

**Report
on recommendations
for a consolidated federal
anti-discrimination law
in Australia**

Discrimination Law Experts' Roundtable

29 November 2010

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The Discrimination Law Experts' Roundtable convened for the first time on 23 July 2010, at the ANU College of Law.

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Index

Acknowledgements.....	iii
Introduction.....	1
Recommendations.....	3
Discussion.....	6
1 Objects of the Act.....	6
2 Definition of discrimination.....	6
3 Grounds.....	8
4 Burden of proof.....	9
5 Exceptions and exemptions – terminology.....	10
6 Exceptions.....	10
7 Reasonable adjustments and inherent requirements.....	12
8 Exemptions.....	13
9 Exemptions – Special Measures.....	13
10 Harassment.....	14
11 Vilification.....	15
12 Contracting out of the Act.....	16
13 Volunteers.....	16
14 Crown in Right of the State.....	16
15 Complaint handling.....	17
16 Confidentiality.....	17
17 Research access.....	18
18 Early intervention.....	18
19 Compliance and remedies.....	19
20 Legal representation and costs.....	21
21 Structure of the Act.....	22
22 Guidelines and Codes of Practice.....	22
23 Implementation costs.....	23
24 Specialist Commissioners.....	23
25 Alternative means of complaint, monitoring and enforcement.....	24
26 The future of anti-discrimination legislation.....	25
Selected bibliography.....	26
Members of the Discrimination Law Experts’ Roundtable.....	29

Acknowledgements

The roundtable

The Discrimination Law Experts' Roundtable convened on 23 July 2010. It was chaired by Ms Heidi Yates and comprised the following, whose biographies are at the end of the report:

Dr Dominique Allen

Mr Wayne Morgan

Adjunct Professor Peter Bailey, AM OBE

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Dr Sara Charlesworth

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L-R: Simon Rice, Peter Bailey, Beth Gaze, Elizabeth Dickson, Wayne Morgan, Patricia Easteal, Anna Chapman, Dominique Allen, Margaret Thornton, Belinda Smith, Marian Sawyer, Heidi Yates, Helen Watchirs, Belinda Barnard, Clare Brennan, Sara Charlesworth.

The report

Research for the roundtable was carried out by Ms Clare Brennan, and the roundtable was reported on by Ms Belinda Barnard who wrote the initial draft of the report. The report was then developed, finalised and later updated collaboratively by the expert members of the roundtable.

Support

Arrangements for the roundtable were made by Ms Karina Bontes Forward, and the Outreach and Administrative Support Team of the ANU College of Law, financially supported by the ANU College of Law. The experts funded their own attendance.

Introduction

Note on the revised report

In the four months since we published our report, we have received very encouraging reports of its usefulness. We have also received welcome requests for more detail, and helpful comments on areas we could address more clearly, in particular from Dr Karen O’Connell and the National Association of Community Legal Centres. In this revised report we have responded to those requests and comments, and have taken the opportunity to expand some of the text and amend some typographical errors.

Background

In a joint media release on 21 April 2010 the federal Attorney-General and the federal Minister of Finance and Deregulation announced a proposal to streamline the four existing federal anti-discrimination laws into a single, consolidated law (‘the consolidated Act’).¹ There has been no further public elaboration on the proposed consolidation.

Informal advice indicates that the drafting of the consolidated Act is the responsibility of the Attorney-General’s Department, and that the Attorney-General’s Department and Department of Finance and Deregulation are consulting at their discretion on the consolidation. Aware of this, a group of academic experts in discrimination law and policy convened to provide a joint contribution to the consultation process.

This report sets out recommendations for a national consolidated anti-discrimination law. The recommendations arise from a roundtable discussion among discrimination law experts, convened by the Law Reform and Social Justice Program of the ANU College of Law at the Australian National University on 23 July 2010.

Policy goals

In announcing the reforms, the Attorney-General emphasised the need for anti-discrimination law to be ‘clear and easy to understand because people shouldn’t need expensive legal advice to know their rights and obligations’. In the same announcement the then Minister for Finance and Deregulation saw that the consolidation process would also ‘reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business’. The recent review of the *Equal Opportunity Act 1995* (Vic) had similar goals.

In light of this, the recommendations of the expert roundtable focus on the policy goal of making compliance with anti-discrimination legislation easier by (1) achieving clarity in, and (2) reducing the regulatory burden of, a consolidated Act.

The consolidation process provides an opportunity for the Government to propose legislation which reflects current best practice and international obligations. To this end the recommendations propose innovations for a clearer, more efficient and more effective contemporary anti-discrimination regime.

There are competing considerations – policy and practical – in relation to many of the recommendations; those considerations are set out in the literature, a selection of which is

¹ Media Release, Attorney-General and Minister for Finance & Deregulation, 21 April 2010.

set out in this report's bibliography. The roundtable participants canvassed the issues extensively before agreeing on the preferred approach in each case.

The 'bottom line'

The Government's media release stated that 'there will be no diminution of existing protections currently available at the federal level'. There has been no statement since then that suggests that the Government will depart from this commitment.

The roundtable proceeded on the basis that no-one who is currently protected by federal anti-discrimination legislation would, in the same circumstances, lose protection under the consolidated Act, that no conduct or condition that is currently unlawful under federal anti-discrimination legislation would, in the same circumstances, be lawful, and that no measures to promote equality currently available under federal anti-discrimination legislation would be lost. Nothing in the recommendations in this report is intended to alter that position.

None of those who participated in the discrimination law experts' roundtable support any change to existing legislation that will have the effect of reducing the levels of protection that are currently available.

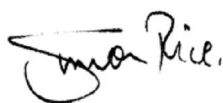
Nature of the report

In the absence of any terms of reference, briefing documentation, or even policy statement beyond a media release, it is difficult to know how to pitch a submission to a law reform process. The policy goals noted above are all that is known about the proposed consolidation of the four existing federal anti-discrimination laws.

What the government proposes is not the mere technical reform of problematic statutory provisions – it is a restatement of the most substantial of Australia's limited legislative guarantees of human rights protection. Such a significant reform warrants extensive public consultation and diverse and detailed research. An example is the extensive, thorough, years-long process of inquiry which preceded the enactment of the *Equality Act 2010* (UK), some publications of which are noted in this report's bibliography.

A number of non-government organisations will make representations to the government, and the government intends consulting with a number of 'stakeholders'. This report has been drafted to assist all participants in the consultation process by providing clear and expert direction on complex issues of principle and technicality. The report is not written as an academic text; the discussion and recommendations are written simply and without lengthy detail, but are underpinned by extensive scholarship and practical experience.

The roundtable participants are committed to ensuring that Australian law promotes equality, and guarantees effective protection against discrimination. Guided by the policy aims behind the proposed consolidation, these recommendations have been crafted to ensure that a consolidated Act will best serve a wide range of interests in achieving a fair Australian society.



Simon Rice
Convenor, Discrimination Law Experts' Roundtable

Recommendations

1 Objects of the Act

The consolidated Act should be qualified by a statement which makes clear that it is Parliament's intention that the Act be interpreted so as to further its objects.

2 Definition of discrimination

The definition of unlawful discrimination in the consolidated Act should be a streamlined statement that abandons reliance on a comparator and avoids a mutually exclusive distinction between direct and indirect discrimination.

3 Grounds

- 3.1 *The consolidated Act should prohibit discrimination on the basis of 'protected attributes', where attributes are defined in an exhaustive list (race, sex etc), and extend to past, future or presumed attributes, characteristics of attributes, and association with a person possessing an attribute or attributes.*
- 3.2 *Consideration should be given to adding additional attributes such as sexuality, homelessness, socio-economic status, and cognitive diversity.*

4 Burden of proof

The burden of proving that an action is justified and not unlawful should rest with the respondent after an arguable case has been raised by the complainant.

5 Exceptions and exemptions – terminology

Exceptions and exemptions should be clearly defined as conceptually different mechanisms for rendering otherwise be unlawful conduct or conditions lawful.

6 Exceptions

The only exception contained in the consolidated Act should be a simple test of 'proportionate means of achieving a legitimate end or purpose', supplemented with guidelines and codes of practice.

7 Reasonable adjustments and inherent requirements

The requirement to provide reasonable adjustment should be extended to all protected attributes.

8 Exemptions

Exemptions should be granted only on application, and on a temporary basis with safeguards that ensure public comment and maintain the purpose of the legislation.

9 Exemptions – Special Measures

Special measures should be separately and fully defined in the Act, and clearly defined as lawful activity. Consideration should be given to establishing a procedure to formally acknowledge special measures.

10 Harassment

Harassment should be unlawful on the ground of any protected attribute in any area of activity covered by the consolidated Act, should not be subject to exceptions, and should extend to protect volunteers.

11 Vilification

Vilification should be unlawful on the ground of any protected attribute and a corresponding offence should be created in the Commonwealth Criminal Code.

12 Contracting out of the Act

Contracting out of the protection of the Act should be explicitly prohibited.

13 Volunteers

Protection against discrimination in work should extend to volunteers.

14 Crown in Right of the State

The Act should bind the Crown in right of the State and state instrumentalities.

15 Complaint handling

Complainants should have the option to directly access court for determination of discrimination complaints.

16 Confidentiality

Information about the outcomes of a complaint should remain confidential, but subject to the parties' being able to agree to disclose information for publication by the Australian Human Rights Commission.

17 Research access

- 17.1 *Confidentiality provisions should not exclude access by researchers who have institutional ethics approval.*
- 17.2 *Complaints-related information should be preserved as archival information for future research purposes.*

18 Early intervention

Triage and early intervention should be used to provide timely outcomes for parties to complaints.

19 Compliance and remedies

A systemic approach should be taken to preventing and addressing discrimination by

- *requiring conciliated agreements to be registered,*
- *empowering the Australian Human Rights Commission ('AHRC') to initiate complaints, issue compliance notices and impose administrative penalties for breach,*
- *providing guidance for the assessment of compensation, and*
- *enabling courts to recommend systemic responses to discrimination, for monitoring by the AHRC.*

20 Legal representation and costs

- 20.1 *Provision should be made for increased expert legal assistance to complainants before the Federal Court or the Federal Magistrates Court, including through specialist community legal services (including funding for advocacy in court proceedings), and the resourcing of the AHRC or an independent agency to provide legal assistance to complainants in selected cases.*
- 20.2 *There should be a statutory presumption that each party will pay its own legal costs in discrimination cases before the federal courts, unless they have acted unreasonably.*

21 Structure of the Act

The structure of a consolidated Act should follow the model of existing anti-discrimination legislation in the ACT, Tasmania and Victoria.

22 Guidelines and Codes of Practice

Separately from the continuing promulgation of Standards, legislative requirements should be supplemented by guidelines and codes of practice that provide detail about legal obligations and support to enable compliance.

23 Implementation costs

The Australian Human Rights Commission should be resourced to carry out the functions necessary to ensure a more efficient and effective anti-discrimination regime, such as management of exemptions and confidentiality.

24 Specialist Commissioners

The role of specialist Commissioners should be maintained, to ensure expertise and continued focus on different forms of discrimination.

25 Alternative means of complaint, monitoring and enforcement

An enforceable positive duty should be imposed to promote equality.

26 The future of anti-discrimination legislation

The model, design and operation of Australia's anti-discrimination laws should be the subject of a national inquiry to report on how they can best be drafted as a means to achieve equality.

Discussion

1 Objects of the Act

Recommendation:

The consolidated Act should be qualified by a statement which makes clear that it is Parliament's intention that the Act be interpreted so as to further its objects.

Anti-discrimination legislation is beneficial legislation. A purposive interpretation requires a clear statement of its objects, and an equally clear statement that those objects should be given effect. Recent High Court judicial interpretations (eg *NSW v Purvis*; *NSW v Amery*) have favoured an unduly narrow and/or literal reading which has had the effect of subverting legislative intent and creating unfortunate precedents.

Accordingly, we recommend that a statement be made in the Act emphasising the beneficial intent of the legislation. Section 3(2)-(4) of the *Freedom of Information Act* (Cth) is an existing example of such a statement.

2 Definition of discrimination

Recommendation:

The definition of unlawful discrimination in a consolidated Act should be a streamlined statement that abandons reliance on a comparator and avoids a mutually exclusive distinction between direct and indirect discrimination.

Unlawful discrimination in Australia is currently defined in two ways, as 'direct' and 'indirect' discrimination. This distinction is conceptually difficult for parties to complaints and sometimes for decision makers. The inclusion of a comparator in most Australian definitions of direct discrimination has made analysis of complaints cumbersome and has distorted the definition of direct discrimination,² while considering indirect discrimination has always been a complex process. Establishing that a comparator without an attribute has been treated more favourably is merely one way of providing evidence that a decision has been based on a prohibited ground or attribute. It should not obscure the real question, which is simply whether there has been discriminatory treatment.

Difficulty in determining which type of discrimination is applicable in a particular matter has led to complainants pleading both types, which adds unnecessarily to the complexity of complaints. Nor does the definition of indirect discrimination adequately cover systemic discrimination.³

² As a result of the High Court's decision in *State of NSW v Purvis*, a court's decision on whether the comparator must have the attribute-related features of the complainant now often determines whether a complaint of discrimination can succeed. This wrongly elevates an issue that, while relevant, should be only one of the factors considered in a discrimination case.

³ Gardner, Julian, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, State of Victoria Department of Justice, June 2008, at 11-12.

The distinction between direct and indirect discrimination has shown itself not to be workable. It is a costly and time-consuming technical barrier to an inquiry into what actually happened. We recommend that the definition be streamlined to express the general underlying idea of discrimination and make clear that the concepts can overlap and are not mutually exclusive. The direct/indirect distinction does not appear in the *Racial Discrimination Act 1975 (Cth)*⁴ ('RDA'), and we recommend that an approach similar to that of the RDA should be applied more broadly; the RDA definition, based on the *International Covenant on the Elimination of All Forms of Racial Discrimination*, follows the international law approach and provides a model that already exists in Australian legislation.

A single definition will ease the regulatory burden and will assist understanding and compliance. As well as making compliance easier, a single definition of discrimination will more closely align Australia with internationally recognised definitions of discrimination, better fulfilling our international human rights treaty obligations. Such an approach is similar to s.9(1) of the *Racial Discrimination Act* and reflects the current approach in Canada, New Zealand and the USA, which makes no formal definitional distinction between direct and indirect discrimination.

Accordingly, we recommend the following definition, based on the *International Labour Organization Convention 111* (which appears in s. 3(1) of the *Australian Human Rights Commission Act 1986 (Cth)*) and the *Convention on the Elimination of All Forms of Discrimination against Women*, while in its terms clearly encompassing, in an inclusive approach, what has been known as direct and indirect discrimination:⁵

Discrimination includes

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of, and
- (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

Recognition in this definition of the discriminatory effect of requirements and conditions reflects the wording of s5(2) of the *Sex Discrimination Act 1984* ('SDA').

The consolidated Act should provide that discrimination occurs when what is done has more than one 'purpose or effect' (see s.10 *Disability Discrimination Act 1992* ('DDA')), provided that the discriminatory purpose or effect is substantial. For consistency with current case law, it should also make clear that the respondent's intention or awareness of the discriminatory purpose or effect is not an element of the action.

4 Although a definition of indirect discrimination was added to the RDA in s.9(1A), the definition of discrimination in s.9 is not in its terms confined to direct discrimination.

5 cf *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (known as *Meiorin*, after the applicant)

3 Grounds

Recommendation:

- 3.1 *The consolidated Act should prohibit discrimination on the basis of ‘protected attributes’, where attributes are defined in an exhaustive list (race, sex etc), and extend to past, future or presumed attributes, characteristics of attributes, and association with a person possessing an attribute or attributes.*
- 3.2 *Consideration should be given to adding additional attributes such as sexuality, homelessness, socio-economic status, and cognitive diversity.*

The grounds currently covered in federal anti-discrimination legislation are only the attributes of race, sex (including pregnancy, marital status and family responsibilities), disability and age. State and territory legislation cover a wide range of attributes that respect the right of non-discrimination in contemporary society. It is highly desirable that anti-discrimination legislation gives clear and consistent guidance to all Australians by referring to a single piece of legislation, enabling parties to plan and organise compliant activity with confidence.

Accordingly, we recommend that the consolidated Act should prohibit discrimination on the ground of a ‘protected attribute’, which is defined in a separate exhaustive list of attributes (race, sex etc) to which additions can be made from time to time. In legislating to prohibit discrimination, Parliament is deciding that discrimination on the basis of an attribute is unlawful unless the action falls within an exception or exemption (below).

The term ‘protected attribute’ should be defined to include a past, future or presumed attribute (cf s.4 DDA), characteristics of an attribute (cf s.5(1)(b) and (c) SDA), and association with a person possessing an attribute (cf s.7 DDA). The consolidated Act should provide examples of the way the definition would work.

In real life, many people have two or more attributes protected by the Act, eg sex and race, or age and disability (‘intersectionality’). Just as a person is unlikely to be able to say what the reason is for their treatment (see the discussion re Recommendation 4 below), they are unlikely to be able to identify which, or what proportion, of their different attributes was the reason for the conduct complained of.

Accordingly, we recommend that the legislation provides that reference to a protected attribute is a reference to one or more protected attributes, and that a person may complain of discrimination on the basis of one or more protected attributes without having to allege which of a number of attributes was the operative attribute in the conduct alleged.

To the extent that the *Constitution* allows (and noting the broad scope of Article 26 of the *International Covenant on Civil and Political Rights* to which Australia is a party) consideration should be given to including in the consolidated Act all of the grounds currently covered in the *Australian Human Rights Commission Act*, in state and territory anti-discrimination laws, and in the *Fair Work Act 2009* (‘FWA’). The broad range of grounds protected from adverse action (including discrimination) in s 351 of the *Fair Work Act*

(‘FWA’)⁶ derive from Australia’s international obligations, and it would simplify federal law for the anti-discrimination laws to cover the same list of grounds.

To reflect contemporary social issues, we recommend that consideration be given to extending coverage of the consolidated Act to at least the following attributes in these or similar terms: homelessness, socio-economic status, sexuality (ie, sexual preference/orientation,) and cognitive diversity.⁷

4 Burden of proof

Recommendation:

The burden of proving that an action is justified and not unlawful should rest with the respondent after an arguable case has been raised by the complainant.

Currently the burden of establishing that discrimination has occurred falls solely on a complainant. This leads to considerable uncertainty for both parties as most, sometimes all, of the relevant evidence is held by respondents. Comparable jurisdictions such as Canada, the US, the UK, and all of the European Union require a complainant to establish an arguable case, and then shift to the respondent the evidentiary burden of establishing the reason/s for the impugned conduct or conditions. They do so on the basis of the well-documented and widely appreciated difficulty of one party’s having to prove the other party’s motivation for acting, where little or none of the evidence about subjective motivation is likely to be in their control. A shifting onus has a long and unremarkable history in Australian industrial law, and continues in ss 361 and 783 of the FWA.

A further advantage of a shifting onus of proof is that it is capable of dealing with multiple attributes, as we discuss in relation to Grounds above. Without a shifting onus, the most disadvantaged people, eg women or migrants with a disability, will continue to have no clear way to establish that they have been discriminated against.

Accordingly, we recommend that the consolidated Act be consistent with international practice and the FWA, by providing that once that a ‘prima facie case’ has been made out that any disadvantage appears to have been on the prohibited ground, a presumption will arise that action was taken for the reason alleged unless the respondent proves otherwise.

This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues, and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened basis was discriminatory, and will lead to clearer case law which will provide better guidance on the law.

To ‘prove otherwise’, the respondent would provide evidence of a lawful reason for the treatment, or would challenge the allegation that the requirement disproportionately

⁶ The grounds in s.351(1) are: race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

⁷ Re cognitive diversity see Arnold et al, 2010.

affected the protected group. The respondent would as well have access to exemptions and defences: recommendations 5-8 below.

5 Exceptions and exemptions – terminology

Recommendation:

Exceptions and exemptions should be clearly defined as conceptually different mechanisms for rendering otherwise be unlawful conduct or conditions lawful.

The current approach to the exemptions and exceptions for unlawful discrimination is complex, inconsistent, and inadequate. One of the most important steps towards simplifying discrimination law is to focus on this area.

Exemptions and exceptions are often confused, in public understanding and legislation. For example, the ‘exception’ in s.8(2) RDA for a charitable deed, will or other instrument is termed an ‘exemption’ in s.36(1) SDA.

Accordingly, we recommend that a clear distinction be introduced between the terms. An ‘exception’ should describe conduct which, but for the operation of the excepting provision, would be unlawful discrimination. An ‘exemption’ is a permissive authorisation for conduct which, but for the operation of exemption, would be unlawful discrimination.

6 Exceptions

Recommendation:

The only exception contained in the Act should be a simple test of ‘proportionate means of achieving a legitimate end or purpose’, supplemented with guidelines and codes of practice.

Provisions for exceptions are numerous, inconsistent, complex and confusing, across all federal, state and territory legislation. They lack consistent principle, terminology, operation and effect. As a result they make it very difficult for parties to be confident that they are complying or will comply with the prohibition against discrimination.

The desirable alternative is a provision which is both simple to understand and simple to give effect to. Such a provision must at the same time be able to allow for a wide range of different activities by a wide range of parties and with diverse interests. This requires a provision which combines simplicity with comprehensiveness.

Accordingly, we recommend that the many existing specific exceptions be replaced by a single approach that examines the legitimacy of particular conduct in all the circumstances. This approach is simple to give effect to, and has a strong preventative role because it enables people and organisations to take steps in advance to ensure that their conduct will not be discriminatory.

In practice the approach is a straightforward process of working through prescribed steps. It asks simply whether the alleged discriminatory conduct is a proportionate means of achieving a legitimate end or purpose (per the UK *Equality Act 2010*). It establishes basic principles for ensuring that allegedly discriminatory conduct will not be unlawful if it is rationally connected to a legitimate purpose, if it is imposed in good faith, and if reasonable adjustments have been afforded where relevant. It is both simple to understand and simple to apply.

The exception is established if the alleged discriminator can satisfy each of three steps.⁸ First, the impugned conduct or condition must have been *rationaly connected* to a legitimate end or purpose. If it was not (eg outright prejudicial treatment), then the exception has not been established. For an end to be 'legitimate', it must be of sufficient importance that its effect on limiting the right to non-discrimination can be justified in the circumstances. A connection between the end and the means chosen would be 'rational' if objective reasons of some substance can be given for it.

Secondly, if the impugned conduct or condition was rationally connected to the legitimate end or purpose, then the alleged discriminator must have engaged in the conduct or imposed the condition *in an honest and good faith belief* that it was necessary to achieve the end or purpose. If they did not, then the exception has not been established.

If the alleged discriminator did engage in the rationally connected conduct, or impose the rationally connected condition, in an honest and good faith belief that it was necessary, then the impugned conduct or condition must have been *in fact reasonably necessary* to achieve the end or purpose. If it was not, then the exception has not been established. Conduct or a condition will have been 'reasonably necessary' only if it had been *impossible to make adjustments* to meet the needs of the person *without causing unreasonable hardship for the discriminator*.

An example is in the area of family responsibilities.

It may be that a bus company employer requires all bus driver employees to be available to start work at 7am. The bus company can ask itself the following questions in advance, to ensure against discriminating. Alternatively, the questions will be asked in the process of resolving a complaint.

The first question is whether the requirement is rationally connected to a legitimate end: yes it is, because the bus company provides school bus services which must operate at this time.

The second question is whether the bus company imposed the requirement in an honest and good faith belief that it was necessary: we can assume this to be the case.

The third question is whether the requirement that all employees be available to start work at 7am is reasonably necessary: it may be that the answer is 'no', because it becomes apparent that not all drivers will actually start driving at 7am, and that what is 'reasonably necessary' is only that a sufficient number of drivers be available to start work at 7am.

The fourth question is whether an adjustment to the requirement is possible, to meet the needs of employees with family caring responsibilities, without causing unreasonable hardship to the bus company: it may be that the answer is 'yes', because flexible rostering is possible.

Different facts will give rise to different results, but the process of inquiry is clear and manageable.

⁸ Meiorin

An assessment of the reasonableness of the conduct or a condition should take into account the net effects – adverse and beneficial – on the alleged discriminator, the complainant, and third parties, in light of the legislative aim to prohibit discriminatory conduct.

Guidelines and codes of practice (see Recommendation 22) should provide detailed guidance for employers, service providers and other potential respondents on what is a proportionate and legitimate act, what is reasonably necessary, and what is to be considered in determining ‘undue’ (or ‘unreasonable’, or ‘unjustifiable’) hardship.

7 Reasonable adjustments and inherent requirements

Recommendation:

The requirement to provide reasonable adjustments should be extended to all protected attributes.

Recommendation 6 – Exceptions – encompasses exceptions that are now made for ‘reasonable adjustments’ and ‘inherent requirements’, familiar from, eg, the DDA. We recognise however that widespread familiarity with these particular exceptions may warrant specific provision being made for them.

Accordingly, we recommend that, if specific provision is made for these exceptions, the exceptions be available for all grounds to be covered in the consolidated Act. This is implicit in Recommendation 6, and is the established approach in the Canadian *Human Rights Act*. There is no principled basis on which such exceptions would be made available for discrimination on the ground of one attribute and not another: if a person with a disability is entitled in the circumstances to a reasonable adjustment being made for their needs, then a person of a certain race or sex or age is no less entitled.

An example is in the area of race.

It may be that in a workplace where the first language of many employees is Arabic, written OH&S instructions are provided to employees only in English. The factual question is whether it would be a reasonable adjustment to this conduct for the employer to provide a version of the written OH&S instructions in Arabic?

An example is in the area of age, or carer’s responsibilities.

It may be that in a workplace, promotion to a particular position requires a specified minimum years of unbroken service. The factual question is whether it would be a reasonable adjustment to this requirement to allow a candidate who did not meet the service requirement because they are young or have taken parental leave, to establish their ability to perform in the higher position through other means.

8 Exemptions

Recommendation:

Exemptions should be granted only on application, on a temporary basis, consistently with the aims of the legislation, and with procedural safeguards that ensure notification of and comment on the proposed exemption.

Similarly to the provision for exceptions, exemptions should be approached in a manner that is consistent with the human rights underpinnings of anti-discrimination legislation, with particular emphasis on the transparency of the process and the opportunity for interested parties to be heard.

Accordingly, we recommend that exemptions from the operation of the Act be granted in the following manner. An application for an exemption should be made to the Australian Human Rights Commission ('AHRC') by the person or body seeking to rely on the exemption. The AHRC should be required to

- publish criteria for the granting of an exemption
- publicly advertise each application for an exemption, calling for comment and submissions
- consider the application, any objections
- ensure that any exemption is for conduct or conditions which are not inconsistent with the objects of the legislation
- grant an exemption only on a temporary basis for a defined period
- impose conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation
- require a renewal of the exemption to go through the application process
- publish reasons for granting or refusing the exemption
- maintain a public register of applications made and exemptions granted and refused.

9 Exemptions – Special Measures

Recommendation:

Special measures should be separately and fully defined in the Act, and clearly defined as lawful activity. Consideration should be given to establishing a procedure to formally acknowledge special measures.

'Special measures' are taken for the benefit of a particular group to address the need for substantive and not merely formal equality, and to achieve equality of outcome. A special measure is not unlawful discrimination, as distinct from being excepted or exempt conduct. Under international law, the measure must be for the benefit of the particular group and, when possible, must be determined in consultation with that group.

Accordingly, we recommend that a positive expression of this concept be included in the consolidated Act, similar to s.7D of the SDA. Similarly to the *Equal Opportunity Act 2010*

(Vic), the consolidated Act should contain a provision which clearly states that special measures do not fall within the behaviour prohibited by the Act.

A special measure takes on its character from the way the conduct is carried out, not from any external authorisation. As a result, its status as a special measure is not always known or recognised. The AHRC has previously provided informal, written acknowledgement that proposed or actual conduct is a special measure. Accordingly, we recommend that consideration be given to enabling the AHRC to acknowledge a special measure on application, under a procedure similar to that recommended above for exemptions, but not so as to make the existence of special measure dependent on receiving such an acknowledgement.

10 Harassment

Recommendation:

Harassment should be unlawful on the ground of any protected attribute in any area of activity covered by the consolidated Act, should not be subject to exceptions, and should extend to protect volunteers.

Grounds

Federal anti-discrimination legislation specifically prohibits harassment only for the attributes of sex and disability. This addresses a particular kind of undesirable behaviour which occurs in a wider range of relationships and circumstances than is the case for discrimination. The provisions enable a complaint to be made without requiring a complainant to demonstrate that they have suffered a detriment other than experiencing harassment.

There is no policy basis for limiting the prohibition against harassment to the attributes of sex and disability. The Tasmanian *Anti-Discrimination Act 1998* prohibits harassment on the grounds of gender, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities. Racist harassment, for example, will often amount to racial discrimination, but deserves to be specifically prohibited.

Accordingly, we recommend that the consolidated Act include a specific prohibition against harassment on the ground of any attribute protected by the Act.

Coverage

The final report of the Senate *Inquiry into the Effectiveness of the Sex Discrimination Act* recommends that the SDA include a general prohibition on sex discrimination and sexual harassment in any area of public life.⁹ The Committee found that *'the existing patchwork approach to coverage under the Act appears both unnecessarily complex and undesirable'*.¹⁰ The existing prohibition on sexual harassment in the SDA covers the areas of work, educational institutions, the provision of goods, services, facilities and accommodation, dealings with land, clubs, and the administration of Commonwealth laws and programs.

⁹ Senate Committee Report, page 150.

¹⁰ Senate Committee Report, page 149.

Harassment on the ground of disability in the DDA covers only the areas of work, education, and the provision of goods and services.

The *Anti-Discrimination Act 1991* (Qld) prohibits sexual harassment in all areas of life.

Accordingly, we recommend that in the consolidated Act, the circumstances in which harassment on any ground is prohibited should be extended to include all areas of activity covered by the Act.

Consistently with the approach in the SDA, protection against harassment should not be subject to any exceptions, and should also be extended to volunteers, as has been done in the *Equal Opportunity Act 2010* (Vic).

11 Vilification

Recommendation:

Vilification should be unlawful on the ground of any protected attribute, and a corresponding offence should be created in the Commonwealth Criminal Code.

Grounds

As is the case with harassment, vilification is a special prohibition in discrimination law, and in some instances in the criminal law. Vilification on the ground of race is unlawful in all Australian jurisdictions, except the Northern Territory, where the RDA provisions relating to offensive behaviour based on racial hatred apply.

Among Commonwealth laws, only the RDA prohibits vilification. The States and Territories prohibit vilification on many grounds, including religion, sexuality, homosexuality, transgender status, gender identity, HIV/AIDS status, disability, and sexual orientation.

The consolidated Act is an opportunity to achieve national consistency, avoiding the complexity and inconsistency of the current patchwork approach. A single definition of vilification with respect to all attributes will avoid the difficulties of meeting different 'harm thresholds' for a complaint, and a clearly expressed defence will enable respondents to understand and comply with their obligations.

Accordingly, we recommend that the consolidated Act prohibit vilification on any of the attributes protected by the Act.

Criminal act

Most State and Territory jurisdictions have criminalised vilification on specified grounds if it has a serious or aggravating element, while Western Australia deals with racial vilification as a separate criminal offence. Commonwealth laws currently include no criminal sanctions for vilification. Australia's reservation to art 4(a) of CERD stated that legislation specifically implementing the terms of article 4 (a) would be introduced 'at the first suitable moment'. A consolidated Act is an opportunity to meet that commitment and withdraw the long-standing and unwarranted reservation.

Accordingly, we recommend that the offence of serious vilification be included in the *Commonwealth Criminal Code*.

12 Contracting out of the Act

Recommendation:

Contracting out of the protection of the Act should be explicitly prohibited.

The elimination of discrimination is a public good. As such it should not be permissible to contract out of obligations imposed by or remedies available under the Act. The facts in *Byrne v State of Queensland* [1998] QADT 20 enabled such an argument to be made, although unsuccessfully.

It may be that an agreement which contracts out of prospective coverage of anti-discrimination protection is contrary to policy,¹¹ or that, in some circumstances, requiring a person to enter such an agreement is an act of victimisation (eg s.94 SDA). Nevertheless, anti-discrimination legislation should offer certainty and give clear guidance to the community.

Accordingly, we recommend that the consolidated Act explicitly prohibit contracting out of its coverage.

13 Volunteers

Recommendation:

Protection against discrimination in work should extend to volunteers.

The existing Commonwealth laws against discrimination and harassment in the area of work do not extend to volunteers. Legislation in Queensland, South Australia, Tasmania and the ACT makes some provision for coverage of volunteers.

The Senate Committee's *Inquiry into the Effectiveness of the Sex Discrimination Act* notes in its final report that 'while it is true that some complainants may be able to rely on state and territory legislation for a remedy, the committee does not consider that coverage under the federal Act should be so partial or depend upon such arbitrary distinctions.'¹²

As a matter of principle it is important for all employment relationships to be covered in anti-discrimination legislation. There is no policy reason for leaving volunteers exposed to discrimination and harassment without remedy.

Accordingly, we recommend that the consolidated Act extend to cover volunteers.

14 Crown in Right of the State

Recommendation:

The Act should bind the Crown in right of the State and state instrumentalities.

There is currently an inconsistent approach across the Commonwealth anti-discrimination Acts to Crown immunity. The RDA, DDA and *Age Discrimination Act 2004* all broadly provide that the legislation intends to bind the Crown, both Commonwealth and State. However,

¹¹ see *Qantas Airways Ltd v. Gubbins* (1992) 28 NSWLR 26 per Gleeson CJ and Handley JA.

¹² Senate Committee Report, page 149.

the SDA binds the State only when provision is made; provision is made for some areas of activity except the important area of work.

The consolidated Act should recognise the important role that governments play as employers and contributors to economic life, and should ensure that the consolidated Act covers both federal and state governments consistently across all grounds.

Accordingly, we recommend that the consolidated Act should bind the Crown in right of the State and state instrumentalities in all areas of activity.

15 Complaint handling

Recommendation:

Complainants should have the option to directly access court for determination of discrimination complaints.

For as long as the federal anti-discrimination regime relies on individual complaints (about which we have significant reservations: see recommendation 25 below), we support the requirement that such complaints be made first to the Australia Human Rights Commission. It is a relatively accessible, low cost option that provides some official assistance in resolving complaints without the need for litigation. However, extensive experience shows that in some circumstances – for example where there is a significant imbalance between the parties in power and/or resources – it would be a better option for both parties to a complaint to have the matter determined by a court early in the process.

Accordingly, we recommend that the consolidated Act include an option for complainants to choose to bypass the complaint process and have direct access to a court, such as in the *Equal Opportunity Act 2010* (Vic). The related issues of legal representation and costs are addressed in Recommendation 22.

16 Confidentiality

Recommendation:

Information about the outcomes of a complaint should remain confidential, but subject to the parties' being able to agree to disclose information for publication by the Australian Human Rights Commission.

In the current complaint process, complainants have the right to decide whether the process and/or outcome should be confidential, although they may agree to confidentiality as part of settling their claim.

Confidentiality is central to the current complaint handling procedure, particularly with respect to conciliation. Confidentiality within the process itself should be preserved but more information about the content and outcomes of complaints should be publicly accessible, although they may be in an anonymous form. This will enable all parties to have clearer guidance on how previous cases have been settled and thereby facilitate settlements. A balance must be sought, between the public interest in access to information about the process and resolution of discrimination complaints, and the important part that confidentiality can play in resolving individual complaints.

Accordingly, we recommend that the conduct of a conciliation process should presumptively be confidential in relation to the identity of the parties, unless the parties agree otherwise,

but that information about the content and result of the complaint should be public to the extent that the parties cannot be identified. The AHRC should publish de-identified information about the content and outcome of each complaint.

17 Research access

Recommendation:

- 17.1 *Confidentiality provisions should not exclude access by researchers who have institutional ethics approval.*
- 17.2 *Complaints-related information should be preserved as archival information for future research purposes.*

Independent analysis of discrimination law, policy and practice is highly desirable to ensure that continuing research will contribute to sound public policy. Such research into the discrimination system is impeded or prevented by privacy provisions in anti-discrimination statutes and privacy legislation, and by the absence of protocols for retaining information.

Accordingly, we recommend that the consolidated Act allow access, for research purposes, to otherwise confidential information held by the AHRC and the courts, but only if the research is approved by an institutional ethics committee. As well, complaints-related information should be preserved as archival information for future research purposes.

To give effect to this recommendation it may be necessary to review the operation and effect of federal privacy and archive legislation.

18 Early intervention

Recommendation:

Triage and early intervention should be used to promote early resolution of complaints.

A 'triage' model of early intervention, as used in New Zealand, will assist to defuse or resolve potential complaints at an early stage. The model in use by the NZ Human Rights Commission emphasises the timely management of complaints 'to reach fair and effective resolutions of complaints at the earliest possible opportunity'.¹³ An initial assessment of the complaint determines whether the Commission is the correct agency, whether information can help the parties clarify or resolve their complaint, and whether the complaint raises issues of unlawful discrimination. Complaints which pass this assessment are either passed to the duty mediator for immediate action, or are acknowledged and assessed further if the nature of the complaint suggests that immediate intervention will not be productive.

Accordingly, we recommend that the consolidated Act include measures to promote early resolution of complaints, along the lines of the streamlined and responsive dispute resolution model in the *Equal Opportunity Act 2010* (Vic).

¹³NZHR Annual Report 2007, p32.

19 Compliance and remedies

Recommendation:

A systemic approach should be taken to preventing and addressing discrimination by

- *requiring conciliated agreements to be registered,*
- *empowering the AHRC to initiate complaints, issue compliance notices and impose administrative penalties for breach,*
- *providing guidance for the assessment of compensation, and*
- *enabling courts to recommend systemic responses to discrimination, for monitoring by the AHRC.*

As a result of the informal and conciliation based nature of discrimination law, complaints processes are highly individualised, which has hindered the creation of systemic remedies for discrimination.

Registration of conciliation agreements

Given the significant amount of public resources expended to support the complaint and conciliation process, it is desirable to find a way to make systemic use of conciliated agreements (aside from private enforcement in individual matters).

The *ACT Human Rights Commission Act 2005*, for example, provides for agreements reached through conciliation at the ACT Human Rights Commission to be registered at the ACT Civil and Administrative Tribunal. These agreements are then enforceable as if they were orders of that tribunal, and at the same time are a useful tool to assist compliance in individual cases and to assist in providing guidance on the application of the Act.

Accordingly, we recommend that the consolidated Act make provision for the registration of de-identified conciliated agreements in a court of federal jurisdiction.

Agency level action

Conciliations through AHRC are not enforceable unless there is a deed agreed by the parties that may be sued on in the event of non-compliance. It would be more effective for the AHRC to have the power to issue compliance notices, with civil penalties and the possibility of damages for breach of a notice. This would allow for an active approach to ensuring compliance, and would harmonise discrimination law with existing regulatory regimes, such as occupational health and safety and Fair Work Australia. Such an approach will come into effect in Victoria in August 2011 under the *Equal Opportunity Act 2010* (Vic).

Accordingly, we recommend that the consolidated Act empower the AHRC to issue compliance notices which can be enforced through the AHRC, and by the AHRC through the courts. Consistently with, eg, the FWA, the civil penalties should apply to serious breaches, or for repeat, egregious, intentional action (an offence of 'serious discrimination')

As with the FWA and existing practice in some State and Territory jurisdictions, the legislation should enable agency-initiated complaints. The AHRC should be able to identify and investigate areas of concern, and consideration should be given to the AHRC's having 'name and shame' powers.

Compensation

In any comparison with legal claims that give rise to compensation for wrongful conduct, anti-discrimination complainants have been very poorly compensated. There is no consistent jurisprudence or legislative guidance about the assessment of damages in anti-discrimination matters, leading to uncertainty for all parties and hindering constructive attempts to resolve matters in advance of a hearing. The situation is compounded by the prevalence of unrepresented litigants in anti-discrimination matters.

Accordingly, we recommend that the consolidated Act require courts to consider all adverse effects on a successful complainant, past and future, in assessing compensation for having been subject to discrimination.

Power to make systemic recommendations

The overall aim of anti-discrimination legislation is to give effect throughout Australia to the right of non-discrimination, ensuring equality of treatment. The individual complaint-based approach is of very limited effectiveness in achieving this goal – see the discussion below relating to Recommendation 25. Parties on both sides of a complaint pay a high price for a result which is usually of little relevance to behaviour more broadly in society.

For as long as legislation persists with reliance on an individual complaint-based approach to address discriminatory behaviour, it is important that the resolution of such complaints contribute as far as possible to the public policy goal of eliminating unlawful discrimination.

Accordingly, we recommend that the consolidated Act that give courts explicit power to give consideration to issues related to but beyond the immediate resolution of the matter between the parties. With such a power a court would be able to publish recommendations for a systemic response, for example changes to the practices or policies of an organisation, sector, industry or government (as is the case in coronial proceedings).

To support this power, the AHRC should be given the power and resources to monitor and report on compliance with such recommendations.

20 Legal representation and costs

Recommendation:

- 20.1 *Provision should be made for increased expert legal assistance to complainants before the Federal Court or the Federal Magistrates Court, including through specialist community legal services (including funding for advocacy in court proceedings), and the resourcing of the AHRC or an independent agency to provide legal assistance to complainants in selected cases.*
- 20.2 *There should be a statutory presumption that each party will pay its own legal costs in discrimination cases before the federal courts, unless they have acted unreasonably*

Representation

The shift of the hearing regime in antidiscrimination cases to the federal courts has created imbalances, distortions and ‘unintended effects’ for parties.¹⁴ Many claims are not pursued, or are dismissed, because of any or all of (1) an imbalance, against a complainant, in legal and financial resources, (2) the deterrent effect of the threat of paying the respondent’s costs if the case is lost, and (3) a complainant’s inability to find resources to pay their own legal costs. Such claims could, if pursued to a determination, provide a just result in an individual case as well as provide guidance, through judicial reasoning, for similar cases.

Gaze and Hunter’s research has found that there is a great need for free, expert legal representation for complainants wishing to take claims to the federal courts. They suggest that this could be provided in the form of increased legal aid (both increased number and level of grants), increased funding of specialist community legal services (including funding for advocacy in court proceedings), and the resourcing of the AHRC or an independent agency to provide legal assistance to complainants to run litigation (not merely act as amicus or intervener) in selected cases with the potential to enhance human rights enforcement in important ways and provide guidance (through judicial reasoning) in similar cases. We note that the Western Australian Equal Opportunity Commission currently provides such legal assistance to complainants in certain cases.

Accordingly, we recommend that the consolidated Act make provision for assistance of the type proposed by Gaze and Hunter on the basis of their research.

Costs

Gaze and Hunter’s research suggests that the practice in the federal courts that ‘costs follow the event’ is a serious disincentive for complainants who fear a possible adverse costs order. This costs regime is inconsistent with that for FWA General Protections claims, and with that in state and territory anti-discrimination laws, where each party is liable for their own legal costs, subject to the possibility of costs penalties for unreasonable behaviour.

Further, there is no evidence the availability of costs orders in the federal jurisdiction has increased the availability of legal representation on a ‘no win no fee’ basis in discrimination matters.

14 Beth Gaze and Rosemary Hunter, 2011.

Accordingly, we recommend that in the consolidated Act costs orders be available on the same basis as the FWA and in state and territory tribunals, that is, that costs not be awarded unless a party has acted unreasonably.

21 Structure of the Act

Recommendation:

The structure of a consolidated Act should follow the model of existing anti-discrimination legislation in the ACT, Tasmania and Victoria.

To ensure that it is easy to understand and accessible, thereby promoting improved compliance, the consolidated Act should have the following elements:

- a clear statement of aims/objects at the beginning to aid interpretation
- provisions guiding judicial interpretation¹⁵
- specific permission for reference to Australia's obligations under international law
- avoidance of the term 'as far as possible' in drafting, because it unnecessarily weakens the relevant obligation, and
- no lesser protection for any ground than the least protection currently available for any ground; a minimum test for sufficiency of a consolidated Act is that no complaint that would have succeeded under previous Acts should fail under the new consolidated Act.

Accordingly, we recommend that the structure of a consolidated Act follow the structure of the existing ACT, Tasmanian and Victorian Acts which, generally speaking, take this the approach with consequential clarity and accessibility.

22 Guidelines and Codes of Practice

Recommendation:

Separately from the continuing promulgation of Standards, legislative requirements should be supplemented by guidelines and codes of practice to provide detail about legal obligations which will enable and support compliance.

It is a common and constructive practice in like jurisdictions such as the UK and Canada to supplement anti-discrimination legislation with supporting documents to provide explanation and guidance on how to comply with anti-discrimination obligations.

Accordingly, we recommend that the consolidated Act make provision for such guidance. This would most likely take the form of guidelines, which are more readily produced than the Standards under the DDA

The existing Disability Standards should, however, be preserved. They provide a level of discrimination protection from which the proposed consolidated Act should not detract. As well, they are an advanced and sophisticated form of discrimination protection, produced

¹⁵ See the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (PERPUDA) and Professor Margaret Thornton, Submission to Senate SDA inquiry.

through collaboration with industry to promote detailed implementation of Australia's international human rights obligations.

23 Implementation costs

Recommendation:

The Australian Human Rights Commission should be resourced to carry out the functions necessary to ensure a more efficient and effective anti-discrimination regime, such as management of exemptions and confidentiality.

To achieve a more efficient and effective anti-discrimination regime, the Australian Human Rights Commission will, under some of our recommendations, carry additional responsibility, for example in relation to exemptions and managing confidentiality. These implementation costs will be offset by significant industry savings in compliance costs.

Accordingly, such resource implications should be funded if the proposed reforms are to achieve their desired ends.

24 Specialist Commissioners

Recommendation:

The role of specialist Commissioners should be maintained, to ensure expertise and continued focus on different forms of discrimination.

We welcome the Government's announcement that it will appoint full-time Race and Disability Discrimination Commissioners, in addition to the new position of Age Discrimination Commissioner. Having a specific focus on each protected attribute through a specialist Commissioner facilitates the functions essential to promote community understanding of anti-discrimination obligations, and provides the expertise needed for reports and submissions to government and parliamentary inquiries. The Government has recognised this need for specialist focus through its current legislation establishing the new position of Age Discrimination Commissioner.

Accordingly, we recommend that in the consolidated Act each attribute is the explicit responsibility of a specialist Commissioner. This person should be an identifiable figure who develops a profile in the community as the Commissioner responsible for the relevant attribute. The specialist Commissioners should be under a statutory obligation to issue periodic reports on progress towards equality, as already required of the Aboriginal and Torres Strait Islander Social Justice Commissioner and as recommended for the Sex Discrimination Commissioner by the Senate Standing Committee on Legal and Constitutional Affairs in its *Inquiry in to the Effectiveness of the SDA*.

25 Alternative means of complaint, monitoring and enforcement

Recommendation:

An enforceable positive duty should be imposed to promote equality.

Positive duty

Current anti-discrimination legislation relies on individual complainants to identify and challenge discriminatory conduct. This model of legislation is over 40 years old and has had little effect in reducing discriminatory conduct. It discourages the victims of discrimination from pursuing a remedy, encourages perpetrators to maintain their behaviour until and unless 'caught', and does not address systemic causes of discrimination.

Australia is lagging behind comparable jurisdictions in complementing the individual complaints-based model with an active approach to bring about systemic change. This is a move from a fault-based model to a capacity-based model which requires those with the capacity to address inequality to do so.¹⁶ In some jurisdictions, like Canada, this is brought about primarily within a complaints based model where responsibility for achieving equality in society is shared by individuals and institutions. In such a system, there is not an insurmountable hurdle in bringing discrimination claims, and respondents must provide reasonable accommodation to enable equal participation. In other jurisdictions, such as the UK, the shift to a capacity-based model commonly takes the form of a positive duty to promote equality, which complements the complaints based anti-discrimination system.

Accordingly, we recommend that the consolidated Act prescribe a positive duty which requires conduct to prevent discrimination and promote equality.

Nature of the duty

Australia has a history of legislation which requires positive action to promote equality of opportunity in both public and private employment, but has not legislated to impose a duty to promote equality of outcomes in program and service delivery. Such a duty is consistent with emerging international practice, and would give better effect to Australia's obligations to implement the guarantees in the *International Covenant on Civil and Political Rights*, the *Convention for the Elimination of all Forms of Discrimination Against Women*, the *Convention for the Elimination of all Forms of Racial Discrimination*, the *Convention on the Rights of the Child*, and various *International Labour Organisation* conventions. The international human rights framework supports a substantive duty on public bodies to take necessary and proportionate steps for the progressive realisation of equality, backed by a series of procedural requirements.

The duty requires employers and service providers to consciously carry out their functions in a non-discriminatory way. It requires organisations take steps to address barriers to equality and to ensure that their policies, practices and services do not have an unjustifiable adverse impact on people with prescribed attributes. It embeds equality performance measures in service/agency planning, evaluation and accountability frameworks.

¹⁶ Sandra Fredman 'Changing the norm: positive duties in equal treatment legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369-398.

It is preferable that a positive duty cover both public and private sectors, as in the Victorian *Equal Opportunity Act 2010*, but as a first step the broader duty could apply only to public bodies or those carrying out public functions, as in the UK. A positive duty on public bodies requires mandatory reporting on progress towards defined equality goals.

In the absence of an equality duty applying to the private sector, other tools (such as the introduction of tax incentives and the inclusion of equality targets as part of Government procurement requirements and funding agreements) could be used to increase the reach of the duty.

A narrower duty would be made explicit for private sector bodies in the same way as is done by s.15 of the *Equal Opportunity Act 2010* (Vic). Expressing in a positive way the existing duty to not discriminate will provide guidance to those who must comply with the Act, by making it clear that some action will be required of them to ensure their actions and practices do not result in discrimination.

To ensure the success of such a measure, resources of the kind used by the Fair Work Ombudsman would be required, to educate the public about anti-discrimination obligations.

A positive duty must be enforceable, as is the case under the Victorian *Equal Opportunity Act 2010*, which enables the Victorian agency to investigate and act on possible serious breaches which are likely to affect a class or group of people: see the discussion of 'Agency level action' in Recommendation 19 above.

26 The future of anti-discrimination legislation

Recommendation:

The model, design and operation of Australia's anti-discrimination laws should be the subject of a national inquiry to report on how they can best be drafted as a means to achieve equality.

Even with the addition of a positive duty, the proposed consolidated Act focuses on easing the regulatory and compliance burdens, and does not fundamentally reform the approach to using legislation as a means to achieve equality.

Accordingly, we recommend that once the consolidation project is complete, the government commission a national inquiry to explore the conceptual changes that should be undertaken to best realise the right of non-discrimination in Australia.

An inquiry would, for example, consider the interaction and possible overlap of anti-discrimination obligations under the consolidated Act and anti-discrimination rights in the FWA, review the effectiveness of an individual complaints model, consider extending the scope of a positive duty to promote equality to the private sector, and investigate international best practice such as the model in Northern Ireland.

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Dr Dominique Allen is a Lecturer at Deakin School of Law and has published widely on Australian anti-discrimination law. She completed a doctoral thesis at Melbourne Law School which evaluated Australia's existing anti-discrimination protections and proposed a series of reforms for improving the law's effectiveness at tackling discrimination and promoting equality.

Adjunct Professor Peter Bailey, AM OBE has been an Adjunct Professor in the ANU College of Law since 1999, and was a Visiting Fellow from 1987 to 1998. Previously he was Deputy Chairman and full-time chief executive of the Commonwealth's Human Rights Commission and a Deputy Secretary in the Department of Prime Minister and Cabinet, and a full time member of the Royal Commission on Australian Government Administration 1974-76. He was Editor for the Human Rights Title in *The Laws of Australia*, and his most recent publication is the text *The human rights enterprise in Australia and internationally*.

Ms Anna Chapman is a Senior Lecturer in Melbourne Law School and a member of the Centre for Employment and Labour Relations Law. Anna's research has focused on legal regulation and sexed, heterosexual and racialised harms and systems of power in the paid labour market in Australia. This work has engaged particularly with anti-discrimination law, unfair dismissal law and anti-vilification statutory schemes. More recently Anna has commenced a project examining the relationship between law, work and care.

Dr Sara Charlesworth is a Principal Research Fellow at the Centre for Work + Life, University of South Australia. She was previously a Principal Research Fellow at the Centre for Applied Social Research, RMIT University. She was a member of the Victorian Equal Opportunity Board from 1998 to 1994, a member of the Federal Sex Discrimination Commissioner's Expert Panel on Sexual Harassment in 2008 and a member of the Advisory Committee to the 2007/8 Gardiner Review of the Victorian *Equal Opportunity Act 1995*.

Dr Elizabeth Dickson is a Senior Lecturer in the Law School at Queensland University of Technology. She teaches discrimination law and researches, publishes and has particular expertise in disability discrimination law. She has consulted for a variety of education institutions on issues relating to the inclusion and accommodation of students with disabilities.

Professor Patricia Easteal, AM is a Professor in the Law Faculty, University of Canberra. She was ACT Australian of the Year 2010. Her 14 books and well over 130 academic journal articles and chapters focus primarily on access to justice for women. She teaches Employment Discrimination and the Law and Women and the Law and has published on age discrimination, sex discrimination, disability discrimination and sexual harassment.

Dr Beth Gaze is an Associate Professor at Melbourne University Law School. She has taught discrimination law for twenty years, and was involved in recent reviews of the Victorian *Equal Opportunity Act 1995* as a member of the advisory committee to the Gardner Review and as a consultant to the Victorian 'Scrutiny of Acts and Regulations Committee inquiry into Exceptions and Exemptions' (2009).

Mr Wayne Morgan is a Senior Lecturer in Law at the ANU College of Law. He has published work on anti-discrimination law and sexuality and has taught general courses on Anti-discrimination law in Australia. Wayne also regularly consults on anti-discrimination cases and regularly makes submissions to government bodies on anti-discrimination law.

Mr Simon Rice, OAM is an Associate Professor at the ANU College of Law. He has been a judicial member of the NSW Administrative Decisions Tribunal in the Equal Opportunity Division since 1996, and is chair of the ACT Law Reform Advisory Council. He is a co-author of the text *Australian Anti-Discrimination Law*.

Professor Marian Sawer AO is an Emeritus Professor in the School of Politics and International Relations at the ANU. She has been involved with a number of Parliamentary inquiries into the Commonwealth *Sex Discrimination Act* as well as helping initiate the ACT *Discrimination Act*.

Dr Belinda Smith is a Senior Lecturer in the University of Sydney Law School. She teaches and researches primarily in the area of anti-discrimination law, gender equity, and work-family conflict. In articles and chapters published in Australia, the United States and Japan she has explored alternative regulatory tools and frameworks for promoting equality.

Professor Margaret Thornton is an Australian Research Council Professorial Fellow at the ANU College of Law researching discrimination law. She has published extensively in the area. She is the author of *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, 1990) and recently edited *Sex Discrimination in Uncertain Times* (ANU E Press, 2010).

Dr Helen Watchirs, OAM is the ACT Human Rights and Discrimination Commissioner. She has worked for 28 years as a human rights lawyer and/or consultant including with the Federal Government and a wide range of UN agencies including the Office of the High Commissioner for Human Rights. Her doctorate in human rights and master's degree in public law from The Australian National University focus on HIV/AIDS issues.