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Consolidation of Commonwealth Anti-Discrimination Laws

Dear Sir / Madam

Introduction

Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to provide comments and to make a submission regarding the Consolidation of Commonwealth Anti-Discrimination Laws discussion paper (Discussion Paper).

About ALHR

ALHR was established in 1993 and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

ALHR comprises a network of Australian lawyers active in the practice, promotion, and implementation of international human rights law standards in Australia. It raises awareness of international human rights laws and standards through training, information, submissions and networking.

ALHR has a national membership of over 2000 and engages its members through National, State and Territory committees.

ALHR is a member of the Australian Forum of Human Rights Organisations. It is also a member of the Commonwealth Attorney General's NGO Forum on Human Rights and the Department of Foreign Affairs Human Rights NGO Consultations.

Summary of recommendations

1. ALHR endorses the unified definition of discrimination proposed by the Discrimination Law Experts Group (**DLEG**).¹
2. Once a complainant has raised a prima facie case of discrimination, the burden shifts to the respondent to establish a non-discriminatory reason for the treatment or evidence of a justification for that differential treatment. The consolidation bill should include a special measures provision which covers all protected attributes. Such measures must not diminish existing protections under existing anti-discrimination laws, and the continuation of such measures must be reviewed periodically to ensure they remain necessary having regard to the substantive equality they seek to achieve.² Affected parties should be consulted regarding the imposition (including timing) of special measures.
3. The consolidation bill should include an express duty to make reasonable adjustments to the physical or social environment for all protected attributes.
4. Public sector organisations should have a positive duty to eliminate discrimination and harassment. That duty should apply to the introduction or application of legislation. Further, responsibility for discrimination or harassment should be attributable to public sector organisations which subcontract or delegate their functions to private parties.
5. The prohibition against harassment should cover all protected attributes. Further consultation and analysis regarding the best way to achieve this (including an examination of how this has been achieved, and the advantages and disadvantages associated with certain mechanisms and initiatives) under similar legal systems is required.
6. The consolidation bill must prohibit discrimination based on sexual orientation, sex characteristics, gender identity and gender expression, and must define these grounds as inclusively as possible as outlined in the Australian Human Rights Commission's (**Commission's**) 'Addressing sexual orientation and sex and/or gender identity discrimination - Consultation report.'
7. Associates of a person with any of the protected attributes must be protected from discrimination in the new consolidation bill.
8. The current protections against discrimination need to be broadened and the consolidation bill must protect against discrimination on the basis of religious belief/activity; political belief/activity; trade union membership and industrial action; carer and/or family responsibilities; gender identity, sexual orientation, gender expression and intersex identity; homelessness and/or social status; irrelevant criminal record; **and** being a victim or survivor of domestic violence;
9. The consolidation bill should protect against intersectional discrimination by including in the definition of discrimination, discrimination on the basis of the intersection of two or more protected attributes.
10. The right to equality before the law should extend to sex, gender, gender identity, sexual orientation, gender expression, intersex identity, race, colour, descent and ethnic origin, nationality, religion and belief, disability, age, political or other opinion, irrelevant criminal record, marital, parental and family status, social origin or status (including homelessness), and violence (including domestic violence, gender-based violence, sexual assault, commercial exploitation, trafficking and forced sterilisation).
11. The consolidation bill should protect against discrimination or harassment in all

¹ S Rice et al., *Discrimination Law Experts Group submission*, December 2011 at 8.

² Having regard to applicable existing or prevailing international human rights law standards.

areas of public life.

12. The consolidation bill should afford voluntary workers the same level and degree of protection against discrimination and harassment afforded to paid workers and employees.
13. The consolidation bill should protect domestic workers from discrimination by removing any exceptions, measures or provisions which afford domestic workers fewer rights than paid 'employees'.
14. The consolidation bill should contain provisions which compel annual reporting³ by an adequately funded and resourced committee of the number and nature of complaints made by domestic workers on grounds involving discrimination, and which empowers investigation and standing by an independent body (such as the Commission) where discrimination involving domestic workers is concerned.
15. The preferred approach to coverage of clubs and member-based associations would be to adopt a similar (albeit broader) approach to that taken under section 9(1) of the *Disability Discrimination Act 1992* (Cth) (**DDA**) which broadly defines clubs and member-based associations and prohibits any discriminatory conduct which would impair enjoyment of a human right in public life.
16. In so far as any exceptions are permitted or retained, the consolidation bill should make it incumbent on clubs and member-based associations to show cause based on grounds of reasonable necessity and proportionality, having regard to evolving international human rights law standards, as to why they should be allowed to receive the benefit of the exception. Exceptions which are obtained by way of 'show cause' applications should be made publicly available by the club or member-based association, including the reasons for applying for that exception (which should be based on a well drafted and defined 'spirit' or 'intention' of the Act to eliminate discrimination and harassment in all areas of public life), to which it applies.
17. Exceptions should be reviewed periodically to ensure they continue to be reasonably necessary and proportionate having regard to evolving human rights standards.
18. The consolidation bill should apply to all partnerships regardless of size.
19. Whether discrimination in sport should be covered separately depends on whether an approach is taken which prohibits discrimination in all areas of public life. The consolidation bill must protect against discrimination in sport regardless of that approach.
20. The consolidated bill should prohibit requests for information which will be used to discriminate against a person on the basis of particular trait or attribute, and the disclosure of information unless needed for non-discriminatory purposes.
21. The consolidated bill should protect against discrimination based on arbitrary standards which bear no relationship to a person's participation or performance.
22. The vicarious liability provisions should be clarified in the consolidation bill. Liability for discrimination or harassment should be attributable to persons (natural or otherwise) with supervisory authority over the perpetrator. The starting position should be that the person knew of or was complicit in the act of discrimination, with the onus on that party then to show that it, he or she had no actual or constructive knowledge. The unlawful act in "connection with" test is preferred over the "within the scope of authority" test.

³ Which does not necessarily need to be separate from any independent reporting requirements prescribed by the legislation. (Such as an 'Australian Human Rights Commission Annual Report on the Consolidated Anti-discrimination Laws').

23. The consolidation bill should apply to all areas of public life with limited exception.
24. The definitions of inherent requirements and genuine occupational qualifications as provided for in section 30 of the *Sex Discrimination Act 1984* (Cth) (**SDA**) and sections 21B and 29A of the DDA should be retained. These exceptions should apply to all attributes and to all areas of public life to ensure consistency and certainty of laws.
25. Religious exemptions should only apply to the core functions and beliefs of religious institutions and acts such as appointing persons to perform official functions in connection with religious observance. They should not apply to membership of religious organisations or more commercial activities of a religious institution, nor should they apply to roles that are not connected to official functions and religious duties.
26. Temporary exemptions should only be available where they meet the objects of the legislation (which should be to promote substantive equality and eliminate discrimination and harassment in all areas of public life).
27. The consolidation bill must include carefully drafted and clearly articulated “Objects” and “Purpose” provisions to define the Act’s scope, application and interpretation, and to provide certainty and assistance to persons (including aggrieved parties and duty holders) as to their rights and obligations.
28. There are a number of other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination legislation. This includes compliance training and awareness raising initiatives, publications which set out duties, obligations and suggested methods for compliance in lay persons’ terms, formal acknowledgement / accreditation for adopting approved voluntary compliance plans and operating guidelines/standards, and other mechanisms set out by the Commission in its submission to the Discussion Paper.
29. The conciliation process should be retained in the consolidation bill. The consolidation bill should also provide for other voluntary Alternative Dispute Resolution (**ADR**) mechanisms (including arbitration) to facilitate faster and more cost-effective dispute resolution. Conciliation could be retained as a default option for parties who do not concede to a specified alternative. There should also be an option for parties to take the matter directly to court where it is clear the complaint cannot be resolved by conciliation or that particular respondents have a fixed position in relation to discrimination complaints.⁴
30. A no-cost litigation model similar to that provided for by the *Fair Work Act 2009* (Cth) (**FW Act**) should be adopted in the consolidation bill. Each party to a discrimination matter should bear its own costs.⁵
31. ALHR considers the Commission to be in the best position to comment on whether it is necessary to change its roles and functions to provide a more effective compliance regime, and to suggest what (if any) improvements are needed. ALHR supports the Commission’s recommendations relating to this issue and recommends that further funding and resources be committed to the Commission to enable it to effectively and efficiently fulfill its functions.
32. The mechanisms set out to manage interactions between Commonwealth anti-discrimination laws and the *FW Act* are workable and, to that end, satisfactory and should be maintained. Mechanisms are needed to manage such interactions

4 NACLC, *Access to Justice and Systemic Issues submission*, March 2011 at 8, accessed on 29 January 2012 at: <http://www.equalitylaw.org.au/LiteratureRetrieve.aspx?ID=48129>

5 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Report No. 30, 2004) (Productivity Commission Report)*, recommendation 13.4

33. The consolidation bill should include a provision similar to those contained in the *Racial Discrimination Act 1975 (Cth) (RDA)* and *SDA* which preserve the effect of anti-discrimination laws but also enable concurrent operation of compatible State and Territory laws. Existing provisions which mediate the interaction between State and Commonwealth complaint systems should be maintained to prevent forum shopping and “double-dipping”. The consolidation bill should not include a general exemption for acts done in direct compliance with specified State or Territory laws. (That is, State and Territory laws should not be automatically exempt from the need to comply with Commonwealth anti-discrimination laws where there is a direct conflict in relation to a particular matter).
34. The consolidation bill should apply to State and Territory Governments and instrumentalities.

Comments and submissions

Meaning of discrimination

Question 1 – What is the best way to define discrimination?

Recommendation: ALHR endorses the unified definition of discrimination put forward by the Discrimination Law Experts Group.⁶

ALHR supports the conclusion in the Discussion Paper that the definitions of direct and indirect discrimination are inconsistent and uncertain and that “these inconsistencies make the legislation unnecessarily complex.”⁷ The negative effect of the inconsistencies is widespread, and include:

- unnecessarily costly and time-consuming cases coming before the Courts;
- complainants facing significant barriers in their ability to access justice before the Courts;
- Australia derogating from its international human rights obligations to protect a person’s right to non-discrimination.⁸

For the reasons put forward in its submission (see below), ALHR endorses the definition recommended by the DLEG which incorporates both direct and indirect discrimination into a single unified definition.⁹ ALHR views this definition as a more simplified, accessible definition which recognises that direct and indirect discrimination are not mutually exclusive.

6 S Rice et al., *Discrimination Law Experts Group submission*, December 2011 at 8.

7 Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (2008) (‘SDA Report’)*, paragraph 11.12; discussed in Attorney General’s Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper, September 2011 (Consolidation Discussion Paper) at 9.

8 See eg. the *International Covenant on Civil and Political Rights (ICCPR)*, Article 26; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, Article 2(3), 3.

9 S Rice et al., *Discrimination Law Experts Group submission*, at 8

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 unfavourable treatment under (a) or is disadvantaged under (b)

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

The DLEG's definition adheres with the approach taken by international human rights treaties such as the *Convention on the Elimination of all forms of Racial Discrimination (CERD)* and the *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*. Both Conventions specifically include disadvantage to the complainant as a core aspect of discrimination.¹⁰

If the Government does not adopt a unified definition in the consolidation bill, ALHR supports the removal of the "comparator test" in the definition of unlawful discrimination due to the widespread difficulties associated with its application (including those identified in the Discussion Paper). Such difficulties result in a departure from Australia's human rights obligations, such as those under the *International Covenant on Civil and Political Rights (ICCPR)* which require Australia to adopt laws that protect a person's right to non-discrimination.¹¹

Question 2 – How should the burden of proving discrimination be allocated?

Recommendation: Once a complainant has raised a prima facie case of discrimination, the burden shifts to the respondent to establish a non-discriminatory reason for the treatment or evidence of a justification for that differential treatment

ALHR agrees there needs to be a reconsideration of how the burden of proof should be allocated. As noted in the Discussion Paper, the current full allocation of the burden of proof to the complainant in many Commonwealth and State anti-discrimination laws makes it disproportionately difficult for the complainant to establish unlawful discrimination. Further, few international approaches follow the Australian approach of placing the burden of proving discrimination entirely on the complainant.¹²

ALHR endorses the rebuttable presumption of discrimination method for allocating burden of proof adopted by the DLEG in its submission to the Discussion Paper (see below).¹³

¹⁰ CERD Article 1 and CEDAW Article 1. See also *ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation (1958)* and *UNESCO Convention Against Discrimination in Education (1966)*.

¹¹ ICCPR Articles 2,3.

¹² *Discrimination Discussion Paper* at paras 48-50.

¹³ S Rice et al., *Discrimination Law Experts Group submission*, at 9.

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.

The rebuttable presumption approach requires that, once a complainant has established a prima facie case that he or she has been a victim of discrimination, it shall be for the respondent to establish a non-discriminatory reason for the treatment or evidence of a justification for that differential treatment. The rebuttable presumption approach divides the burden of proof in a way which ensures both parties' rights and obligations are understood and adhered to. The suggested approach also accords with the approach of many international human rights instruments and certain requirements under UK, the European Union and Canadian law.¹⁴ Importantly, and as noted in the Discussion Paper, the approach of allocating a part of the burden of proof to the respondent has already been in operation under the *FW Act* and in section 136 of the *Equality Act 2010* (UK) without impairing either parties' party's right to justice in practice.

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?

Recommendation: There is value in including a special measures provision which covers all protected attributes in the consolidation bill. However, such measures must not diminish existing protections under existing anti-discrimination laws. Further, the continuation of such measures must be reviewed periodically to ensure they remain necessary having regard to the substantive equality they seek to achieve and to applicable international human rights laws and standards.¹⁵ Affected parties should be consulted regarding the imposition (including timing) of special measures.

Consistent with international human rights law and standards, ALHR sees merit in including a single special measures provision which covers all protected attributes. This is because, unlike in other areas of human rights law, the realisation of substantive equality may be dependent on "affirmative action" or "positive discrimination". A working example of this in Australia which has produced positive results can be seen in the context of the former access to higher education scheme which promoted higher education for Indigenous peoples.¹⁶

However, any special measures must only:

- be for the sole purpose of securing adequate advancement of the intended beneficiaries such that they may enjoy and exercise their human rights and

¹⁴ Eg. CERD, *General Recommendation No.30: Discrimination Against Non Citizens* (01/10/2004), Office of the High Commissioner for Human Rights, Recommendation 24; EU Directive 2000/78/EC, Article 31; UK Act, section 136;

¹⁵ Whilst the United Nations Special Rapporteur, Mr Marc Bossuyt, noted in his report of ten years ago that the issue of affirmative action is complex and that (at least at that time) no common ground had been reached regarding its limits, the Human Rights Committee has confirmed that affirmative action policies are compatible with international human rights. UN Doc. E/CN.4/Sub.2/2002/21. *Stalla Costa v Uruguay* (1987) UN Doc CCPR/C/30/D/198/1985 at 176, 192. See also Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007 at 176.

¹⁶ Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007 at 176.

fundamental freedoms equally with others;¹⁷

- only be authorised for as long as the objective of substantive equality has not been achieved;
- be legitimate in the sense of being reasonable and not arbitrary, with the onus of proving the measure is proportionate to the circumstances on those seeking to impose or enforce it;¹⁸ and
- not diminish existing protections provided for by existing anti-discrimination legislation (including in the area of racial discrimination) and, as submitted by the Commission, be consistent with the requirements under *CERD*, including as explained by the *Declaration on the Rights of Indigenous Peoples*.¹⁹

Affected parties must be consulted in relation to the imposition (including timing) of special measures.²⁰

Question 4 - Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

Recommendation: The consolidation bill should include an express duty to make reasonable adjustments to the physical or social environment in relation to all protected attributes.

ALHR supports the reasoning and submissions of the Commission regarding the need to explicitly state (and, by doing so, clarify) the need to provide reasonable adjustment and that this apply to all protected attributes. Express duties to make reasonable adjustments in relation to disability would, for example, accord with Australia's international human rights law obligations under the *Convention on the Rights of Persons with Disabilities*.²¹ ALHR also supports the submissions of the Equality Rights Alliance that the requirement to make reasonable adjustments should extend to employees with family or carer responsibilities as is currently the position in Victoria.²²

Question 5 - Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Recommendation: Public sector organisations should have a positive duty to eliminate discrimination and harassment. That duty should apply to the introduction or application of legislation. Further, responsibility for discrimination or harassment should be attributable to public sector organisations which

17 *Gerhardy v Brown* (1985) 159 CLR 70, 128 - 129 (Brennan J); See also Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7 *Indigenous Law Bulletin*, 11, 13.

18 See discussion by Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7 *Indigenous Law Bulletin*, 11, 12. See also Warwick McKean, *Equality and Discrimination under International Law* (1983) 82, and *The International Centre for the Legal Protection of Human Rights, Non-Discrimination in International Law – A Handbook for Practitioners* (2011 ed) 19.

19 Having said this, ALHR submits that it is important that an intersectional approach be taken towards achieving the objectives of the Committee on the Elimination of All Forms of Discrimination against Women and Committee on the Elimination of Racial Discrimination.

20 Megan Davis explains, for example, that although consent is undoubtedly important in the context of special measures, consent and consultation must be carefully considered having regard to particular situations where the proposed measures can vastly different impact different affected groups differently. Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7 *Indigenous Law Bulletin*, 11, 14.

21 See Articles 2 to 5 and 12 of the *Convention on the Rights of Persons with Disabilities*.

22 Section 9, *Equal Opportunity Act 2010* (Vic).

subcontract or delegate their functions to private parties.

Whilst international law is traditionally concerned with “State” (and hence “public”) actors, substantive equality cannot be achieved by subjecting public authorities and excusing private authorities from the rules and principles which aim to redress discrimination. Case law from international bodies exists which have considered not only the obligations of States to comply with non-discrimination principles, but also the obligation to ensure that those principles are observed by private actors. Australia is itself party to Conventions which confer the ability on individuals to bring a claim against public authorities for failures to enforce non-discrimination principles whether publicly or privately.²³ There is also scope to bring matters before international tribunals for failures by the State to “respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights in the *ICCPR*. Further, international case law exists to the effect that public authorities may be responsible for any discrimination that occurs when its functions are delegated or subcontracted to private parties.²⁴

Having regard to the foregoing, ALHR submits that public sector organisations should have a positive duty to eliminate discrimination and harassment, that that duty should apply to the introduction or application of legislation, and that responsibility for discrimination or harassment should be attributable to public sector organisations which subcontract or delegate their functions to private parties.

Question 6 – Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

Recommendation: The prohibition against harassment should cover all protected attributes. Further consultation and analysis regarding the best way to achieve this (including an examination of how this has been achieved, and the advantages and disadvantages associated with certain mechanisms and initiatives) under similar legal systems is required.

ALHR is committed to achieving substantive equality in all spheres, including in the workplace, public and private life. It agrees with the Discussion Paper position that the current legislative milieu poses unnecessary complexities and uncertainties in relation to the prohibition on harassment. It submits that the prohibition against harassment should cover all protected attributes and that further consultation and research around the issue regarding how best to implement this, is required.

Protected Attributes

Question 7 – How should sexual orientation and gender identity be defined?

Recommendation: Sexual orientation, sex characteristics, gender identity and gender expression must be defined to be as inclusive as possible as outlined in the Australian Human Rights Commission’s ‘Addressing sexual orientation and sex and/or gender identity discrimination - Consultation report.’

We welcome the federal government’s commitment to include new protections to prevent

²³ This includes, for example, *the International Covenant on Civil and Political Rights (ICCPR)* (as, for instance, interpreted by the Human Rights Committee (HRC) in *Nahlik v Austria* (No. 608/95, *ICCPR*, paragraph 8.2)), *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, and the *Convention on the Elimination of All Forms of Discrimination Against Women*. See also *The International Centre for the Legal Protection of Human Rights, Non-Discrimination in International Law – A Handbook for Practitioners* (2011 ed) 20, 21.

²⁴ See, for example, *B.d.b. v the Netherlands* (No. 2 /1, *ICCPR*).

discrimination on the basis of sexual orientation and gender identity.²⁵

We refer to consultations conducted by the Commission in 2010 in relation to discrimination on the basis of sexual orientation and gender identity.²⁶ We note, in particular, the comments during these consultations calling for protections in law to be as inclusive as possible with a number of participants supporting the use of the terms 'sex characteristics', 'gender identity' and 'gender expression'.²⁷ We further note that a number of participants "specifically supported the inclusion of the term 'intersex' in federal laws."²⁸

Question 8 – How should discrimination against a person based on the attribute of an associate be protected?

Recommendation: Associates of a person with any of the protected attributes must be protected from discrimination under the new consolidation bill.

The Discussion Paper acknowledges that there is an inconsistent approach towards the protection of associates of a person with a protected attribute. Protection of associates is provided for in the *DDA* and the *RDA* and in all States and Territories with the exception of Western Australia and South Australia.²⁹

Significantly, in its submission to the 2008 Senate Inquiry into the effectiveness of the *SDA* (**2008 SDA Review**), the Human Rights and Equal Opportunity Commission (as it was known then) recommended that:

*in the interests of national harmonisation, as well as ensuring that the Sex Discrimination Act represents 'best practice' in providing the most effective means of achieving substantive equality, the current definitions of discrimination under the SDA would benefit from statutory clarification'... [including by] 'amend[ing] the definitions of discrimination to cover disadvantage suffered as a result of an association with a person with a protected attribute or characteristic.'*³⁰

ALHR submits that protection from discrimination for associates of a person with any of the protected attributes provided for in the new consolidation bill is simpler, avoids confusion, and promotes consistency. This is in line with the Government's principles for this project, which are namely to:

- reduce complexity and inconsistency in regulation to make it easier for individuals and businesses to understand their rights and obligations under the legislation;

25 United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10 at paragraph 33 accessed on 28 January 2012 at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>; *Report of the Working Group on the Universal Periodic Review, Australia, Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/17/10/Add.1, 31 May 2011, response to recommendations 42 and 44, accessed on 29 January 2012 at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf

26 Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination - Consultation Report (Commission's Consultation Report)*, Sydney, 2010 accessed on 10 January 2012 at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/SGL_2011.pdf

27 *Commission's Consultation Report* at 27(35)

28 *Commission's Consultation Report* at 29 (37)

29 *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, September 2011 at 22.

30 Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting equality*, 1 September 2008 at 84 accessed on 10 January 2012 at: http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/submissions/sub69.pdf

- not reduce or diminish protections which current exist in federal anti-discrimination legislation; and
- clarify and enhance protections where appropriate.³¹

ALHR therefore recommends that associates of a person with any of the protected attributes be provided with protection from discrimination in the new consolidation bill.

Question 9 – Are the current protections against discrimination on the basis of these attributes appropriate?

Recommendation: The current protections against discrimination need to be broadened and the consolidation bill must protect against discrimination on the basis of religious belief/activity; political belief/activity; trade union membership and industrial action; carer and/or family responsibilities; gender identity, sexual orientation, gender expression and intersex identity; homelessness and/or social status; irrelevant criminal record; being a victim or survivor of domestic violence;

The consolidation bill is an opportunity to give effect to Australia's international human rights obligations and meet best practice with respect to protecting against discrimination. It is also an opportunity to remove confusion and ensure consistency across state and federal discrimination laws, the *Fair Work Act 2009 (Cth)*³² and the *Australian Human Rights Commission Act 1986 (Cth)*. It is for these reasons that ALHR recommends expanding protections against discrimination in the new consolidation bill.

ALHR has read and endorses the Human Rights Law Centre's (HRLC) comments and recommendations relating to the need to expand current grounds for protection against discrimination in the new consolidation bill.³³

Religious belief/activity; political belief/activity; trade union membership and industrial action; and carer and family responsibilities

To briefly summarise, protections against discrimination on the grounds of religious belief, political belief, trade union membership and industrial action, are found in obligations under International Labor Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*.³⁴ Obligations are also found in other human rights instruments, including the *ICCPR*³⁵ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*³⁶ which Australia has ratified.

Obligations to protect against discrimination on the grounds of family and/or carer responsibilities are found in both Article 11 of *CEDAW* and the Article 1 of *ILO C156 Workers with Family Responsibilities Convention, 1981 (Family Responsibilities*

³¹ Attorney General, *Consolidation of Anti-Discrimination Laws*, accessed on 10 January 2012 at:

<http://www.ag.gov.au/antidiscrimination>

³² We note section 351 *Fair Work Act* protects against discrimination in employment on the basis of a person's 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.

³³ Human Rights Law Centre, *Realising the Right to Equality, The Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws*, January 2012 at 23-33.

³⁴ See Article 1. *ILO 111* was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

³⁵ Articles 18, 19&21, 22 of *ICCPR* respectively

³⁶ Articles 6, 7 & 8 *ICESCR*.

Convention)³⁷, which acknowledges that more traditional forms of discrimination – such as sex discrimination – do not adequately capture the problems faced by parents and carers, especially in the workforce.

We further note section 351 of the *FW Act* protects against discrimination in employment on the basis of a person's "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."

ALHR therefore submits that to include the grounds of religious belief, political belief, trade union membership and industrial action, family and/or carer responsibilities for protection against discrimination in federal law would reduce confusion and promote consistency of discrimination laws.

Gender identity, sexual orientation, gender expression and intersex identity

We note the federal government's commitment to include new protections to prevent discrimination on the basis of sexual orientation and gender identity and the Commission's consultations highlighting the need for these protections to be as inclusive as possible referred to above. This is discussed further in our response to question 7 above.

Homelessness and/or social status

ALHR endorses the definition of social status proposed in the HRLC's submission, namely "a person's status as homeless, unemployed or a recipient of social security payments."³⁸

The HRLC refers to a study undertaken by PILCH Homeless Persons' Legal Clinic which found homeless people were treated unfairly in the areas of accommodation and provisions of goods and service on the grounds of homelessness or their social status.³⁹

Similarly, the Special Rapporteur on Adequate Housing has stated that:

*...homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status.*⁴⁰

Article 2 of *ICCPR* and Article 2 of *ICESCR* provide for respect of the human rights within the Covenants without distinction of any kind, including "other status". Article 26 of *ICCPR* provides for protection from discrimination on any ground, including "other status". General Comment 20 further elaborates upon the meaning of "other status", noting it is "not an exhaustive list"⁴¹ and includes "social origin,"⁴² "economic or social group or strata, including a person's social and economic situation when living in poverty or being homeless".⁴³ ALHR submits this includes homelessness and social status and that the grounds for protection against discrimination should therefore include homelessness and social status.

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

38 Cited in HRLC, *Realising the Right to Equality* at 26.

39 HRLC, *Realising the Right to Equality* at 26.

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

41 Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, 2 July 2009 at paragraph 15 accessed on 29 January 2012 at: <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>

42 *General Comment 20* at paragraph 24.

43 *General Comment 20* at paragraph 35.

Irrelevant criminal record

Article 2 of *ILO 111* requires all parties to:

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

Australia has incorporated *ILO 111* into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) now called the *Australian Human Rights Commission Act 1986* (Cth). The *Australian Human Rights Commission Regulations 1989* (Cth) includes 'criminal record' as a grounds of discrimination. This is therefore not a new ground of discrimination. To promote consistency across all discrimination laws, ALHR submits that discrimination on the basis of criminal record be included in the federal consolidated bill.

Victim or survivor of domestic violence

The Discussion Paper acknowledges that domestic violence is a "significant problem in Australia" and specifically refers to support for a new ground of protection against discrimination; namely victim or survivor of domestic violence.

Research highlights that financial security and independence can provide important protection for victims and survivors of domestic violence.⁴⁴ Having paid employment is an important form of financial security and independence. However, a recent national survey undertaken to assess the prevalence of domestic violence as it affects the Australian workplace found that nearly one third of respondents reported personally experiencing domestic violence. And nearly half of those who experienced domestic violence reported difficulties with getting to work.⁴⁵

In recent years, domestic violence workplace entitlements have started to be included in a number of Australian enterprise agreements.⁴⁶ And in February 2011, the NSW Government announced its support for domestic violence related leave in the public sector.⁴⁷

These are all extremely important developments and ALHR warmly welcomes the continuing inclusion of such entitlements in enterprise agreements. However, protection for victims or survivors of domestic violence is also "appropriate" and required through the consolidation bill. This is consistent with Australia's human rights obligations, including CEDAW General Recommendations 12 and 19, Articles 2, 3, 7 and 26 of *ICCPR*, and Articles 3 and 10 of *ICESCR*. Further, in its 2010 review of Australia, the

44 ALRC, *Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation*, February 2011 at 4(8) accessed on 13 January 2011 at:

http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP%2036%20Whole%20Pdf_0.pdf ; Rochelle Braaf & Isobelle Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011 at 25-30 (27-32) accessed on 13 January 2012 at: <http://www.adfvc.unsw.edu.au/PDF%20files/Seeking%20Security%20Report%20WEB.pdf>

45 *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey, Key findings 2011* accessed on 12 January 2012 at: <http://www.dvandwork.unsw.edu.au/download/file/fid/27>

46 See, for example, <http://www.dvandwork.unsw.edu.au/resources#workplace> and ALRC, *Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation*, February 2011 at 18 (22).

47 'Domestic violence victims granted leave', *SMH*, 12 February 2011 accessed on 12 January 2012 at:

<http://news.smh.com.au/breaking-news-national/domestic-violence-victims-granted-leave-20110212-1aqy8.html>

Committee on the Elimination of Discrimination against Women recommended that Australia develop strategies to prevent homelessness resulting from domestic violence.

Protection on this ground in the consolidated bill is also required, as Smith and Orchiston discuss, because current legislation does not provide adequate protection from discrimination on the basis of being a victim or survivor of domestic violence.⁴⁸

Additionally, as the Commission notes:

*a law prohibiting such discrimination would help to raise community and business awareness about the impact of domestic and family violence. This may, in turn, facilitate the adoption of policies and procedures to support victims and survivors of domestic violence and aid in establishing workplace and other environments that are generally more supportive of victims and survivors.*⁴⁹

ALHR submits that such an education function could assist in further moving domestic violence out of the private sphere into the public sphere.

The federal Australian Labor Party (**Labor**) recently amended its platform to explicitly state that “Labor will further ensure that the Fair Work and anti-discrimination legislation frameworks provide appropriate protection to victims of domestic violence in the workplace, including in relation to leave entitlements.”⁵⁰ As the amendment suggests, provisions to protect victims or survivors of domestic violence through Fair Work and enterprise agreements should complement protections provided through a consolidation bill.

ALHR therefore strongly supports the inclusion of protection against discrimination on the basis of being a victim or survivor of domestic violence in the new consolidation bill.

Question 10 – Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

Recommendation: The consolidation bill should protect against intersectional discrimination. Intersectional discrimination should be covered by including in the definition of discrimination, discrimination on the basis of the intersection of two or more protected attributes.

ALHR refers to the HRLC’s submission and endorses the reasons set out in that submission as to why intersectional discrimination should be included in the consolidation bill.⁵¹

ALHR refers to and endorses the way NACLC proposes intersectional discrimination be covered: namely – “the definition of discrimination should include discrimination on the basis of the intersection of two or more of these attributes.”⁵²

48 Belinda Smith and Tashina Orchiston, *Domestic Violence Victims and Work: the Role of Anti-Discrimination Law, Working Paper*, December 2011 accessed on 10 January 2012 at:

http://sydney.edu.au/law/about/staff/BelindaSmith/Smith_Orchiston_DV_and_Anti_Discrimination_Law_Working_Paper_12Dec2011_revised.pdf

49 Andrea Durbach, ‘Domestic violence discrimination and the consolidation of Commonwealth anti-discrimination laws’, *Safe at Home, Safe at Work Conference*, 5 December 2011 accessed on 12 January 2012 at:

http://www.humanrights.gov.au/about/media/speeches/sex_discrim/2011/20111205_domestic_violence.html

50 Motions from the ALP National Conference 2011, Amendment 448A accessed on 12 January 2012 at:

<http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/>

51 HRLC, *Realising the Right to Equality*, at 33-35.

52 NACLC, *Areas for increased protection in discrimination law*, April 2011 at 14-15 accessed on 29 January 2012 at: <http://www.equalitylaw.org.au/LiteratureRetrieve.aspx?ID=48130> .

Protected Areas of Public Life

Question 11 – Should the right to equality before the law be extended to sex and / or other attributes?

Recommendation: The right to equality before the law should extend to sex, gender, gender identity, sexual orientation, gender expression, intersex identity, race, colour, descent and ethnic origin, nationality, religion and belief, disability, age, political or other opinion, irrelevant criminal record, marital, parental and family status, social origin or status (including homelessness), and violence (including domestic violence, gender-based violence, sexual assault, commercial exploitation, trafficking and forced sterilisation).

The universality of human rights is based on the premise that all people are born “free and equal in dignity and rights”.⁵³ The international conventions to which Australia is a party require domestic protection on well established ‘grounds’ of discrimination, including:

- sex and gender⁵⁴;
- sexual orientation;
- race, colour, descent and ethnic origin⁵⁵;
- nationality;
- language;
- religion and belief;
- disability;
- age;
- political or other opinion; and
- marital, parental and family status.

The right to equality before the law regardless of sex or other attributes, and a prohibition against discrimination in the enjoyment of rights and freedoms in all areas of public life without qualification or exception is, having regard to current knowledge⁵⁶ and Australia’s increasingly liberal and globalised society, necessary for achieving substantive equality and the equal enjoyment of human rights and freedoms.⁵⁷

53 Article 1, *Universal Declaration of Human Rights*; Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007, 175.

54 The European Union addresses discrimination against transgendered and transsexual individuals as a form of gender discrimination. Whether this or another approach is adopted by the consolidation bill, ALHR submits that any prohibition against discrimination should afford unqualified protection to persons regardless of sexual orientation or gender identity.

55 ALHR submits that these anti-discrimination protections based on these grounds should extend to migrants, Indigenous peoples, victims of trafficking, refugees and asylum seekers as these groups are particularly vulnerable to racial or ethnic discrimination.

56 Ignorance breeds fear.

57 Whilst it is recognised that the equality and discrimination may be differentiated conceptually, it is understood that “the goal of equality is usually achieved in the first instance through a prohibition on discrimination”. See Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007, 176.

Question 12 - What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

Recommendation: The consolidation bill should protect against discrimination or harassment in all areas of public life.

ALHR supports the elimination of discrimination and harassment in all areas of public life. Any consolidated anti-discrimination law should focus on achieving substantive justice by prohibiting discrimination by or against a person engaged in any activity regardless of the area of public life in which the activity is conducted.⁵⁸ This includes all areas of public life on grounds addressed in response to question 11, as well as the following grounds:

- social origin or status (including but not limited to homelessness); and
- violence (including gender-based violence, domestic violence, sexual assault, commercial exploitation, trafficking and forced sterilisation).

Speaking to some areas of public life to which protection against discrimination must extend, ALHR notes that the Government has already committed, by ratifying certain international conventions, to eliminating discrimination as follows:

Form of discrimination	Areas of public life concerned	Convention
Sex and gender discrimination	<p>All areas of public life concerning civil and political involvement including but not limited to status and identity, property rights, citizenship and immigration, tax and social security</p> <p>All areas concerning economic, social and cultural involvement</p> <p>The political, economic, social, cultural, civil or any other field, whether influenced or impacted publicly or privately by any person, organisation or enterprise, which affects women</p> <p>Areas of public life concerning children</p> <p>Areas of public life concerning enjoyment of rights by the disabled</p>	<p>ICCPR</p> <p>ICESCR</p> <p>CERD</p> <p>CEDAW</p> <p>CRC</p>
Sexual orientation	<p>All areas of public life concerning civil and political involvement including but not limited to marriage, expression, adoption and child custody, access to welfare, ability to access effective remedies to seek redress for discriminatory abuses</p> <p>All areas of public life concerning economic, social and cultural involvement</p>	<p>ICCPR</p> <p>ICESCR</p> <p>CERD</p> <p>CEDAW</p> <p>CRC</p> <p>CRPD</p>

⁵⁸ This represents a more liberal adaptation of the approach taken in section 22(1) of the *Tasmanian Anti-Discrimination Act 1998* which prohibits discrimination by or against a person in any activity so long as it is 'in connection with' certain specified areas of public life.

Race, colour, descent and ethnic origin	Areas of public life concerning identity based on race, language, culture, religion, or national or ethnic origin, including but not limited to employment, access to goods, services and public accommodation, access to justice	CERD CEDAW CRC CRPD
Social origin or status	All areas of economic, social and cultural life where participation or development may be influenced by social status, including property (or lack thereof). Includes education, healthcare and access to public places	ICESCR ⁵⁹
Violence	All areas of public life (including economic, social and cultural life) where violence (gender-, race-based, or otherwise) publicly or privately perpetuated is concerned	CEDAW CERD ICESCR

Question 13 – How should the consolidation bill protect voluntary workers from discrimination and harassment?

Recommendation: The consolidation bill should afford voluntary workers the same level and degree of protection against discrimination and harassment afforded to paid workers and employees.

As the Discussion Paper acknowledges:

[A] volunteer [is] ... an individual engaging in behaviour ... that is essentially (primarily) motivated by the expectation of psychic benefits of some kind as a result of activities that have a market value greater than any remuneration received for such activities.⁶⁰

Any form of harassment or discrimination whether practised against a paid or voluntary worker has the effect of normalising such practices. Further, the failure to protect voluntary workers to the same extent as paid employees has the effect of discouraging, rather than encouraging, volunteerism (which the Federal Government has developed initiatives to promote).⁶¹

⁵⁹ Section 18 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* provides that every person has the right to participate in public affairs without discrimination, and that every eligible person has the right to vote, be elected at periodic elections and have access to public service and office. Whilst homeless persons are not expressly excluded from public life participation, they do face particular impediments in their ability to enjoy it. For example, many homeless persons do not have a recognised or long-term residential address and may therefore be inclined not to register for voting for fear of not being able to register a change of address and therefore facing a fine or other penalty. See, for example, PILCH Homeless Persons' Legal Clinic, Federation of Community Legal Centres Victoria, Human Rights Law Resource Centre, 'Homelessness and Human Rights – A Guide for Community Lawyers' at 10.

⁶⁰ Diane Desautels, 'Discrimination Law – Statutory Protection for Volunteers Against Discrimination: Quinipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities' (1987) 204 Conn. 287, 528 A.2d 352 at 126 (http://assets.wne.edu/161/8_comm_Discrimi.pdf).

⁶¹ See, for example, information regarding the Federal Government's Department of the Prime Minister and Cabinet's recent initiatives (including its National Volunteering Strategy Consultation Report published in early 2011)

Question 14– Should the consolidation bill protect domestic workers from discrimination? If so, how?

Recommendation: The consolidation bill should protect domestic workers from discrimination by removing any exceptions, measures or provisions which afford domestic workers fewer rights than other workers or employees. The consolidation bill should include provisions which compel reporting by an adequately funded and resourced body of the number and nature of complaints made by domestic workers on grounds involving discrimination.

The consolidation bill should empower further investigation and standing in relation to discrimination in the context of domestic worker matters by an independent body (such as the Commission).

As explained by the International Labour Organization’s [sic] Committee of Experts on the Application of Conventions and Recommendations (**CEACR**), domestic workers are susceptible to multiple forms of discrimination and abuse by virtue of their individual employment relationships, “stereotyped thinking about gender roles” and general undervaluing. The lack of legislative protection contributes to their vulnerability.⁶²

According to the CEACR, “laws or measures designed to promote equality of opportunity and treatment in employment and occupation that exclude domestic workers from their scope are contrary to” the *ILO Equal Remuneration Convention No. 100*, and to *ILO 111*. Australia is a party to both these conventions. ALHR highlights, in particular, the CEACR’s concerns in relation to the non-compliance of Australian laws with *ILO 111* through its use of “specific, blanket exceptions” in legislation which leaves “the door open to discrimination against domestic workers”.⁶³

Having regard to the foregoing and consistent with the prescribed international human rights laws and standards which Australia expressly committed to, ALHR submits that the consolidation bill should protect domestic workers from discrimination by removing any exceptions, measures or provisions which afford domestic workers fewer rights than other workers. The consolidation bill should also contain provisions which compel reporting by an adequately funded and resourced body of the number and nature of complaints made by domestic workers on grounds involving discrimination, and which empowers further investigation and standing in cases involving discrimination against domestic workers by an independent body (such as the Commission).

Question 15 – What is the best approach to coverage of clubs and member-based associations?

Recommendation: The preferred approach to coverage of clubs and member-based associations would be to adopt a similar (albeit broader) approach to that taken under section 9(1) of the DDA which broadly defines clubs and member-

to encourage a responsive and supportive volunteering environment in Australia at http://www.dpmc.gov.au/publications/national_volunteering/index.cfm.

62 See International Labour Office – Geneva, Report IV(1) - Decent Work for Domestic Workers – Fourth Item on the Agenda (2010) at 17.

(http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf).

63 The CEACR cites, by way of example, the Victorian Equal Opportunity Act 1995 which permits employers to discriminate when determining who should be offered employment for personal or domestic services in a person’s home. See International Labour Office – Geneva, Report IV(1) - Decent Work for Domestic Workers – Fourth Item on the Agenda (2010) at page 51

(http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf).

based associations and prohibits any discriminatory conduct which would impair enjoyment of a human right in public life.

The bill should make it incumbent on clubs and member-based associations to show cause based on grounds of reasonable necessity and proportionality, having regard to evolving international human rights law standards, as to why they should be entitled to the benefit of an exception.

Exceptions should be reviewed periodically to ensure they continue to be reasonably necessary and proportionate having regard to evolving human rights standards.

Whilst recognising the need to respect and protect the right to freedom of association⁶⁴, ALHR submits that consistent with the objectives that anti-discrimination laws seek to achieve, the preferred approach to coverage of clubs and member-based associations would be to adopt a similar (albeit broader) approach to that taken under section 9(1) of the *DDA* which broadly defines clubs and member-based associations and prohibits any discriminatory conduct which would impair enjoyment of a human right in public life.

It is contrived to maintain exceptions and limitations which, for example, legalise (and hence legitimise) discrimination in “clubs” with 30 or more members which sell or supply liquor. In this regard (and with respect to clubs, memberships or associations that are “attribute-based”), ALHR proposes that the consolidation bill should make it incumbent on them to show reasonable cause, seek “leave” based on grounds of reasonableness and necessity, or, in other words, “opt-out” on grounds which, by international law standards, are reasonably necessary and proportionate to achieving a clear legitimate end. The continued application of any exception (or, as one author puts it, “‘justification’ for discrimination”⁶⁵) should be reviewed periodically to ensure the ground for granting the exception continues to be reasonably necessary and proportionate having regard to evolving international human rights law standards.⁶⁶

Question 16 – Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

Recommendation: The consolidation bill should apply to all partnerships regardless of size.

64 ALHR notes, in particular, the following conclusions of Elizabeth Odio Benito, Special Rapporteur of the United Nations Sub-Commission on Human Rights, that “[a] regime of absolute respect for human rights must reconcile unity with diversity, interdependence with liberty. The equal dignity owed to all seeks respect for the differences in the identity of each person. It is in absolute respect for the right to be different that we find authentic equality and the only possibility of the full enjoyment of human rights without racial, sexual or religious discrimination”. (See Elizabeth Odio Benito, *Study of the Current Dimension of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, [17], UN Doc E/CN.4/Sub.2/1987/27. See also Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007, 192.

65 Diane Desautels, ‘Discrimination Law – Statutory Protection for Volunteers Against Discrimination: Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities’ (1987) 204 Conn. 287, 528 A.2d 352 at 129 (http://assets.wne.edu/161/8_comm_Discrimi.pdf).

66 For instance, in the context of employment, US courts have held that employers are not to assume categorically that women, due to their sex, cannot perform a particular line of work. See, for example, *Weeks v Southern Bell Tel. & Tel. Co.* 408 F2d 228 (5th Cir, 1969); *Rosenfeld v Southern Pac. Co.*, 444 F2d 1219 (9th Cir, 1971). See also Diane Desautels, ‘Discrimination Law – Statutory Protection for Volunteers Against Discrimination: Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities’ (1987) 204 Conn. 287, 528 A.2d 352 at 130 (http://assets.wne.edu/161/8_comm_Discrimi.pdf).

ALHR agrees with the Discussion Paper view that the policy rationale for inconsistencies in the application of anti-discrimination laws to partnerships in Australia is “obscure”.⁶⁷ Having regard to the main aim of human rights which is to accord everyone equal opportunities for free and full development such that “methods of eliminating discrimination include redressing actual inequalities in the enjoyment of human rights”⁶⁸, ALHR submits that the consolidation bill should apply to all partnerships regardless of size.

Question 17 – Should discrimination in sport be separately covered? If so, what is the best way to do so?

Recommendation: Whether discrimination in sport should be separately covered depends on whether an approach is taken which prohibits discrimination in all areas of public life. The consolidation bill must protect against discrimination in sport regardless of the approach taken.

If an approach is taken by the Government to prohibit all forms of discrimination which would impair the enjoyment of a human right in public life, ALHR submits it may not be necessary for the consolidation bill to provide for separate coverage of discrimination in sport. This is because discrimination in relation to sport could be adequately covered by provisions which prohibit discrimination in employment, education, provision of services and facilities, clubs and membership-based association, partnerships, volunteer work, etc.

However, should the consolidated bill not uniformly apply to all areas of public life including, without limitation, voluntary workers, clubs and member-based associations, partnerships, etc, ALHR submits that it should at least articulate a protection for sport which is no less than that provided for under Victorian legislation. In other words, the consolidated bill should at least prohibit discrimination without necessary and reasonable cause⁶⁹ which results from refusing or failing to select other persons in a sporting team or by excluding persons from participating in sporting activities. Such provisions should impose an obligation that reasonable adjustments be made to accommodate effective participation in relation to sport and sport-related activities.

Question 18 – How should the consolidated bill prohibit discriminatory requests for information?

Recommendation: The consolidated bill should prohibit requests for information which will be used to discriminate against a person on the basis of particular trait or attribute, and the disclosure of information unless needed for non-discriminatory purposes.

The consolidated bill should prohibit discriminatory requests for information based on arbitrary standards which bear no relationship to an individual’s participation or performance in public life. This includes, for example and without limitation, criminal

67 Australian Government – Attorney General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, September 2011, 32.

68 K. Tomasevski, ‘Women’s Rights’ in J. Symonides (ed), *Human Rights: Concepts and Standards* (2000), 231 – 58; Rhona Smith, *Textbook on International Human Rights* 3rd ed, 2007, 192.

69 Which, for instance, may result from compelling health and safety concerns, and on which the onus should be put on sporting associations, clubs or bodies to demonstrate that such cause is necessarily reasonable and proportionate to achieving a desired outcome (eg, to prevent death or physical injury).

convictions which have no relevance or association to paid, voluntary or domestic work, or poor credit record.⁷⁰

Question 19 – Can the vicarious liability provisions be clarified in the consolidation bill?

Recommendation: The vicarious liability provisions should be clarified in the consolidation bill. Liability for discrimination or harassment should be attributable to persons with supervisory authority over the perpetrator, with the starting point being that the person knew of or was complicit in the act of discrimination. The onus should then be on that person to prove that he or she had no actual or constructive knowledge.

The unlawful act in “connection with” test is preferred over the “within the scope of authority” test.

ALHR considers that the vicarious liability provisions can be clarified in the consolidation bill. Consistent with the views expressed by the International Centre for the Legal Protection of Human Rights (**INTERIGHTS**), liability for discrimination or harassment should be attributable to persons with supervisory authority over the perpetrator.⁷¹ Persons with supervisory authority typically have power and authority to “monitor and end” discriminatory practices. Whether such power or authority is immediate or otherwise is irrelevant to whether discrimination or harassment occurred. The starting point should be that the person knew of, or was complicit in, the discriminatory conduct, with the onus then on the supervising party to prove that it, he or she had no actual or constructive knowledge.

There is an interest in attributing responsibility for monitoring and reprimanding those who commit discrimination or harassment as far up the supervisory chain as possible in order to foster environments which discourage discrimination and harassment. This is so in both public and private life as it would encourage policies and practices with the elimination of discrimination and harassment in mind.

ALHR considers the unlawful act in “connection with” test (as adopted in the *RDA* and *SDA*) to be simpler and more appropriate for achieving the universal aims of anti-discrimination legislation than the “within the scope of authority” test adopted in the *Age Discrimination Act* and *DDA*.

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

Recommendation: The consolidation bill should apply to all areas of public life with limited exception.

Exceptions to anti-discrimination laws may serve a specific purpose (for example, a women-only counselling service to victims of sexual assault). In such cases, allowance should be provided in the legislation for special measures which promote substantive equality and are consistent with the objects of anti-discrimination legislation.

A general limitations clause may be appropriate for acts done under statutory authority, insurance, pensions and allowances and charities. However in other areas it may be more appropriate to have specific exceptions for educational institutions and religious institutions. Exceptions for educational institutions should be limited to allow for same sex schools and religious-affiliated schools to operate accordingly. There should be no

⁷⁰ For an interesting discussion on the application of discriminatory requests for information under US legislation, see Diane Desautels, ‘Discrimination Law – Statutory Protection for Volunteers Against Discrimination: Quinipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities’ (1987) 204 Conn. 287, 528 A.2d 352 at 139 – 140 (http://assets.wne.edu/161/8_comm_Discrimi.pdf).

⁷¹ The International Centre for the Legal Protection of Human Rights, *Non-Discrimination in International Law – A Handbook for Practitioners* (2011 ed) 118.

exception for discrimination on the basis of race, sexual orientation or gender identity in schools as this may effectively deprive certain groups of the right to education. Likewise, discrimination by religious institutions should be limited to their core functions and beliefs and not be a blanket exemption to all activities of religious institutions.⁷²

Exemptions in relation to combat duties should now be changed or removed to reflect the changes implemented by the Australian Defence Force in 2011.

ALHR supports anti-discrimination laws that apply to all areas of public life with limited exceptions. This would promote certainty and consistency of the laws. Special measures designed to promote equality should be provided for in the legislation. There should be no general exceptions for sexual harassment, or racial or religious vilification.

Question 21 – How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

Recommendation: The definitions of inherent requirements and genuine occupational qualifications as provided for in section 30 of the SDA and sections 21B and 29A of the DDA should be retained. These exceptions should apply to all attributes to ensure consistency and certainty of law.

Question 22 - How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

Recommendations: Religious exemptions should only apply to the core functions and beliefs of religious institutions and acts such as appointing persons to perform official functions in connection with religious observance. They should not apply to membership of religious organisations or more commercial activities of a religious institution, nor should they apply to roles that are not connected to official functions and religious duties.

It is important that religious exemptions should only apply to the core functions and beliefs of religious institutions and acts such as appointing priests or ministers or other persons to perform official functions in connection with religious observance. It should not apply to membership of religious organisations or more commercial activities of a religious institution (such as hiring out facilities and accommodation or the provision of goods and services). It should also not apply to roles that are not connected to official functions and religious duties (such as a janitor or administrative officer working at a religious school).

In relation to gender identity, a person who is intersex or who has legally changed their sex or gender should be entitled to be recognised as the gender/sex which they have adopted. There should be no exemptions which apply to this including with respect to religious institutions. For example, if a person has legally changed their sex from female to male, he should be treated as a male by the religious institution rather than the sex which he previously identified as.

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?

Recommendations: Temporary exemptions should only be available where they meet the objects of the legislation (which should be carefully and clearly stated as

⁷² *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010)

promoting equality and eliminating discrimination and harassment in all areas of public life).

Temporary exemptions create difficulties in terms of certainty and consistency of laws. If provided for in consolidated legislation, temporary exemptions should only be available to allow time for a person or entity to comply with regulations. For example, it may be appropriate where some time is required to comply with new disability standards. Temporary exemptions should only be available where they meet the objects of anti-discrimination legislation (such as promoting equality and ending discrimination).

Recommendation: The consolidation bill must include carefully drafted and clearly articulated “Objects” and “Purpose” provisions to define the Act’s scope, application and interpretation, and to provide certainty and assistance to persons (including aggrieved parties and duty holders) as to their rights and obligations.

Complaints and Compliance Framework

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?

Recommendations: There are a number of other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination. This includes compliance training and awareness raising initiatives, publications which set out the obligations for compliance in lay persons’ terms, formal acknowledgement / accreditation for adopting approved / certified voluntary compliance plans and operating guidelines, and other mechanisms as set out by the Commission in its submissions to the Discussion Paper.

ALHR endorses the recommendations put forward by the Commission regarding mechanisms that would assist with providing greater clarity and certainty to duty holders regarding their compliance obligations under Commonwealth anti-discrimination law. It notes, in particular, the potential attractiveness to public and private organisations and to service providers of a formal acknowledgement / accreditation (such as a recognised certification or “seal of approval”) to those who develop and adopt policies and initiatives to eliminate discrimination and harassment in their immediate environments.⁷³ It also notes the importance of regular public and private anti-discrimination, harassment and vilification compliance training and awareness-raising programs and initiatives.⁷⁴

73 Examples of this can be seen through the introduction of ‘Employer of Choice for Women’ recognition initiatives, United Nations Global Compact recognition for private organisations committed towards the implementation of human rights in business practices, etc. Of course, this would need to be balanced against the possibility for abuse by persons who prepare and undertake to comply with policies and practices dedicated towards eliminating discrimination and harassment but do not comply with them. To that end, certification should constitute a formal agreement to comply with the terms of anti-discrimination legislation, with enforceable penalties applicable to those who commit a breach.

74 For instance, the Victorian Equal Opportunity Commission regularly offers ‘understanding the law’ and ‘effective practice’ training workshops around Victorian anti-discrimination legislation, including ‘Play by the rules: promoting fair, safe and inclusive sport’, ‘Workplace behaviour: preventing and managing sexual harassment and bullying’, ‘Inclusive recruitment’, and ‘Positive duty at work’.

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

Recommendations: The conciliation process should be retained in the consolidation bill. The consolidation bill should also provide for other voluntary Alternative Dispute Resolution (ADR) mechanisms (including arbitration) to facilitate faster and more cost-effective dispute resolution. Conciliation could be retained as a default option for parties who do not concede to a specified alternative. There should also be an option for parties to take the matter directly to court where it is clear the complaint cannot be resolved by conciliation or that particular respondents have a fixed position in relation to discrimination complaints.⁷⁵

Conciliation

ALHR supports maintaining the conciliation process in the consolidation bill. This allows for a low-cost mechanism for parties to attempt to resolve complaints and provides greater flexibility and control to both the complainant and respondent in terms of outcomes and remedies for the complaint.

With the introduction of the *Civil Dispute Resolution Act 2011 (Cth)*, the Federal Magistrates Court and the Federal Court have moved towards a system whereby parties are required to make genuine attempts to resolve disputes prior to commencing proceedings in either Court. The existing conciliation process is consistent with this approach.

Other ADR

The introduction of other voluntary ADR would provide greater alternatives for low-cost and speedier dispute resolution. The option of having arbitration is appealing, particularly for complainants who lack sufficient funds to pursue court proceedings. Such other voluntary ADR options could be offered as an alternative to compulsory conciliation where both parties consent to use the alternative. Compulsory conciliation could be retained as the default option for parties who do not apply for other alternatives or cannot agree on another alternative.

ALHR refers to NACLC's *Access to Justice and Systemic Issues submission* and endorses NACLC's position that in some circumstances, particularly where it is clear that the complaint cannot be resolved by conciliation, or that particular respondents have a fixed position in relation to discrimination complaints, there should be an option for parties to take the matter directly to court.⁷⁶

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

Recommendations: There are a number of improvements that need to be made to the court process for anti-discrimination complaints. Amongst these include the need to simplify standing requirements for representative proceedings, importing a clear role for amicus, empowering the Commission to appear in proceedings which involve discrimination based on any protected attribute, and making the discrimination jurisdiction a "no-cost" one in which each party bears its own costs.

⁷⁵ NACLC, *Access to Justice and Systemic Issues submission*, March 2011 at 8, accessed on 29 January 2012 at: <http://www.equalitylaw.org.au/LiteratureRetrieve.aspx?ID=48129>

⁷⁶ NACLC, *Access to Justice and Systemic Issues submission*, March 2011 at 8, accessed on 29 January 2012 at: <http://www.equalitylaw.org.au/LiteratureRetrieve.aspx?ID=48129>

Representative proceedings

ALHR supports the adoption of representative proceedings to facilitate access to justice in a complex legal framework. To facilitate the use of representative proceedings, the consolidation bill should simplify the standing requirements to permit persons with a “special or sufficient interest in the matter” to bring proceedings, making clear the role and function of amicus curiae, and empowering the Commission to appear in proceedings which involve discrimination based on any protected attribute.

We also refer to the inadequacies of representative proceedings as outlined in the NACLC submission with respect to the decision made in *Access for All (Hervey Bay) v Hervey Bay Council*. ALHR endorses NACLC’s recommendation to include a provision in the consolidated bill for “representative complaints and complaints by groups on behalf of, or in the interests of members”.⁷⁷

Litigation costs

ALHR advocates for access to justice for all members of our society. The costs of the court process for anti-discrimination complaints, particularly the potential for adverse costs orders to be made against parties at the conclusion of proceedings, will often prohibit or deter individual litigants from proceeding to a final hearing of their legitimate complaint. This is especially so where individual litigants complaining of discrimination or harassment will often be in a marginalised or disadvantaged position.⁷⁸

The *FW Act* recognises the inequities between employees and employers in litigation conducted pursuant to that Act and has therefore adopted a no-cost litigation model for various causes of action brought under it. A similar model should be adopted in the consolidation bill.

ALHR supports the *Productivity Commission Report* recommendation that each party to a discrimination case should bear its own costs.⁷⁹

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?

Recommendations: ALHR considers the Commission to be in the best position to comment on whether it is necessary to change its roles and functions to provide a more effective compliance regime, and to suggest what (if any) improvements are necessary. ALHR supports the Commission’s recommendations in this respect and recommends that further funding and resources be committed to the Commission to enable it to effectively fulfill its functions.

ALHR particularly supports the Commission’s recommendations to change the role and functions of the Commission to provide a more effective compliance regime by:

- making existing Commission inquiry powers and functions applicable to all areas of public life and to all protected attributes;
- simplifying standing requirements;

⁷⁷ NACLC, *Access to Justice and Systemic Issues submission* at 14-15 accessed on 23 January 2012 at: <http://www.equalitylaw.org.au/LiteratureRetrieve.aspx?ID=48129>

⁷⁸ Such as commencing or conducting proceedings against a well-resourced corporate or government organisation.

⁷⁹ Productivity Commission, *Review of the Disability Discrimination Act 1992 (Report No. 30, 2004) (Productivity Commission Report)*, recommendation 13.4

- empowering the Commission to appear in proceedings where a discrimination or harassment claim is brought on the basis of any attribute covered by the consolidated anti-discrimination legislation.

Interaction with Other Laws and Application to State and Territory Governments

Question 28 - Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

Recommendations: The mechanisms currently in place to manage interactions between Commonwealth anti-discrimination laws and the Fair Work Act appear to be working and should be maintained. Mechanisms are required to manage interactions between the two laws.

The current mechanisms for managing interactions between Commonwealth anti-discrimination laws and the *FW Act* appear to be satisfactory in the sense of being practically workable and should be maintained. There is a need for mechanisms to manage such interactions in order to prevent “double-dipping” where complainants have a choice of jurisdiction.

As noted in the Discussion Paper, the existing protections under anti-discrimination law extend beyond the traditional employment relationships (e.g. subcontractors and partnerships). Workers who work in these non-traditional employment relationships constitute a significant percentage of Australia’s workforce and it is important that they are also protected from discrimination and harassment. This is particularly so in circumstances where non-traditional employment relationships may provide workers with less legal protections and leave workers more vulnerable to discriminatory behavior (such as in the case of domestic and voluntary workers).

Question 29 - Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

Recommendations: The consolidation bill should include a provision similar to those contained in the RDA and SDA which preserve the effect of anti-discrimination laws but also enable concurrent operation of compatible State and Territory laws. Existing provisions which mediate the interaction between State and Commonwealth complaint systems should be maintained to prevent forum shopping and “double-dipping”. The consolidation bill should not include a general exemption for acts done in direct compliance with specified State or Territory laws.

“Covering the field” incompatibility under the Constitution

ALHR supports the inclusion of a provision similar to those contained in the *RDA* and *SDA* which preserve the effect of anti-discrimination laws but also enable concurrent operation of compatible State and Territory laws. This ensures Constitutional integrity, consistency, and compliance with Australia’s international human rights law obligations.

Interaction between State and Commonwealth complaints systems

The current provisions should be maintained to prevent forum shopping and “double-dipping”. ALHR supports the Commission’s submission that the consolidation bill should ensure that a complaint made to a State or Territory anti-discrimination body which is found to be outside the jurisdiction of that body does not constitute a “complaint” such that it is later barred from being heard in the appropriate jurisdiction.⁸⁰

⁸⁰ Australian Human Rights Commission, *Review and consolidation of discrimination law*, December 2011, paragraph 303

State and Territory laws generally

The consolidation bill should not include a general exemption for acts done in direct compliance with specified State or Territory laws which permit discriminatory acts or acts of harassment. To permit such an exemption would maintain inconsistencies (for instance, State and Territory instrumentalities may be permitted to maintain discriminatory practices whilst at the same time being compliant with the laws of their jurisdiction) and run counter to the purpose of having a consistent, consolidated Commonwealth anti-discrimination law. It would also reduce the threshold level of protection which is intended to be provided for to all Australians. Any exemption which a State or Territory wishes to preserve should be subject to appropriate levels of consultation by affected parties, be especially crafted, and be consistent with clearly formulated aims and objectives of the consolidated laws.

Question 30 - Should the consolidation bill apply to State and Territory Governments and instrumentalities?

Recommendation: The consolidation bill should apply to State and Territory Governments and instrumentalities without exception.

This would ensure that a consistent and concerted effort is made towards eliminating discrimination or harassment in all areas of public life, including in areas where governments and their appointed officers and representatives may have otherwise been afforded some form of protection or immunity from the provisions of anti-discrimination or harassment Acts.

ALHR welcomes the opportunity to provide further evidence or elaborate on its comments.

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President

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