

**CONSOLIDATION OF COMMONWEALTH
ANTI-DISCRIMINATION LAWS**

SUBMISSION

Discrimination Law Experts' Group

13 December 2011

The Discrimination Law Experts Group met on Monday 28 November 2011 to collaborate on a response to the discussion paper issued in relation to the Consolidation of Commonwealth Anti-Discrimination Laws Project. The Experts Group included the following members who contributed to the development of this Submission:

Dr Dominique Allen, Law Faculty, Deakin University

Adjunct Professor Peter Bailey, AM OBE, College of Law, Australian National University

Ms Anna Chapman, Law Faculty, University of Melbourne

Dr Elizabeth Dickson, School of Law, Queensland University of Technology

Associate Professor Beth Gaze, Law Faculty, University of Melbourne

Dr Karen O'Connell, Law Faculty, University of Technology Sydney

Associate Professor Simon Rice, OAM, College of Law, Australian National University

Dr Belinda Smith, Sydney Law School, University of Sydney

Professor Margaret Thornton, College of Law, Australian National University

The Working Group meeting and this submission were coordinated by Associate Professor Beth Gaze.

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Summary of Recommendations

2 Objects of the Act

A form of objects clause is proposed (see p. 7-8)

3. Meaning of Discrimination, Exceptions and Exemption

A series of provisions is proposed that defines discrimination and clarifies the roles of justification, exceptions and exemptions (see p. 8-9). These recommendations replace the recommendations in our March 2011 report concerning the definition of discrimination and exceptions to discrimination.

4. Burden of Proof

We recommend that once a complainant has established a prima facie case of unfavourable treatment based on an attribute, a rebuttable presumption should arise that the treatment was based on the attribute. The respondent would be able to rebut the presumption by introducing evidence about a non-discriminatory basis for their action.

5. Special Measures

We recommend that the consolidation Act should include a single special measures provision, covering all protected attributes, and should include a process for temporary authorisation of special measures, to reassure business and other organisations that actions which benefit an attribute group and provide for substantive equality will not breach the Act.

6. Special Exceptions

We recommend that the religious exceptions be repealed. If they are retained we recommend that they not apply to functions undertaken under contract to the government and that are undertaken with public funding. If they are retained we recommend that a religious organization seeking to rely on them should be obliged to identify the religious doctrine or susceptibility involved and the source of religious authority for the claim.

7. Temporary Exemptions

We recommend that the process for considering and granting temporary exemptions be consistent across all attributes, and that the process of granting exemptions should be as set out in our March 2011 submission.

8. Complaints and Compliance Framework

We make recommendations relating to:

- a) Conciliation

- b) Remedies: damages and compensation
- c) Remedies: any reasonable act or course of conduct
- d) Litigation costs
- e) Representation
- f) The AHRC's role and functions

9. Concluding Remarks: confidentiality, research and victimisation

We recommend that any confidentiality provision should not preclude either:

- Publication of de-identified information about conciliated settlements, or
- Access to data for research purposes where the research has been approved by a human research ethics committee.

We recommend that the victimisation provision be revised to make clear that possible criminal liability for victimisation is not a barrier to bringing a civil claim; if necessary, the criminal provisions for victimisation should be repealed.

1. INTRODUCTION

This submission from the Discrimination Law Experts does not set out to answer every question posed in the Discussion Paper, as we have dealt in detail with many of the issues in our Report of 29 November 2010 (updated 31 March 2011) (copy attached as Appendix 2). This submission builds on and should be read in conjunction with that Report, which was written and distributed before the Discussion Paper, and was designed to promote discussion by putting forward ideas about how the consolidation could improve the operation of federal discrimination laws.

This submission responds to questions raised in the Consolidation Discussion Paper of September 2011. In drafting this submission we have focused on key elements of the anti-discrimination law framework. In particular, we have drawn upon our joint understanding about the nature of discrimination, the harm it does and the role of law in addressing it. The following points outline the principles on which our recommendations are based.

- Discrimination harms society as a whole and every member, not merely the identified aggrieved persons. For this reason, an obligation to address discrimination should be shared widely across society, and the identified aggrieved person should not bear an onerous burden in driving change.
- Discrimination unfairly excludes women and members of particular groups and limits their capacity to fulfil their potential in our society. It manifests in a wide variety of ways, ranging from blatant and intentional prejudicial conduct to the unintentional imposition of apparently neutral barriers. To address discrimination fairly and effectively in its many manifestations, anti-discrimination law needs to be wide in its coverage but also sophisticated and nuanced so that it can apply to the great diversity of human experiences, goals and needs.
- Simplicity should be a goal of regulatory reform but only to the extent that it serves to enhance both compliance and efficiency.
- In designing effective anti-discrimination laws it is important to appreciate and articulate connections between the definition of discrimination, the nature and scope of prohibitions and exceptions that justify or permit some forms of discrimination. A wide definition of discrimination provides a clear and simple message, but necessitates rules and mechanisms that enable fair and efficient identification of discrimination that is justifiable.

In this submission, we have focused on the fundamental and central issues in anti-discrimination law, in particular the definition of discrimination, where the burden of proof should lie, and the definition of exceptions and exemptions.

In essence, we believe strongly that the legislation should recognise the systemic nature of discrimination, which requires a proactive/capacity-based approach to enforcement rather than one that is merely reactive and rests on those aggrieved, who may have very little capacity to enforce the law. The former accords with the contemporary approach to human

rights, whereas the latter replicates an individualised torts-based model. Discrimination is an evolving concept, and after 35 years, the conceptual model of discrimination as a statutory tort now lags behind developments in the UK, Continental Europe and Canada which recognise that there is a broader public interest at stake than merely compensating the individual. The Australian Government therefore needs to have an eye to modernisation as well as to consolidation.

We have aimed at consistency and simplicity in the interests of all parties. In our submission, we also stress our desire for our recommendations to be read and understood as a unified whole, rather than as a series of discrete clauses that are readily severable from each other.

2. OBJECTS OF THE ACT

The Discussion Paper does not refer to the objects of the Act but we regard an objects section as the keystone of the new legislation. It would set out the values inhering within the legislation, not just for duty-holders, but for the wider community more generally. It would also make clear that the Act is beneficial legislation.

We are concerned that a persistently narrow doctrinal interpretation by the courts has undermined the efficacy of anti-discrimination legislation. With the exception of former Justice, Michael Kirby, High Court judges have tended to ignore the beneficent purpose of the legislation and the contents of the UN instruments on which the legislation is based. *Purvis* (2003)¹ and *Amery* (2006)² are notable examples of judicial decisions which have skewed the interpretation of the legislation. We therefore believe that some guidance for courts should be included in the objects clause, along the lines of that contained in *Freedom of Information Act 1982* (Cth) and the *Equal Opportunity Act 2010* (Vic).

We recommend the following provisions:

1. Objects of the Act

The object of this Act is to eliminate unlawful discrimination, and to give effect to Australia's obligations under the United Nations human rights instruments set out in the Schedule. In pursuing these objects, regard shall be had to the following:

- (a) In this Act regard shall be paid at all times to the aims of eliminating discrimination on the basis of attributes covered by this Act, and Australia's obligations under the United Nations human rights instruments set out in the Schedule;

¹ *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92; 202 ALR 133.

² *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196.

- (b) The values of equality, respect and human dignity shall be shown to all persons, regardless of attribute. This includes a right to be free from harassment and victimisation;
 - (c) The principle of equality shall be interpreted to mean substantive equality, not merely formal equality;
 - (d) It is recognised that the attainment of substantive equality may require special accommodation and special measures;
 - (e) In the case of a finding of discrimination, a remedy may include a proactive initiative that benefits those with the same attribute as the complainant and recognises the systemic nature of discrimination;
 - (f) This Act enables the Australian Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
 - (g) This Act enables the Australian Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the to the Federal Magistrates Court and the Federal Court for resolution of such disputes.
2. It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further its objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

3. MEANING OF DISCRIMINATION, EXCEPTIONS AND EXEMPTIONS

In response to questions 1, 2, 3, 4, 20 and 21 of the Discussion Paper we propose the following wording and explanation.

1. Unlawful discrimination

Discrimination is unlawful in public life unless it is justified within the scope and objects of this Act.

2. Definition of discrimination

Discrimination includes:

- (a) treating a person unfavourably on the basis of a **protected attribute**;

- (b) imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same **protected attribute** as the aggrieved person; or
- (c) failing to make **reasonable adjustments** if the effect is that the aggrieved person experiences less favourable treatment under (a) or is disadvantaged under (b)

The conduct described in 2(a) and (b) is not mutually exclusive.

3. Public life and protected areas

For the purposes of this Act 'public life' includes work, education, the supply of goods and services, accommodation, clubs, the delivery of government programs, the disposition of land and superannuation.

4. Justifying discrimination

The matters to be taken into account in deciding whether discrimination is not unlawful because it is justified include:

- (a) the public interest in achieving the objects of the Act; and
- (b) the nature and extent of the disadvantage resulting from the treatment under s 2(a) or imposition of the condition, requirement or practice under s 2(b); and
- (c) if the discrimination relates to conduct under s 2(c), the nature of the adjustment required and the consequences for the complainant if such an adjustment is not made; and
- (d) the availability, cost and feasibility of an alternative that is not discriminatory; and
- (e) Whether the discrimination is justified as a **special measure**; and
- (f) If the discrimination is in the protected area of work, the inherent requirements of the relevant work.

5. Burden of proof

The burden of proving that an act of discrimination is not unlawful because it is justified under section 1 lies on the person who did the act.

As noted in the Discussion Paper the definitions of discrimination currently used in Commonwealth anti-discrimination laws have been criticised as inconsistent, complex and uncertain' and the inconsistencies 'make the legislation unnecessarily complex'.³ For this reason we propose a single definition of discrimination to apply to all protected attributes across all areas. A single definition would reduce regulatory complexity, increase consistency and therefore promote compliance.

In respect of this proposed definition, we specifically note the following points.

- Firstly, we have drafted the provisions relating to definition, areas of coverage, exceptions, and burden of proof to operate together. They are interconnected and we recommend that they should be treated as a whole.
- The definition we propose is different to the one we proposed in our March 2011 Report. Although we see merit in a unified definition, we recommend a definition of discrimination that retains the two concepts of direct and indirect discrimination, and utilises wording from existing legislation, because it has some familiarity to the Australian public and legal profession. However, we do not believe the two categories should be construed technically or as mutually exclusive concepts. This can be achieved by expressly stating that the concepts are not mutually exclusive and providing for the general defence of justification to apply to both forms of discrimination.
- While this may appear on its face to be a reduction of protection for direct discrimination, which previously was not subject to a general exception, the defence of justification should be narrowly construed because the legislation is beneficial legislation that aims to reduce and eliminate discrimination, as the objects clause makes clear. Provided the defence of justification is correctly applied by the courts, the exceptions from discrimination should be no wider than through the current enumerated exceptions that it will replace, but may provide a more rational way to consider all the issues relevant to justifying discrimination. Although we do not advocate this because we prefer not to make distinctions between attributes of discrimination, if it was necessary to maintain the level of protection present in earlier legislation such as the *Racial Discrimination Act*, the consolidated legislation could provide that only the previously limited exceptions are available and the general defence of justification does not apply.
- Under current legislation, exceptions to the prohibitions on discrimination are found in a vast array of separate sections covering a range of areas and circumstances. The specificity of these exceptions may provide some certainty and thus we recommend retaining them. However, by separating out each of these provisions the legislation lacks a clear and unifying statement of the principles that justify exceptions. The opening statement that discrimination is unlawful unless it can be justified within the objects of the Act is designed to serve this purpose. It aims to serve the important normative goal of changing attitudes by clarifying that if traditionally excluded groups

³ Attorney General's Department (Cth), *Consolidation Of Commonwealth Anti-Discrimination Laws, Discussion Paper*, September 2011(Consolidation Discussion Paper), page 9.

are treated differently or disadvantaged by a condition or requirement it is discriminatory, even though there may be some circumstances which justify the discrimination. While this approach sets up formal equality as the basic test, the provision relating to special measures makes it clear that the overall aim of the legislation is substantive equality, consistently with the proposed objects clause.

- By providing a general defence of justification, all relevant circumstances can be considered in determining whether discrimination is unlawful or not, allowing duty-holders to put forward their own particular situation and needs. This mechanism will allow for a balancing of the rights and interests of duty holders and rights holders under the Act. **Such a defence, however, will only serve the goal of eliminating discrimination if human rights principles are used to inform and constrain the determination of justification.** We have proposed that these principles be embodied in the Act's objectives as a way of shaping this determination.
- While familiar language has been retained to define direct discrimination 'less favourable treatment' has been replaced with 'unfavourable treatment' to remove the comparator element that has caused so many difficulties, as noted in the Discussion Paper [26]. For further clarity, an express provision could be provided stating that the complainant need only prove detriment in respect of their protected attribute and does not need to prove the comparator element. This approach is consistent with the approach in the ACT and Victorian legislation.
- Under current legislation duty holders bear an implicit obligation to provide reasonable adjustments to persons with protected attributes, and under the DDA this obligation is explicit. This obligation is implicit in the current definition and prohibition of indirect discrimination, whereby only *reasonable* requirements and conditions can be imposed if they disadvantage protected groups, so duty-holders must ensure that they adjust their requirements and conditions to ensure that they are reasonable. For consistency and clarity, this obligation to provide reasonable adjustments should be made explicit and included as part of the definition of discrimination and should apply across all protected attributes. This clarifies the obligations of duty holders.

4. BURDEN OF PROOF

Q 2 How should the burden of proving discrimination be allocated?

Currently, enforcement of anti-discrimination law rests entirely on the largely unaided actions of those who suffer disadvantage, with virtually no support from legal aid funding.⁴ Unlike comparable areas of law such as consumer protection, occupational health and

⁴ B. Gaze and R. Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation,' (2009) 32 UNSW LJ 699-724.

safety, securities and investment regulation, and the fair work system, there is no regulatory agency that can act to enforce the law. Without individual complaints, the law will not be enforced, and human rights cannot be regarded as adequately protected.

At present, individual direct discrimination claimants have the burden of proving ‘the basis’ for their disadvantaging or less favourable treatment by the duty holder. The Discussion Paper acknowledges the impact of this requirement as a barrier to bringing a discrimination complaint:

allocating the burden of proving causation in direct discrimination to the complainant requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair.⁵

In the absence of any requirement for the respondent to produce evidence of the basis of their action, it is extremely difficult to prove what was in the mind of the respondent. As a result, many cases of direct discrimination fail, because although less favourable treatment is proved, the court cannot be satisfied that it was ‘on the basis’ or ‘because’ of the prohibited attribute.

As the Discussion Paper notes (at [50]), all major comparable countries use some mechanism to require the respondent to produce evidence of the basis for their action.

The aim of the law should be to require duty holders to provide evidence of why they took the particular action that has been challenged, so that the court can make an assessment of whether it was on an unlawful basis. While this is often discussed in terms of reversing the onus of proof, a formulation more familiar in the Australian legal system is the idea of a rebuttable presumption, as discussed in our March 2011 Report:

Accordingly, we recommend that the consolidated Act be consistent with international practice and the FWA, by providing that once 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

⁵ Consolidation Discussion Paper para [52].

disproportionately affected the protected group. The respondent would as well have access to exemptions and defences.⁶

Benefits to both parties

A rebuttable presumption that the action was taken on an unlawful basis, arising when the complainant establishes a prima facie case, would benefit both complainants and respondents. Complainants would be assisted to get their cases past the hurdle of their inability to establish the duty holder's motivation, and onto the central substantive issue of whether the basis for the action was unlawful or there was a sufficient non-discriminatory justification for the action. Respondents would benefit by having their legal obligations substantially clarified. Case law would address the substantive issue of the basis for an action and whether a justification for discrimination existed, rather than procedural or onus of proof issues which cast no light on legal obligations. Clarifying the substance of the law would make anticipatory action to avoid liability easier by providing clearer guidelines for staff training, and would also make defending a claim simpler, as defence would address the substantive issues of the basis for the action.

The purpose of establishing a rebuttable presumption is to encourage the parties to a discrimination dispute to focus on the issues of substance, such as what was the basis of the action, and, if it was a prohibited attribute, whether there is any acceptable justification for the action. In assessing these issues, the credibility of both parties will be assessed.

Relationship with provision for multiple reasons

This issue overlaps to some extent with the provisions regarding multiple reasons for an action. Anti-discrimination law should not allow actions where a discriminatory basis played a role, so the formulation in the federal laws concerning multiple motives should be retained. The operation of a rebuttable presumption would not require that an employer negate the possibility that an unlawful attribute influenced the decision. Instead, defence would focus on rebutting the presumption by showing sufficient non-discriminatory reason(s) to explain the decision.

Where a duty holder proves a non-discriminatory motive unrelated to an attribute that is sufficient by itself to justify the action or decision, then they will have discharged their onus and avoid liability unless the credibility of the evidence is challenged. This allows the decision-maker to hear evidence and argument on the substantive issues of the basis for the decision and the credibility of the parties.

Proposed formulation

We propose that the legislation should provide that once the claimant has made out a prima facie case that allows the possibility of inferring that unlawful discrimination occurred, that is, that the respondent's action could have been motivated by an unlawful attribute, a

⁶ Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* (31 March 2011) (March 2011 Experts Report): Part 4. Burden of proof, p. 8-9.

rebuttable presumption would arise that the basis for the action was unlawful. The respondent could rebut this presumption by introducing evidence of the basis of their action that is sufficient to dispel the inference of any unlawful basis. Showing that the reasons relied on by the employer were sufficient in themselves as a basis for the action would discharge the presumption, unless the credibility of the evidence is questioned. Section 136 of the *Equality Act 2010 (UK)* provides an example:⁷

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If 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.

(3) But subsection (2) does not apply if that person shows that they did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

5. SPECIAL MEASURES

Question 3: Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

Special measures are an important aspect of anti-discrimination laws, since they permit measures for the benefit of an 'attribute group' where those measures address the need for substantive and not merely formal equality, and advance equality of outcome. A special measure is not unlawful discrimination.

As set out in our original submission (Part 9), we recommend that a positive expression of this concept be included in the consolidated Act, similar to s.7D of the SDA. As in 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.

⁷ Section 361 of the *Fair Work Act* is worded differently:

361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

To qualify as a special measure, the requirements of the international conventions should be met, but there should also be a requirement for some evidence that the members of the group who are intended to benefit have been consulted and do not disagree with the measure proposed.

Mechanism for advance authorisation

As we pointed out in our original submission (Part 9), a special measure takes on its character from the goal it serves and the means of achieving the goal, not from any external authorisation. As a result, its status as a special measure is not always known or recognised. This leaves individuals and organisations vulnerable to complaints of unlawful discrimination, since ultimately the only means of knowing whether a practice constitutes a 'special measure' is through legal determination.

In order to provide greater certainty for businesses and organisations, we recommend that a consolidated Act provide some means of authorising a special measure. Accordingly, as in our original submission, we recommend that consideration be given to enabling the Australian Human Rights Commission (AHRC) to acknowledge or authorise a special measure on application. However, this should not mean that the existence of a special measure is made dependent on receiving such an acknowledgement.

The process could be similar to the temporary exemption process (see Part 7, below) in providing authorisation for a special measure after a public, transparent process. Any authorisation of a special measure should also be temporary, since social and other conditions giving rise to substantive inequality may change over time. Further, since under international law a special measure must be determined in consultation with the group who is to benefit, any applicant for an authorisation should be able to demonstrate appropriate consultation.

A process for authorising special measures would provide reassurance to business in particular that actions which benefit an attribute group and provide for substantive equality will not breach the law.

Recommendations: The consolidation Act should include a single special measures provision, covering all protected attributes. It should include measures for the benefit of an attribute group where those measures address the need for substantive equality/equality of outcome.

The consolidation Act should include a process for temporary authorisation of special measures, to reassure business and other organisations that actions which benefit an attribute group and provide for substantive equality will not breach the Act.

6. SPECIAL EXCEPTIONS

Question 20: Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that need to be retained?

Our response to the issue of a general limitations clause is set out above in Part 3. The following relates to the question of specific exceptions.

Exceptions for religious organisations

We believe that the religious exceptions should be removed because we do not accept that religious rights should prevail over the rights of individuals to be treated in a non-discriminatory way in public sphere activities.

We note that although most state and territory legislation has similar exceptions, some of the exceptions are narrower in scope (Tas and Qld) and there is no consensus that a very broad exception is appropriate. If the exceptions are retained then they should be cast in the narrowest available form in order to minimise the denial of non-discrimination rights involved.

If the exceptions are to be retained, we propose some procedural reforms that would make their use more rigorous and more appropriate.

First, we do not believe that the exceptions should be available where a religious organisation is carrying out functions contracted out by government using public funding. The use of public money in a discriminatory way is not acceptable, and cannot be reconciled with the obligations the government has accepted in ratifying the International Covenant on Civil and Political Rights, and the Discrimination Conventions.⁸ In the USA, California courts have held that a *government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy*, and that since Boy Scouts of America, which has policies that exclude female, gay and bisexual members, could not comply, it was legally acceptable for it to be excluded from using public benefits such as a free mooring in the municipal marina.⁹ While this case demonstrates that government has power to restrict the use of public funds if it wants to, we argue that the Australian government should act in accordance with its obligation to ensure that public funds are not used in a discriminatory way. Such a privilege should be reserved only for activities undertaken by religious organisations paid for with private funding.

Second, problems have arisen in determining the scope of the religious exceptions, and in particular in determining what is the religious doctrine or susceptibility involved.¹⁰ Religious

⁸ See eg ICCPR A. 2.

⁹ *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) Cal SC, cert refused by US Supreme Court.

¹⁰ These issues have arisen in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, subsequently dismissed by the NSW ADT: *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293), and *Cobaw Community Health Services v*

organisations in litigation have objected to secular tribunals determining the content of their doctrine, but nevertheless seek exemption from the general law on the basis of the doctrine. To avoid the risk of an open-ended exception from the law, religious organisations that want to rely on these exceptions should be required to identify the content and scope and basis of their claim in a way that informs people who might be affected. Thus we propose that the legislation should require that any organisation that seeks to rely on s. 35 ADA or s. 37(d) SDA must provide a written statement of the doctrine or susceptibility involved and document the basis of the claim of its religious character. This would limit the need to have such questions determined by a secular court, although argument should still be heard about the breadth and basis of any claims made. Ideally the statement should be provided to any individual, such as an employee, student or service recipient, who may be affected by the religious doctrine. At least, it should be provided to a person who brings a discrimination complaint at no later stage than in answer to conciliation. Any such statement should be in writing, authorised at an appropriate level of authority within the religious organisation, and should be a public document.

7. TEMPORARY EXEMPTIONS

Question 23: Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

In exceptional or transitional situations, temporary exemptions are sometimes required in order to make anti-discrimination legislation practical and workable, by protecting individuals or organisations from complaints of unlawful discrimination for a defined period.

A temporary exemption renders conduct lawful that would otherwise be unlawful under anti-discrimination law, and so should not be granted lightly. We submit that in dealing with temporary exemptions, the objects of anti-discrimination law should be paramount, and exemptions should only be granted with caution, for the shortest possible time and with the narrowest coverage.

Currently, temporary exemptions under the DDA, SDA and ADA are granted by the AHRC, using self-generated guidelines. **We recommend** that the process for considering and granting temporary exemptions be made consistent across all grounds of discrimination. We acknowledge that at present there is no facility to grant temporary exceptions relating to racial attributes. We do not want to see protection for racial attributes reduced, but nor do we agree with creating a hierarchy of grounds or attributes. These concerns can be adequately dealt with by ensuring that the scope for exceptions on all attributes (other than special measures), is minimised.

Christian Youth Camps Ltd & Anor [2010] VCAT 1613, currently on appeal to the Supreme Court of Victoria.

We **recommend** that the process of granting exemptions is as follows, as set out in our March 2011 Report:

“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.”¹¹

In addition, if the exemption is to protect an applicant while transitional steps are being taken to comply with anti-discrimination law, the applicant should be required to show how the exempted act or practice will be changed over time to comply with the law.

8. COMPLAINTS AND COMPLIANCE FRAMEWORK

In our March 2011 Report, we expressed the following reservations about the current individual complaints-based model for addressing discrimination:

“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

¹¹ Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* (31 March 2011) 13.

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.¹² 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."¹³

To make the legislation more effective at addressing discrimination, changes are need to the definitions, as described above, and also to the compliance framework. Discrimination harms us all, not only the identified aggrieved person. Each act of discrimination involves elements of both public and private harm. Therefore, the obligation for addressing discrimination should also be shared by all of us. One way of doing this is to ensure that the public body charged with administering the legislation has sufficient power to address the public aspect of the harm, while retaining the capacity for private harm to be addressed through the individual complaints system. Therefore, to improve the current model, we recommend investing the AHRC with the appropriate powers to address discrimination proactively, rather than placing the entire burden of addressing discrimination on the complainant. The recommendations we made in our March 2011 Report, which are extracted below, will make the individual complaints-based system more pro-active and systemic, while still retaining the most attractive features of the current model, namely that discrimination complaints can be resolved quickly and informally. Furthermore, these changes will create a streamlined, flexible system that will not place an onerous compliance burden on business.

No contracting out

As another corollary of the fact that discrimination harms us all, not only the identified victim, the new Act should expressly prohibit contracting out of the protections provided under it. Compliance is not aided if employers, for example, can contract out of compliance in respect of some or all its employees. As we stated in our March 2011 Report (Recommendation 12):

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.

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

¹³ Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* (31 March 2011) 24.

It may be that an agreement which contracts out of prospective coverage of anti-discrimination protection is contrary to policy,¹⁴ 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.

Question 24: Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under commonwealth anti discrimination law

“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 through collaboration with industry to promote detailed implementation of Australia’s international human rights obligations.”¹⁵

“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.

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’).”¹⁶

We support the retention and broadening of the use of action plans which can be an effective means for individual organisations to anticipate and address concerns that may

¹⁴ See *Qantas Airways Ltd v. Gubbins* (1992) 28 NSWLR 26 per Gleeson CJ and Handley JA.

¹⁵ March 2011 Experts Report, 22-23.

¹⁶ March 2011 Experts Report, 19.

arise in relation to their activities. As in the case of action plans under the DDA, because these plans are a statement of intent, and not approved by any agency as compliant with the law, compliance with a plan should be merely a relevant factor in a discrimination case, rather than necessarily a defence to a claim.

At this stage we have no comment on the proposal of co-regulation referred to in the Discussion Paper. We would welcome further information on what is proposed as a basis for comment.

a) CONCILIATION

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

The Discussion Paper considers remedies and litigation costs under conciliation (Q 25), but they seem more relevant to court process (Q 26) and role and functions of the Commission (Q 27).

The Conciliation Process

We repeat our comments of March 2011 as follows:

“For as long as the federal anti-discrimination regime relies on individual complaints, 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).”¹⁷

“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’.¹⁸ 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

¹⁷ March 2011 Experts Report, 17.

¹⁸ New Zealand Human Rights Commission *Annual Report 2007*, 32.

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).¹⁹

“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.”²⁰

Confidentiality provisions in a consolidated Act should not prevent the public disclosure of de-identified information from conciliation agreements by the AHRC. Such information provides an important guide to the scale of settlements under the Act.

Question 26. Are any improvements needed to the court process for anti-discrimination complaints?

b) REMEDIES: DAMAGES AND COMPENSATION

Remedies for discrimination law have typically been ungenerous, as the comprehensive table in CCH’s ANZ & EO Law & Practice (para 89-950) clearly illustrates. Discrimination law is now established as a distinct body of law and, although not necessarily yielding outcomes the same as those arising in consumer protection, work law and tort law, should at least yield results comparable in terms of equality and justice.

Discrimination law in State and Territory jurisdictions universally provides for redress for loss or damage caused by an unlawful action. The most advanced provisions are in Tasmania (AD Act s.89), which authorizes redress for ‘loss, injury or humiliation’; and the Northern Territory (AD Act s.88), where ‘loss or damage’ can include ‘embarrassment, humiliation and intimidation’.

¹⁹ March 2011 Experts Report, 18.

²⁰ March 2011 Experts Report, 19.

By contrast, Commonwealth discrimination remedies have tended to lag. References in the original (pre-2000) Commonwealth legislation were traditionally to ‘compensation’ only. In *Hall v Sheiban* (1989) 20 FCR 217 Lockhart J, French J, and Wilcox J commented that while redress should not be over-generous, it should not be restricted to monetary compensation. Lockhart and French JJ took the view that because embarrassment and the like are an aspect of discrimination for which ‘damages’ rather than strictly quantifiable monetary compensation should be awarded, damages style awards should be available. Wilcox J would have allowed damages on the basis that discrimination is a statutory tort.

Since 2000, remedies are now available only through the Federal Magistrates Court or the Federal Court and should stand comparison with other jurisdictions. Notwithstanding this change, and despite comments such as those in *Hall v Sheiban*, a tradition seems to have grown up of very low awards of damages for unquantifiable harm.²¹

Recommendation. The Federal Court’s and Federal Magistrates Court’s powers in relation to discrimination law should be amended to make specific reference to the need to ensure that adequate redress for harassment, injury to feelings and the like is awarded in appropriate cases.

c) REMEDIES: ANY REASONABLE ACT OR COURSE OF CONDUCT

Despite the broad wording of their remedial powers in legislation, Australian courts have adopted a narrow and restrictive approach to the crafting of remedies. Once again, they have used the law of torts as the benchmark rather than formulating a remedy that takes account of the public interest arising from violation of human rights. Rather simplistically, the view has been that each individual complaint would exercise a ripple effect and contribute to a reduction in discrimination. In fact, individual complaints, about 98 per cent of which do not proceed to a public hearing, would appear to have little effect on the public consciousness other than the more notorious instances of sexual harassment.

If a complaint arises within a particular organisation and the complainant is successful in establishing discrimination, the typical approach of Australian courts has been to effect a remedy for the individual complainant alone without regard to the fact that the impugned act of discrimination may be merely one manifestation of a systemic discriminatory practice, such as the exclusion of Indigenous people from a workplace. The focus has been on compensating past conduct rather than looking to the future and prevention. In accordance with our view that a proactive, capacity-based approach be adopted in the promotion of human rights, we recommend that a court should be able to receive evidence that the individual complaint is indicative of class-wide discriminatory practices and make orders

²¹ In contrast with areas of law such as defamation, where large awards of damages are given for harm that is not quantified.

accordingly. The need for such a remedy is amply demonstrated by the number of reported conciliation cases in which changes to duty-holder practices are part of the settlement.²²

The *Anti-Discrimination Act 1977 (NSW) (ADA)*, s108(2)(e) does confer a power to develop a program or a policy, but it is limited to cases of racial or homosexual vilification. We believe that there is no justification for limiting the power in this way and that it should apply across the board. However, we note that ADA s 108(3) empowers the Tribunal to make orders that include instances where the respondent's conduct affects persons other than the complainant. We endorse inclusion of such a clause which constitutes an important step towards recognition of a systemic approach.

The United States courts have consistently been prepared to take account of the context in which the harm has occurred and make prospective orders in appropriate cases, if thought necessary. The most significant recent Supreme Court decision is ***Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder 557 US (2009) which upheld a constitutional race-based voting rights case with future effect of 25 years.*** While the supervision of orders with prospective effect could be onerous for a Court, we believe that the Australian Human Rights Commission would be well placed to carry out such an overseeing role which would accord with its community education remit.

We recommend minor changes only to the *Australian Human Rights Commission Act 1986*, s 46PO(4).²³

- (d) Omit 'by way of compensation' (or specific clause that damages should not be limited to compensation);

We recommend adding:

- (g) An order may extend to conduct of the respondent that affects persons other than the complainant or complainants if the court, having regard to the circumstances of the case, considers such an extension is appropriate;

²² See examples in the Conciliation Register at the AHRC web site.

²³ Section 46PO(4) provides:

- (4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:
 - (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
 - (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
 - (c) an order requiring a respondent to employ or re-employ an applicant;
 - (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
 - (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
 - (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

(h) an order requiring a respondent to develop and implement a program or policy aimed at addressing unlawful discrimination;

(i) The Australian Human Rights Commission is charged with an overseeing role of any orders with proactive effect.

d) LITIGATION COSTS

In their study of the experiences of parties under federal anti-discrimination laws, Gaze and Hunter interviewed 49 complainants in federal anti-discrimination litigation and 5 complainants in matters that had not reached court, as well as 23 lawyers and advisers to parties in the anti-discrimination system.²⁴ The results of those interviews provided evidence of the disincentive to bringing a discrimination claim created by the risk of an award of costs against them, especially for the most disadvantaged complainants. They may have to risk all or most of their personal financial assets, as well as undergoing the emotional and psychological stress of litigation in circumstances where the law is unclear and the litigation record shows that favourable decisions have often been set aside on appeal. Even if they succeed, damages awarded are in most cases quite low,²⁵ and fail to recognise the risks that litigants face and to compensate them adequately for their efforts in carrying out the public benefit function of enforcing human rights at their own risk and expense. As a result there is little incentive for individuals to enforce the law. This is significant because under current law, individual litigation is the only method of enforcing the law.

Awareness of this disincentive is part of the 'shadow of the law' under which parties engage in conciliation. Both parties know that complainants are unlikely to bring court action. This leaves complainants in a weak negotiating position in the conciliation process.

When enforcement was moved to the federal courts and the rule that costs follow the event was adopted, it was suggested that it would assist in providing access to legal representation on a no-win no-fee basis. However there is no evidence that this has occurred. Anti-discrimination litigation is complex and unpredictable. It requires the complainant to prove the basis of the action in direct discrimination, and that the condition or requirement was not reasonable in indirect discrimination. Many complainants are very powerless, such as people with serious disabilities, young people, many of whom do not have resources to be legally represented or advised, and who face high personal, legal and financial risks. Even if some complainants, whose cases may be worth the most in damages, can attract no-win no-fee or pro bono legal representation, this is not an effective method of enforcing the human rights across the board for all individuals.

²⁴ Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press 2010).

²⁵ Gaze and Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' above n.4; Dominique Allen 'Remedying discrimination: the limits of the law and the need for a systemic approach. (2010) 29 U.Tas. LR 83-110.

In addition there is a public interest in having some litigation in order to clarify the meaning and application of the law.

These issues could be addressed by changing the costs regime in two ways. First, as we contended in our previous submission, litigation in the federal courts in anti-discrimination matters should be placed on the same basis as litigation under the Fair Work Act or the Family Law Act where ordinary individuals have to face the risks of litigating. Costs should be awarded only where a party has behaved unreasonably. This is unlikely to have a substantial effect on the willingness of respondents to settle at conciliation, as we believe the major factors influencing this are those outlined above: complainants' difficulties in surmounting the problems of proof, and the disincentives complainants face to litigating because of the substantial risk of financial and personal costs they face, as well as respondents' desire to maintain the confidentiality of allegations.

However, an unwelcome effect of moving to a no-costs system would be to reduce the adequacy of compensation to successful complainants. To ensure that successful complainants are adequately compensated where they bring claims successfully against **respondents that have financial capacity to contribute to their costs, we recommend that there should be power to award costs against such a respondent.** This departure from symmetry regarding costs recognises:

- that the costs of enforcing human rights law should be more widely dispersed and should not fall solely on those who are disadvantaged by breaches of the law
- the fact that many organisational respondents have virtually unlimited resources for litigation with access to tax deductibility for litigation costs that is not available to individual complainants, and
- that many organisational respondents do not incur substantial personal risks like an individual complainant, which would operate as a discipline on engaging in litigation and encouraging settlement in this area.

Taking account of the resources available to the parties in this way would require those who can afford it to contribute to the costs of ensuring that the human right to non-discrimination is respected. This approach would acknowledge the difficulties for an individual with limited resources who can only enforce the law by bringing action against an organisation that may have substantial or unlimited resources for litigation, and the ability to ensure that human rights are respected in its business, operations and policies.

e) REPRESENTATION

Our March 2011 Report said:

“The shift of the hearing regime in antidiscrimination cases to the federal courts has created imbalances, distortions and ‘unintended effects’ for parties.²⁶ 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.²⁷ 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, and that agency assistance to specific litigants to assist with running their cases is common and valued in Canada and UK.

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.”²⁸

f) THE AHRC’S ROLE AND FUNCTIONS

QUESTION 27 Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

We repeat the recommendations of our March 2011 Report:

“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.”²⁹

It is has been widely recognised that the current enforcement mechanisms are not appropriate for addressing systemic discrimination or the public harm which discrimination causes.

²⁶ Beth Gaze and Rosemary Hunter, above n.24.

²⁷ Gaze and Hunter, above n 25.

²⁸ March 2011 Experts Report, 21.

²⁹ March 2011 Experts Report, 19.

Accordingly, we **recommend** that the AHRC be able to initiate complaints on its own motion. As noted above, we also **recommend** that the AHRC has the capacity and resourcing to support selected cases which are in the public interest.

“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*.”³⁰

“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.

We **recommend** that 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.”³¹

9. CONCLUDING REMARKS: CONFIDENTIALITY, RESEARCH AND VICTIMISATION.

Confidentiality and conciliated settlements

In our original submission we argued that although it was appropriate to respect party rights to confidentiality, particularly in respect of conciliation processes, it was equally important that the content and results of discrimination claims should be open to public scrutiny

³⁰ March 2011 Experts Report, 23.

³¹ March 2011 Experts Report, 23.

(Recommendation 16). Publicising the nature of settlements anonymously does not jeopardise the position of the parties.

Confidentiality and research

Although the issue is not raised in the current Discussion Paper we wish to reiterate our argument that properly approved research projects should be allowed access even to confidential materials (Recommendation 17, March 2011 Report). To support such research, complaints-related information should be preserved as archival information. Independent analysis of the interpretation and operation of current discrimination law informs sound public policy and good law reform. Confidentiality provisions in the legislation should not preclude research access authorised by a human research ethics committee.

Victimisation: criminal and civil liability

At present, victimisation is both a civil and criminal matter under federal anti-discrimination laws. The anti-discrimination Acts treat it as a criminal offence by defining penalties for it, while the AHRC Act includes it in the category of 'unlawful discrimination' which can be the subject of complaint to the Commission under Part IIB of the Act. Recently in *Walker v Cormack* [2011] FCA 861, Gray J suggested that the civil matter may not be able to be proceeded with because of the possibility it could expose a person against whom a victimization claim had been made to the possibility of criminal proceedings. Since we are not aware of any prosecution having ever been brought for victimisation under the federal law, it is essential that any suggestion that the criminal nature of the provision should impede bringing a civil claim of discrimination is resolved urgently.

APPENDIX 1: Relationship of Recommendations in this Submission to those in our Report of March 2011

Substantial revisions of our previous recommendations have been made on the following topics:

- Objects of the Act
- The meaning of Discrimination and exceptions
- Special exceptions
- Complaints and compliance framework, including conciliation, remedies, costs, representation and the AHRC's role.

We have revised and updated our previous positions on

- The Burden of Proof
- Special measures
- Temporary exemptions
- Legal representation and costs
- Confidentiality and research.

We continue to support our previous recommendations in the following areas:

3 Grounds / attributes

7 Reasonable adjustments and inherent requirements

10 Harassment

11 Vilification

12 Contracting out of the Act

13 Volunteers

14 Crown in Right of the State

15 Complaint handling

16 Confidentiality

17 Research access

18 Early intervention

19 Compliance and remedies

21 Structure of the Act

22 Guidelines and Codes of Practice

23 Implementation costs

24 Specialist Commissioners

25 Alternative means of complaint, monitoring and enforcement

26 The future of anti-discrimination legislation

APPENDIX 2: March 2011 report.

Note: some aspects of this report no longer represent our current thinking, which has advanced based on the issues raised in the Discussion Paper released in September 2011. In particular, the **recommendations for defining discrimination and the general exception in the March 2011 Report are now superseded by the recommendations** made in the Submission of 13 December 2011.

REPORT
ON RECOMMENDATIONS
FOR A CONSOLIDATED FEDERAL
ANTI-DISCRIMINATION LAW
IN AUSTRALIA

DISCRIMINATION LAW EXPERTS' ROUNDTABLE

29 NOVEMBER 2010

UPDATED: 31 MARCH 2011

This updated Report is current as at 31 March 2011.


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


Contact details for Discrimination Law Experts' Roundtable are:

 c/o Law Reform and Social justice Program, ANU College of Law,
Australian National University, ACT, 0200, Australia

 +61 (0)2 6125 7845

 +61 (0)2 6125 0103

 lrsj@anu.edu.au

 <http://law.anu.edu.au/lrsj>

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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	Associate Professor Simon Rice, OAM
Ms Anna Chapman	Professor Marian Sawer, AO
Dr Sara Charlesworth	Dr Belinda Smith
Dr Elizabeth Dickson	Professor Margaret Thornton
Professor Patricia Easteal, AM	Dr Helen Watchirs, OAM
Dr Beth Gaze	



L-R: Simon Rice, Peter Bailey, Beth Gaze, Elizabeth Dickson, Wayne Morgan, Patricia Easteal, Anna Chapman, Dominique Allen, Margaret Thornton, Belinda Smith, Marian Sawer, 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 set out in this report's bibliography. The roundtable participants canvassed the issues extensively before agreeing on the preferred approach in each case.

¹ Media Release, Attorney-General and Minister for Finance & Deregulation, 21 April 2010. [Discrimination Law Experts' Roundtable: Report on recommendations updated 31 March 2011](#)

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.

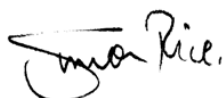
NATURE OF THE REPORT

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 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

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

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.

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 affected

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.

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 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 *rationally 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.

⁸ *Meiorin*

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

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. 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.

⁹ Senate Committee Report, page 150.

¹⁰ Senate Committee Report, page 149.

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, 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.

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

¹² Senate Committee Report, page 149.

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).

19 COMPLIANCE AND REMEDIES

Recommendation:

¹³NZHRC *Annual Report 2007*, p32.

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

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.

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*.

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.

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

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

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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MEMBERS OF THE DISCRIMINATION LAW EXPERTS' ROUNDTABLE

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, heterosexed 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.