work arrangements is limited to employees with at least 12 months continuous service who have care and responsibility for a child under school age, or a child with a disability under 18 years.⁸⁸ It does not sufficiently protect casual workers, or people with diverse carer's responsibilities as required under international law.

Even taken together, the provisions in the SDA and FWA do not go far enough in terms of encouraging or promoting the structural changes necessary for achieving substantive equality.

Recommended solution

Australia must take stronger measures to enable workers with family and carer responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities.⁸⁹

The Consolidated Act should include 'family and carer responsibilities' as a protected attribute. Moreover, the attribute should be defined broadly, in recognition of the diverse family and carer relationships that exist in the Australian community.

Recommendation 16:

The Consolidated Act should include 'family and carer responsibilities' as a protected attribute. This attribute should be defined broadly.

⁸⁵ Provided that the conduct is not lawful under applicable state or territory anti-discrimination legislation.

⁸⁶ *Fair Work Act 2009* (Cth), s 342.

⁸⁷ See Discussion by Carol Andrades, *Working Paper No 47 – Intersections between 'General Protections' under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries*, Centre for Employment and Labour Relations Law, December 2009.

⁸⁸ *Fair Work Act 2009* (Cth), s 65.

⁸⁹ Article 7, C156 Workers with Family Responsibilities Convention, 1981.

4.9 Characteristics extension

The HRLC recommends that there should be a general characteristics extension. This should apply to any characteristic generally pertaining to, or imputed to, a person with a protected attribute.

Specific protections for marital status, pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal – which are extensions of sex and disability discrimination – should be maintained.

Recommendation 17:

The Consolidated Act should contain a general characteristics extension. Specific protections for pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal should also be maintained.

4.10 Other status

The HRLC submits that the list of protected attributes in the Consolidated Act should be a non-exhaustive list which specifically prohibits discrimination on the ground of 'other status'.

Both the ICCPR⁹⁰ and ICESCR⁹¹ prohibit discrimination on the basis of a number of prescribed attributes as well as any 'other status'. International jurisprudence from the UN Human Rights Committee establishes that the term 'other status' refers to a clearly definable group of people linked by their common status.⁹²

Based on the criteria adopted by the HRC, for example, it is clear that discrimination on the grounds of 'criminal record', 'homelessness' and 'social status' would fall within the definition of 'other status'. While we maintain that these attributes should be specifically protected in the Consolidated Act – not merely covered by an 'other status' attribute – these are all good examples of emerging forms of discrimination which international human rights law has come to recognise. Discrimination on the ground of 'other status' may also capture discrimination on the basis of particular physical features, such as obesity or tattoos.

Non-exhaustive lists of protected attributes have been used in other jurisdictions, including South Africa, which extends protections to victims of discrimination on the basis of specified characteristics

⁹⁰ See ICCPR, art 2(1) and 26.

⁹¹ ICESCR, art 2,

⁹² See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses HRC decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

as well as any other grounds which 'cause or perpetuate systemic disadvantage... or cause unequal enjoyment of fundamental rights.'⁹³

The inclusion of 'other status' as a protected attribute in the Consolidated Act would ensure its consistency with Articles 2(1) and 26 ICCPR and Article 2(2) of the ICESCR. It would also enable the Consolidated Act to be flexible and responsive to new or evolving problems of discrimination.

Recommendation 18:

The Consolidated Act should contain a non-exhaustive list of protected attributes and, to that end, should prohibit discrimination on the basis of a person's 'other status'.

4.11 Intersectional discrimination

The HRLC submits that the Consolidated Act should specifically prohibit discrimination on the basis of a protected attribute or a *combination* of protected attributes, in order to better recognise and address intersectional discrimination.

As noted in the Discussion Paper, intersectional discrimination is discrimination which occurs on the basis of a combination of protected characteristics. It refers to something more than a series of separate discriminatory acts. The concept of Intersectional discrimination recognises the multi-layered and complex discrimination experienced by people because of their overlapping and inextricably linked attributes.

For example, a government policy may impact unequally on Aboriginal women, despite that Aboriginal men and non-Aboriginal women are reasonably able to comply with that policy. In this example, it is the combination of race and gender which forms the ground of the unequal treatment. This is an example of intersectional discrimination. Compare this with a situation whereby an employer denies an employee the opportunity to undergo training because she is a woman and subsequently refuses her a promotion because she is Aboriginal. In the second example, the current laws can respond to the discrimination by compartmentalising the discriminatory acts.

In circumstances involving intersectional discrimination, complainants may be deterred from pursuing their right to equality beyond the Commission stage because they feel that the law does not adequately account for their experiences.⁹⁴ While it may be possible to discuss cases involving intersectional discrimination informally at the Commission stage, complainants experiencing intersectional discrimination face extreme challenges when it comes to particularising and proving the discrimination before a Court. Hence, access to justice is limited for victims of intersectional discrimination.

⁹³ *Equality and Prevention of Unfair Discrimination Act 2000* (Act No. 4 of 2000) (South Africa) as cited by the University of Cambridge above n **Error! Bookmark not defined.**

Intersectional discrimination also presents a significant barrier to achieving substantive equality, as recognised under international human rights law. For example, the CEDAW Committee has stated that.⁹⁵

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.

Further, in its 2006 Concluding Observations on Australia, the CEDAW Committee specifically noted the compounded discrimination faced by Indigenous, refugee and minority women and women with disabilities.⁹⁶

Likewise, the HRC has also stated that.⁹⁷

Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

The Committee on the Elimination of Racial Discrimination also considered this issue in their General Comment on the gender-related dimensions of racial discrimination, stating:⁹⁸

Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

Acknowledging intersectional discrimination in the Consolidated Act would assist the law to respond to circumstances where person's experience of discrimination does not fit into a particular box, such as 'sex', 'age', 'race' or 'disability' discrimination. Sometimes people are treated unfavourably for a number of reasons that cannot be logically and clearly separated out from one another.

⁹⁴ See Beth Gaze, Submission No 50 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sex Discrimination Report, 2.

⁹⁵ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30th Session, 2004, [12].

⁹⁶ Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5.

⁹⁷ Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) [30].

⁹⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25: Gender related dimensions of racial discrimination*, 20/03/2000.

In order to address intersectional discrimination and promote substantive equality, the Consolidated Act should clarify that unlawful discrimination include discrimination on the basis of a combination of – or the intersection of – two or more protected attributes.

Recommendation 19:

The Consolidated Act should provide specific protections against intersectional discrimination.

5. Protected Areas of Public Life

5.1 Equality before the law

As noted in the Discussion Paper, 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. Therefore, equality before the law is concerned with operation and effects of laws rather than the acts of individuals.⁹⁹ It requires all laws enacted by the government to be non-discriminatory.¹⁰⁰

The right to equality before the law is a cornerstone of Australia’s international human rights obligations. Indeed, this right is the focus of the specific instruments on which our Federal anti-discrimination laws are based.

For example, 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. (Emphasis added)

Similarly, Article 12 of the CRPD states as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

...

⁹⁹ *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].

¹⁰⁰ UN Human Rights Committee, General Comment No. 18 above n 7.

Article 15(1) of CEDAW also provides that 'States Parties shall accord to women equality with men before the law'.¹⁰¹

Despite very clear statements under each of these instruments, the right to equality before the law is not protected in the SDA, the DDA or the AHRCA.¹⁰² The RDA is the exception of the four Federal anti-discrimination laws. Section 10 of the RDA provides for a general right to equality before the law, which we discussed, in some detail, in our previous submission.¹⁰³

The failure to *consistently* guarantee the right to equality before the law represents a significant gap in the protection of human rights in Australia. This means that Australia is not currently complying with its obligations under international human rights instruments.¹⁰⁴

This gap has been the subject of criticism by human rights organisations and prominent inquiries over several years.¹⁰⁵ For example, as noted in the Discussion Paper, the 2008 inquiry conducted by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs into the effectiveness of the SDA recommended that it be amended to include a general equality before the law provision modelled on section 10 of the RDA.¹⁰⁶ The Australian Law Reform Commission 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 law, as discussed in our previous submission.¹⁰⁷

One of the stated purposes of a Consolidated Act is to 'address current inconsistencies' in Federal anti-discrimination laws.¹⁰⁸ Further, the Federal Government has guaranteed that the Consolidated Act will not result in 'diminution of existing protections currently available at the Federal level'.¹⁰⁹ Accordingly, it is recommended that the Consolidated Act include an equality before the law provision on similar terms to section 10 of the RDA which would apply to all attributes protected by the Consolidated Act.¹¹⁰

Concerns about the effect of a broad right to equality before the law on particular groups – such as people with disabilities who are subject to special legal regimes like the guardianship and mental health legislation – can be overcome by the operation of a general limitations clause, or a simple

¹⁰¹ See also CEDAW, art. 2(c).

¹⁰² 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.

¹⁰³ See also, for example, *Canadian Charter of Rights and Freedoms* s 15.

¹⁰⁴ For example, Arti 2(c) and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 12 of the Convention on the Rights of Persons with Disabilities.

¹⁰⁵ For example see Australian Human Rights Commission, *Submission to the Enquiry into the Effectiveness of the Sex Discrimination Act 1984*, 2008 [207-208]; Productivity Commission, *Review of the Disability Discrimination Act 1992* (Cth), (2004) 233.

¹⁰⁶ 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.

¹⁰⁷ ALRC, *Equality Before the Law: Justice for Women*, ALRC 69.

¹⁰⁸ Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of Anti-Discrimination Legislation', (Joint media release, 21 April 2010).

¹⁰⁹ *Ibid.*

¹¹⁰ 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

qualification that the right to equality before the law does not preclude appropriate and effective legislative safeguards that are consistent with international human rights law.

Recommendation 20:

The Consolidated Act should include an 'equality before the law' provision in similar terms to section 10 of the *Racial Discrimination Act* which would apply to all protected attributes.

5.2 Protected areas of public life

The HRLC submits that the Consolidated Act should protect against discrimination in 'political, economic, social, cultural or any other field of public life'.

The recommended formulation is consistent with the definition of discrimination under the CERD and current protections under the RDA. Similarly broad protections are also provided for under the CEDAW and CRPD, both of which define discrimination by reference to conduct in the 'in the political, economic, social, cultural, civil or any other field'. It is clear, from the text of these instruments, that Australia is obliged to provide broad protections against discrimination under international human rights laws.

As noted in the Discussion Paper, the Federal Anti-Discrimination laws currently provide inconsistent protections from discrimination across areas of public life. For example, the AHRCA, DDA and SDA adopt the approach of prohibiting discrimination in connection with specific activities (such as hiring and firing in employment) or specific areas of public life (such as work, education, the provision of goods and services and the administration of Commonwealth laws and programs). The end result is that, while these acts cover a variety of activities in public life, the protections are piecemeal, fragmented and complex. The current formulation under these Federal Anti-Discrimination laws is not consistent with Australia's international human rights obligations.

By contrast, section 9 of the RDA broadly prohibits conduct based on race which interferes with the enjoyment of 'any human right or fundamental freedom in the political, economic, social, cultural or any other field of public *life*'. While the RDA, in addition, specifies areas in which discrimination is prohibited these sections are for the avoidance of doubt only and do not limit the general right contained in section 9.

In light of the Federal Government's guarantee that the Consolidated Act will not result in 'diminution of existing protections currently available at the Federal level'¹¹¹ and the aim of ensuring consistency, the Consolidated Act should adopt the approach currently reflected in section 9 of the RDA. That

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.

¹¹¹ Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

approach would protect against discrimination in 'political, economic, social, cultural or any other field of public life'.

For the avoidance of doubt, the Consolidated Act may specify that 'public life' includes but is not limited to work, education, the supply of goods and services, accommodation, clubs, the delivery of government programs, the disposition of land and superannuation.¹¹²

Recommendation 21:

The Consolidated Act should protect against discrimination in political, economic, social, cultural or any other field of public life.

5.3 Volunteers

For the reasons set out above, the Consolidated Act should protect volunteers from discrimination at least insofar as their voluntary activities fall within an area of 'public life'. This would include, for example, volunteers who perform work in the not-for-profit organisations, government bodies, schools and emergency services.¹¹³

Not only do volunteers make an important contribution to public life, as noted in the Discussion Paper, volunteering also provides people with engagement and participation opportunities. For example, a person with a disability or parental responsibilities may engage in voluntary work to assist their transition into paid employment. In that sense, protection for volunteers is important for achieving overall substantive equality.

While volunteers are already protected from discrimination under the RDA and some state and territory anti-discrimination laws, those current protections are ad-hoc and insufficient to meet Australia's international legal obligations.

Recommendation 22:

Persons performing voluntary work in an area of public life should be fully protected from discrimination..

5.4 Clubs and member-based associations

As the Discussion Paper highlights, the exceptions for clubs and member-based associations in the current anti-discrimination legislation are confusing and inconsistent. This is partly because the federal laws adopt different terminology such as 'voluntary bodies', 'incorporated associations', and

¹¹² See Discrimination Law Experts' Group submission, 'Consolidation of Commonwealth Anti-Discrimination Laws', 13 December 2011, 9.

¹¹³ By contrast, volunteering would fall outside of the 'public life', for example, where a person volunteers to coordinate a book club for a group of friends, or help a neighbour tend their garden.

'clubs'. The exceptions are also different in substance and scope, as illustrated by the comparative table contained in the Discussion Paper.¹¹⁴

The RDA sets the highest benchmark as it contains no such exceptions for these types of bodies. The DDA permits discrimination in this area only insofar as persons with a particular disability are permitted to form an exclusive club or association. The ADA allows 'voluntary bodies', including all not-for-profit associations, to discriminate on the basis of age in connection with the admission of members and the provision of benefits, facilities and services.¹¹⁵ The SDA contains the most complex array of exceptions. Under the SDA, 'voluntary bodies' with less than 30 members that do not sell or supply liquor are covered by an exception. It is also permissible to form single-sex 'clubs' under the SDA.

On the whole, these exceptions are inconsistent and confusing. The SDA exceptions are particularly problematic, as they fall well short of Australia's international legal obligations to ensure that women are protected from discrimination by organisations, enterprises and individuals in both the public and private spheres.¹¹⁶ Notably, under CEDAW, Australia is obliged to address 'the persistence of gender-based stereotypes that affect women... in societal structures and institutions'.¹¹⁷

The HRLC submits that blanket exemptions for clubs, charities and voluntary bodies – organisations that often wield considerable economic, political and social power – are incompatible with Australia's human right obligations and should be removed in their entirety, except insofar as they may provide special protection for vulnerable groups (such as children, elderly people and those with a particular disability). This change is necessary, in order to 'level up' to the standards set by the RDA while still ensuring consistency and simplicity in the Consolidated Act.

Alternatively, if the Consolidated Act is to contain certain exceptions to clubs and member based associations, those exceptions should be minimal.

Consideration may be given to excluding 'volunteer associations' – as defined by the Model Work Health and Safety Act (**WHS Act**) – from the obligations of non-discrimination and the positive promotion of equality under the Consolidated Act, as a way to reconcile and limit the existing exceptions and exemptions for clubs and member based associations.

The WHS Act defines a 'volunteer association' to mean:¹¹⁸

...a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

The explanatory memorandum to the WHS Act clarifies that a 'community purpose' is intended to cover philanthropic or benevolent purposes, including the promotion of art, culture, science, religion,

¹¹⁴ above n 1. [29 – 30]

¹¹⁵ Depending on the circumstances, these exceptions to disability and age discrimination are also likely to constitute special measures. For example, a support group established exclusively for persons with a mental illness may constitute a special measure as it would help to alleviate the isolation and disadvantage experienced by its members.

¹¹⁶ CEDAW, Art 2(e) and General recommendation 25, above n, 95 [7].

¹¹⁷ General recommendation 25, above n 95, [7].

¹¹⁸ *Model Work Health and Safety Act* (revised draft 23 June 2011), s 5(8).

education, medicine or charity, and sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.¹¹⁹

Applying the same, or substantially similar test in the Consolidated Act, may improve consistency and ease the regulatory burden on clubs and member-based associations, although the HRLC recommends that the area of sport should be treated separately and subject to particular consideration.

Recommendation 23:

The Consolidated Act should not contain blanket exemptions for clubs and member-based associations.

5.5 Partnerships

Federal anti-discrimination laws are currently inconsistent in their application to partnerships. The RDA currently applies to all partnerships. However, the DDA only applies to partnerships of 3 or more people while the SDA and ADA apply to partnerships of 6 or more.

In order to achieve consistency without eroding the current standard set by the RDA, the Consolidated Act must apply to all partnerships, regardless of their size. The HRLC supports the Commission's position in this respect.¹²⁰

Recommendation 24:

The Consolidated Act should apply to all partnerships regardless of size.

6. Exceptions and Exemptions

6.1 General exception

The Federal anti-discrimination laws currently contain a variety of ad-hoc and inconsistent permanent exceptions and exemptions to prohibitions against discrimination. Rather than allowing a nuanced balancing of rights in cases where the individual's right to non-discrimination may conflict with another right or freedom, many of these exceptions are arbitrary, inflexible, broad, and unreasonable. Many of these exceptions and exemptions also protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups, hence perpetuating inequality.

For example, exemptions under the DDA permit discrimination in relation to employment in areas of the Australian Defence Force and peacekeeping services by the Australian Federal Police.¹²¹ These

¹¹⁹ Explanatory memorandum, *Model Work Health and Safety Act* (7 December 2010), [31] – [32].

¹²⁰ Australian Human Rights Commission, above n 17, 28.

¹²¹ *Disability Discrimination Act 1992*, s 53 – 54.

exemptions do not require consideration of whether the person's sex or disability would impact on their ability to perform the required duties. Similarly, a permanent exemption under the SDA permits the Australian Defence Force to discriminate against women in the performance of combat duties.¹²² The SDA also contains a permanent exemption which allows religious schools to discriminate against members of staff, in connection with employment, on the grounds of sex, marital status or pregnancy.¹²³ We discuss the exceptions for religious bodies in more detail below.

The effect of these inconsistent exceptions and exemptions is to create an unnecessary hierarchy of protected attributes, despite there being no principled reason for preferring some attributes over others.

This unprincipled approach is inconsistent with international human rights law. International law recognises that not all differentiations between people constitutes unlawful discrimination. For example, the HRC has observed that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'¹²⁴

The HRLC submits that, in lieu of the myriad of permanent exceptions and exemptions, there should be a single, overarching exception clause drafted in terms that are consistent with human rights principles. The effect of this clause would be to render discrimination *not* unlawful where the duty-holder can establish that the conduct was 'necessary and proportionate means of achieving a legitimate end or purpose'.

Necessity, proportionality and legitimacy (in terms of legitimate bases for restricting non-absolute human rights) are well-established principles of international and comparative human rights law.¹²⁵ A legitimate end or purpose may include the protection of national security; public safety, order, health or morals; or the rights and freedoms of others. A 'proportionate' response must be necessary for achieving the legitimate aim or purpose. A proportionate response – that is, a response that is rational, appropriate and adapted – must also follow the least restrictive approach available. In other words, it can only impinge on an individual's right to non-discrimination in the most minimal way.

At the very least, if a general exceptions clause is not adopted, the current exceptions should be subject to a public, transparent and principled review. The review should be guided by international legal principles, such as necessity, proportionality and legitimacy. In the interests of transparency, the Australian public should be given reasons why the exceptions (if any) are retained.

¹²² *Sex Discrimination Act 1984*, s 43.

¹²³ *Sex Discrimination Act 1984*, s 38.

¹²⁴ HRC, General Comment No 18, above n 7.

¹²⁵ In Canada, for example, exceptions to discrimination are only lawful if they are: (1) for a pressing and substantial objective; and (2) rationally connected and proportionate to that objective; and (3) give rise to the minimal discrimination necessary to achieve the objective: *R v Oakes* [1986] VSCR 103.

Recommendation 25:

The Consolidated Act should state that discrimination is not unlawful if the discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose. At the very least, if a general exceptions clause is not adopted, the current exceptions should be subject to a public, transparent and principled review.

6.2 Exemptions for religious organisations

The HRLC acknowledges, with disappointment, the Government's pre-determined position on the maintenance of permanent exemptions for religious bodies. Arbitrary exemptions from discrimination for religious bodies and organisations do not give any consideration to the relevance and justification in modern, Australian society. These exemptions are manifestly inappropriate and inconsistent with Australia's human rights obligations and international best-practice.

Broad religious exceptions in the SDA and ADA

The ADA and the SDA both contain permanent exceptions for any acts or practices of a body established for religious purposes that:

- conforms to the doctrines, tenants or beliefs of the relevant religion; or
- are necessary to avoid injury to the religious sensitivities of adherents of that religion.¹²⁶

The exceptions are ostensibly designed to protect religious freedom. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights. However, freedom of religion is not an absolute right, meaning that freedom of religion can be limited in certain circumstances. In cases where the right to freedom of religion conflicts with other rights, for example the right to equality, neither right should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed. If it cannot be shown that the discrimination is reasonable and proportionate, such discrimination should not be permitted under law.

The exceptions outlined above are extremely broad and while they may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exceptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.

Currently, the religious exceptions set up a regime whereby religious freedom can not ever be curtailed in the name of equality. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.

Specific religious exceptions in the SDA

The SDA also contains exceptions for religious groups conducting specific activities, namely:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;¹²⁷
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;¹²⁸
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice;¹²⁹
- (d) educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided the discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion;¹³⁰ and
- (e) accommodation provided by a religious body.¹³¹

In the HRLC's opinion, the exceptions in subsections (a) – (c) are likely to be permissible in accordance with a human rights-based limitations analysis (i.e. the limitation on the right to equality is a reasonable and proportionate means of achieving a legitimate end, being the protection of religious freedoms).

However, the exceptions in (d) and (e) above are overly broad and would allow for both permissible and impermissible limitations on the right to equality. For example, the exception for education institutions may permit a school that receives substantial government funding to refuse to enroll a child whose parents are in a de facto relationship. The exception for accommodation by a religious body could provide a legal entitlement for a profit-making church-run accommodation service to evict a pregnant woman into homelessness. Neither of these examples is likely to meet the standard of a reasonable and proportionate measure to achieve a legitimate aim and should therefore not be sanctioned by law.

Religious exceptions in relation to discrimination on the grounds of sexual orientation and gender identity

The concerns identified above in relation to religious exceptions to sex and age discrimination laws also apply to any proposed exceptions to new protections on the grounds of sexual orientation and gender identity.

¹²⁶ *Age Discrimination Act 2004* s 35; *Sex Discrimination Act 1984* s.37(d).

¹²⁷ *Sex Discrimination Act 1984* s 37(a).

¹²⁸ *Sex Discrimination Act 1984* s 37(b).

¹²⁹ *Sex Discrimination Act 1984* s.37(c).

¹³⁰ *Sex Discrimination Act 1984* s.38.

¹³¹ *Sex Discrimination Act 1984* s.23(3)(b).

This has the potential to cause significant harm to the community. Consider, for example, a Same Sex Attracted or Gender Questioning young person who, at the election of his or her parents, is sent to a school with homophobic religious teachings and other practices. The harm the student may suffer, either through direct discrimination or as a consequence of the messages (both overt and implicit) imparted by the school, is intolerable in a free and equal society.

The HRLC considers that it would be incongruous for the Government to take the positive step of introducing protections on the basis of sexual orientation and gender identity on one hand, and entrench discrimination towards these groups through broad permanent exceptions on the other.

Recommendation 26:

The right to be free from discrimination on the grounds of sexual orientation and gender identity should only be limited where discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

Transparency and accountability in reliance on permanent exceptions

A further problem with the existing exceptions and exemptions for religious organisations is that there is little transparency around their operation. There is also a lack of clarity for people engaging with religious organisations who may be on the receiving end of discriminatory conduct. If the Government decides to maintain religious organisations' blanket right to discriminate, information about the nature of those discriminatory practices should be public. This is particularly so when the body that wishes to discriminate receives public funds or where the discrimination in question has some other public impact.

To this end, the HRLC recommends that a system be put in place whereby any religious organisation that wishes to be exempted from the operation of the Consolidated Act disclose and lodge with the Commission a notice which specifies the exempted policy or practice. Religious organisations should also be required to notify those potentially affected by the exception of their intention to rely on the exception. For example, advertising material and information for job applicants should contain detail of the proposed discrimination.

Requiring such notices on a case-by-case basis would enable the Commission and the public to be informed about the rationale, nature, extent and likely impact of discrimination by religious bodies. It may also encourage religious bodies to assess whether the discrimination is necessary and appropriate in each case.

Recommendation 27:

Religious bodies that wish to rely on an exemption or exception to excuse the operation of the Consolidated Act should be required to publicly disclose and lodge a notice to that effect with the Commission, on a case-by-case basis.

7. Complaints and Compliance

7.1 Human rights framework for complaints and compliance

The obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims.¹³² The European Court of Human Rights has described this as an obligation to ensure that human rights are ‘practical and effective’ as opposed to ‘theoretical and illusory’.¹³³ With the right to an effective remedy also comes the right to a fair trial, which ensures that the legal system is fair and accessible to complainants.

The requirement to provide an effective remedy is found in many human rights conventions including the ICCPR. For example, Article 2(2) of the ICCPR requires state parties to ‘adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant’, and Article 2(3)(a) further provides that States must ensure that people whose rights are violated have an ‘effective remedy’.

The Human Rights Committee has confirmed that domestic remedies should be appropriately adapted so as to take account of the ‘special vulnerabilities of certain categories of person’.¹³⁴ The Committee also considers that the right to an effective remedy imposes a duty to investigate allegations of human rights breaches. The failure to discharge that duty may itself constitute a separate breach of the ICCPR.¹³⁵

In the context of Australia’s legal system, which requires individuals to enforce their rights to non-discrimination through the Courts, the right to a fair hearing is also paramount. The right to a fair hearing is embodied Article 14(1) of the ICCPR, which states:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The basic elements of the right to a fair hearing, some of which are discussed further below, include:

- equal access to, and equality before, the courts;
- the right to legal advice and representation;
- the right to procedural fairness;

¹³² Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹³³ See, *inter alia*, *Alenet de Ribemont v. France* 3/1994/450/529 citing *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

¹³⁴ UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [15].

¹³⁵ UN Human Rights Committee, General Comment 31, above n 134. [18]

- the right to a hearing without undue delay;
- the right to a competent, independent and impartial tribunal established by law;
- the right to a public hearing; and
- the right to have the free assistance of an interpreter where necessary.

The Human Rights Committee has acknowledged that access to justice and fairness in the legal system are critical to protecting human rights. In its General Comment Number 32, the Committee states:

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.¹³⁶

In light of these obligations the HRLC submits that Consolidated Act must contain appropriate structures to ensure that discrimination is effectively investigated and enforced by both individuals and other relevant bodies, as set out below.

7.2 Role and functions of the Commission

We refer to and reiterate the recommended additional powers of the Commission, as set out in the HRLC's previous submission. Conferring additional functions and powers on the Commission would enable it to contribute more effectively to law-making and systemic problems. Additional enforcement powers would also enable the Commission to engage with duty-holders and work with them to promote compliance.

A summary of the HRLC's recommendations for the powers of the Commission is set out below. For a more detailed discussion refer to the HRLC's previous submission, *Advance Australia Fair*.¹³⁷

Public inquiries

The Commission is current only empowered to conduct public inquiries into discrimination and breaches of human rights perpetrated by, or on behalf of, the Federal Government. This limits the Commission's ability to look more broadly at human rights concerns, such as issues arising in private sector or by state and territory bodies.

The Commission's inquiry powers are further undermined by a lack of enforceability. Although the Commission can make recommendations to the Federal Government, there is no obligation to respond. The Consolidated Act should require the Federal Government to respond, in a timely manner, to findings or recommendations contained in Commission reports that are tabled in Parliament. In its response, the Federal Government should be required to indicate how it will address the recommendations.

¹³⁶ UN Human Rights Committee, *General Comment Number 32, Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, (2007).

¹³⁷ See pages 34 – 38.

Recommendation 28:

The Commission's formal inquiry functions should be expanded to empower it to inquire into any human rights issues or concerns arising in Australia.

Recommendation 29:

The Federal Government should be required to respond, within a specified timeframe, to any report provided to it by the Commission following an inquiry or investigation.

Investigations and other enforcement options

The Commission's inquiry functions should also be expanded so that it may investigate human rights concerns across all states and territories, including in the private sector. The Commission should be able to initiate and pursue such investigations on its own motion, rather than on the basis of a particular complaint. This would enable the Commission to more effectively address systemic discrimination. It would also relieve the burden that is currently placed on individual complainants, as discussed above.

To ensure that such investigations lead to a real change, investigative powers would need to be accompanied by additional enforcement options.

For example, the Commission should be empowered to enter into an agreement, sometimes described as an enforceable undertaking, with a party to the effect that it will take particular steps to ensure its compliance with the law. Such agreements should be registered with the Federal Court and, once registered, ought to be treated as an order of the Court. Where the substance of an investigation cannot be resolved by agreement, the Commission should be empowered to issue a compliance notice (with maximum financial penalties), or commence proceedings in the Federal Court on its own motion for breaches of the Consolidated Act.

The existence of these powers would have a normative impact, even where such powers are not actually used. In other words, there would be an additional impetus on duty-holders to engage with the Commission on an informal basis, working towards compliance, in order to avoid the need for a formal investigation or compliance notice. The HRLC believes that concerns about conflicts of interests – or perceived conflicts – could be adequately addressed by ensuring confidentiality of the complaints process and introducing internal structures within the Commission designed to avoid conflicts of interest.

Recommendation 30:

The Commission should be empowered to investigate human rights abuses across the private sector and each state and territory.

Recommendation 31:

The Commission should be empowered to enter into enforceable undertakings and issue compliance notices for breaches of human rights.

Intervention and amicus curae

We reiterate the recommendations set out in the HRLC's previous submission, *Advance Australia Fair*, regarding the powers of the Commission and Special-Purpose Commissioners to intervene in legal proceedings.

The Commission currently has the power to intervene, with the Court's leave, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment.¹³⁸ The HRLC maintains that the Commission and Special-Purpose Commissioners should be empowered to intervene, as of right (i.e. without requiring the Court to grant leave), in all cases that raise significant human rights or equality issues.

Currently, the right to intervene applies only in the Federal Court and the Federal Magistrates Court. The HRLC recommends that Special-Purpose Commissioners should also be empowered to appear as amicus curiae in appeals to the High Court from discrimination decisions made by the Federal Court and Federal Magistrates Court.

These measures would enable the Commission and Special-Purpose Commissioners to facilitate the establishment of clear and principled jurisprudence in this area of the law. This is important because the establishment of strong legal precedents acts as a deterrent to future discriminatory conduct, thereby minimising future costs (financial and non-financial) of discrimination on society.

Recommendation 32:

The Commission and Special-Purpose Commissioners should be empowered to intervene, as of right, in all cases that raise significant human rights or equality issues.

¹³⁸ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o)

Recommendation 33:

Special-Purpose Commissioners should also be empowered to appear as amicus curiae in appeals to the High Court from discrimination decisions made by the Federal Court and Federal Magistrates Court.

7.3 Representative proceedings

The HRLC reiterates its previous recommendation that the Consolidated Act should make provision for representative complaints of discrimination.¹³⁹

As discussed above, one problem with the current Federal Anti-Discrimination framework is that it places an onerous burden on individuals to enforce their rights to equality through complaints. Enabling the Commission and public interest organisations to pursue representative complaints would go some way towards relieving this burden on individuals. Such a change would also have the potential to produce positive outcomes that reach beyond the circumstances of one individual, thereby contributing to systemic change and substantive equality.

The AHRCA currently permits representative complaints to the Commission.¹⁴⁰ However, it is extremely difficult for the representative body to pursue the matter in the Federal Courts if the complaint is unresolved at the Commission stage. This is because, 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 AHRCA, meaning that it may not bring proceedings before the Court. The situation is further complicated by s 33D(1) of the *Federal Court of Australia Act 1976* (Cth), 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. Hence, the aggrieved person on behalf of whom a representative complaint is made may be forced to pursue their claim through the courts on their own.

The HRLC maintains that the Commission and public interest organisations with a legitimate interest in particular subject matter should have standing to commence and pursue discrimination proceedings on behalf of aggrieved persons, particularly where the claim involves a systemic problem that affects a wide class of persons.¹⁴¹

¹³⁹ Human Rights Law Resource Centre, above n 49, [Recommendation 4].

¹⁴⁰ *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

¹⁴¹ 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.

Recommendation 34:

The Consolidated Act should make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

7.4 Litigation costs

The federal laws currently provide no special protection from the risk of adverse costs orders in discrimination matters, beyond the general discretion of judges with regards to costs. This presents a significant barrier to access to justice, especially for victims of discrimination who, due to their vulnerability and financial situation, tend to be risk-adverse.¹⁴² This compounds the inequality experienced by victims of discrimination.

Presently, costs follow the event in proceedings under the Federal anti-discrimination acts. In other words, the unsuccessful party to the litigation must pay both parties' costs although the Courts have discretion as to the basis on which costs are awarded.

This is not the case in all jurisdictions. The FWA for example, establishes a no-cost jurisdiction, requiring parties to bear their own costs unless a court or tribunal determines, for example, one party pursued a claim that was frivolous, vexatious or without reasonable prospects of success. Similarly, under Victorian anti-discrimination law there is a rebuttable presumption against costs being awarded. In a 2004 report on the efficacy of the DDA, Australia's Productivity Commission recommended that parties should be required to bear their own costs, subject to a discretion to award costs in accordance with statutory guidelines that had been developed for the family law jurisdiction.¹⁴³

While the HRLC supports the introduction of a no-cost jurisdiction which may be subject to principled guidelines about the allocation of costs in special circumstances.

Recommendation 35:

The Consolidated Act should establish a no-costs jurisdiction for discrimination complaints.

7.5 Remedies

Australia has an obligation under international human rights law to provide effective remedies for discrimination.

As noted in the Discussion Paper, the Federal Courts already have broad powers to award any remedy they see fit in discrimination cases. In reality, however, courts have tended to award low-level

¹⁴² Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), 369.

¹⁴³ *Ibid*, recommendation 13.4, 396.

financial compensation or, very occasionally, reinstatement to the victim's former job (where the discrimination led to the termination of employment).

A simple cost-benefit analysis causes many complainants to settle their matters at the conciliation stage for amounts that do not necessarily reflect the seriousness of the issue. For example, between 1 January 2004 and 31 December 2004, the median financial payment obtained by complainants under the SDA in conciliation was \$5,700.¹⁴⁴ This situation gives rise to serious concerns that Australia is failing to provide adequate remedies for victims of discrimination. It also limits the normative and deterrent powers of anti-discrimination laws.

To address these concerns, the Consolidated Act should contain a list of alternatives – such as corrective and preventative orders – which are available to the Federal Courts.¹⁴⁵ For example, a Court may order an employer to provide further training to staff, or update its policies and procedures regarding discrimination.

The Federal Government should also provide guidance about the scale of financial awards to ensure that awards made by the Courts adequately reflect the seriousness of the harm caused by unlawful discrimination. This may be achieved, for example, through guidelines or the explanatory memorandum to the Consolidated Act.

Recommendation 36:

The Consolidated Act should encourage Courts to make corrective and preventative orders, in addition to financial awards to victims of discrimination. Guidance should be provided about the scale of financial awards to ensure that awards made by the Courts adequately reflect the seriousness of the harm caused by unlawful discrimination.

7.6 Resourcing

For the reasons explained above, Australia has an obligation to ensure that victims of discrimination have access to effective remedies through our legal system. Maintaining appropriate funding to legal aid and community legal centres – which assist victims of discrimination in navigating the legal systems – is a vital component of this obligation.

Accessibility of the legal system depends on awareness of legal rights and of available procedures to enforce those rights. When access to legal assistance is not available, meritorious claims or defences

¹⁴⁴ Human Rights and Equal Opportunity Commission, *Five Years On: An Update on the Complaint Handling Work of the Human Rights and Equal Opportunity Commission*, 7 December 2005, <www.hreoc.gov.au/complaints_information/publications/five_years_on.html>.

¹⁴⁵ The same recommendation was made by the Standing Committee on Legal and Constitutional Affairs in its report, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 (Recommendation 23).

may not be pursued or may not be successful.¹⁴⁶ In many instances, 'injustice results from nothing more complicated than lack of knowledge'.¹⁴⁷

In a 2009 submission to the Federal Government, the Law Council of Australia stated that:¹⁴⁸

Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.

The Law Council of Australia has further stated that 'when legal assistance is not available to the economically and socially disadvantaged in our community, the integrity of the justice system is challenged'.¹⁴⁹

It is equally important to ensure that the Commission receives enough funding to enable it perform the functions that it is given, which may include broader powers to investigate, initiate and participate in litigation and enforcement.

Recommendation 37:

Legal aid bodies, community legal centres and the Commission must be adequately funded and supported to ensure the effective operation of the Consolidated Act.

¹⁴⁶ Victorian Law Reform Commission (VLRC), *Civil Justice Review Report 14*, 2008, 607.

¹⁴⁷ Chief Justice Murray Gleeson, 'Conference Opening and Keynote Address' (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).

¹⁴⁸ Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

¹⁴⁹ *Ibid.*

For more information and discussion about the consolidation of Federal anti-discrimination laws, visit:

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