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Thank you for the opportunity to comment on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper. Below is the submission of the South Australian Equal Opportunity Commission.

Consolidation of Commonwealth Discrimination Laws

- 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?**

Test for direct discrimination

The Commission agrees with the comments contained in the Discussion Paper regarding the difficulties with the comparator test and considers that the more effective test for direct discrimination is the detriment test.

The *Equal Opportunity Act 1984* (SA) ("the SA Act") currently applies the comparator test. Although no cases have yet failed before the South Australian Equal Opportunity Tribunal on the basis of the difficulty of applying the comparator test, the uncertain and unpredictable nature of the test means that a decision, such as that in *Purvis*¹, is a possibility.

Applying the detriment test consistently throughout Federal anti-discrimination law will provide greater clarity and certainty for those seeking recourse through the Federal system.

Test for indirect discrimination

The definition of indirect discrimination in the SA Act includes the need to show that the complainant does not or is unable to comply with the condition, requirement or practice in question.

¹ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

The Commission notes the inconsistency of this requirement with comparative international models for defining indirect discrimination and agrees that the test for indirect discrimination should not include a requirement that the 'complainant does not or cannot comply' with the condition imposed on the basis that it gives the impression of a test which is more stringent than that which is actually borne out by the case law.

The 'reasonableness' test currently applied is ambiguous and provides little guidance of what the standard is. The term 'reasonableness' is given varying and sometimes inconsistent interpretations which creates uncertainty. The Commission concurs with the views of the Australian Human Rights Commission that applying the 'legitimate and proportionate' test, (a more universally applied standard), would provide further guidance for both complainants and respondents. The Commission supports this approach primarily, but also sees some benefit in the alternative proposition of an indicative list of factors to be considered when determining what is "reasonable".

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

Direct discrimination

Under the SA Act, the burden of proof in complaints of direct discrimination rests with the complainant. However, as raised by the Discussion Paper, demonstrating that the conduct considered to be discriminatory was due to a protected attribute can be very difficult for the complainant to establish.

For example, a common complaint received by the Commission is that of age discrimination in recruitment. Often complainants believe they have been discriminated against on the basis of their age; however, producing evidence that the prospective employer's attitude or belief has influenced their recruitment decision is near impossible. This unreasonable burden could be eased by adjusting the onus of proof so that the complainant is required to raise a *prima facie* case that demonstrates a reasonable belief that they were discriminated against, after which, the burden of proof falls to the respondent who must provide evidence that their actions did not amount to discrimination.

We note the consistency of this approach with the Fair Work Act and UK models and support it on that basis.

Indirect discrimination

Under the SA Act, the burden of proof in matters of indirect discrimination remains with the complainant, who must establish that the requirement or condition in question is unreasonable.

The Commission agrees that adopting a position whereby once the complainant proves the condition or requirement has the effect of disadvantaging people with the relevant attribute, the onus then shifts to the respondent to prove that the condition is reasonable.

Furthermore, the obligation to produce evidence sits with the party best placed to produce that evidence, in the example above, that party would clearly be the respondent. The court should be free to draw a negative inference if the respondent then fails to produce this evidence.

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

The SA Act has separate special measure provisions for several of the grounds of discrimination. The provisions take on one of two forms, those being, measures intended to achieve equality (for sex, chosen gender, sexuality, marital status, caring responsibilities) or schemes or undertakings for the benefit of persons of a particular age, race or disability. Our experience is that the fact that only some attributes have a special measures provision attached to them can give rise to some confusion. A single special measures provision that could be applied across all attributes seems a reasonable approach.

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

The Commission submits that the consolidated act should expressly provide for reasonable adjustments in relation to all protected attributes. Whilst it is implicit in the provisions relating to indirect discrimination that the obligation to make reasonable adjustments applies not only to disability, an express obligation in the consolidated act would provide greater clarity for complainants and respondents.

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

The Commission supports, in principle, the introduction of a positive duty on public sector organisations to eliminate discrimination and harassment.

In the UK and Canada, antidiscrimination laws have been amended to include an obligation on organisations to reduce discrimination and take positive steps to achieve equal opportunity. A specific power requiring organisations to take action, incorporated into a consolidated act and coupled with compliance tools, could be a major force in focusing responsibilities on organisations and away from the individual complaint based system.

However, the Commission stresses the importance of a broad consultation and education process with the affected public sector organisations to ensure the effectiveness of the provision and promote the necessary awareness across the public sector.

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

The Commission supports the prohibition of harassment based on all protected attributes and in all areas of public life (including a single definition of vilification) to reduce the existing uncertainty and complexity.

The Racial Vilification Act 1996 (SA) prohibits public acts which incite hatred towards, serious contempt towards, or ridicule of people of a particular race. The “harm” threshold, however, is very high - a person must show that there was a threat of physical harm, or incitement to harm. Cases of racial vilification are reported to the Police and prosecuted only with the written consent of the Director of Public Prosecutions. In practice, given the threshold is high; cases of racial vilification are rarely prosecuted. The Commission therefore welcomes any reform to federal laws which may provide a better recourse for those affected by racial and other forms of vilification.

7. How should sexual orientation and gender identity be defined?

The Commission believes that labels should be avoided and that any definition of sexual orientation and gender identity be defined broadly to provide protection to

people of all sex and/or gender identities. The Commission suggests that the term 'gender expression' be used to capture those who do not necessarily identify with one particular gender.

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

The SA Act protects against discrimination against a person based on the attribute of an associate and the Commission agrees with the proposal to extend the coverage of associates to all protected attributes.

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

The Commission supports any approach which increases protection from discrimination for vulnerable or disadvantaged people and creates more simplicity in this area. The SA Act contains two unique protected attributes, namely identity of spouse and religious dress or appearance (the latter in the area of employment or education only). Since their introduction into the amended SA Act in 2009, the Commission has received complaints relating to both grounds.

The Commission also believes that the legislation should reflect Australia's undertakings with regards to international human rights and incorporate the ILO 111 grounds, such as criminal record.

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

Section 6(2) of the SA Act deals with intersectional discrimination and states that a person acts on a particular ground, if in fact the person acts on a number of grounds, and that ground referred to is the 'substantial reason for the act'. This can be a difficult concept or test to apply where multiple grounds are involved and the Commission supports a simpler provision under Commonwealth law.

The Commission proposes that the definition of discrimination be drafted in a manner that incorporates intersectional discrimination. Including the phrase 'one or more' in relation to the protected attributes in the definition of discrimination provides a clear manner in which to ensure intersectional discrimination is covered.

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

The Commission supports the extension of this right to all protected attributes, as an important step in the recognition of this fundamental human right.

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

The SA Act specifies the areas of public life to which each ground applies. This is not applied consistently, with some grounds only protected in limited areas. For example, discrimination on the basis of religious dress is only covered in employment and education and association with a child only in relation to customer service or accommodation.

The Commission endorses the approach in either section 9(1) of the RDA or the Tasmanian Act which broadly defines 'public life' as 'any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.

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

Under the SA Act, 'employment' is defined to include unpaid work. It is recommended that the consolidated Commonwealth act extend protection from discrimination to unpaid/voluntary workers. Our community relies heavily on the contribution volunteers make and there seems no reason that they should not be afforded the same protections as paid workers.

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

The SA Act states that the discrimination provisions do not apply in relation to:

- (a) an employer employing a person for purposes not connected with a business carried on by the employer; or
- (b) a principal engaging a natural person as an independent contractor for purposes not connected with a business carried on by the principal.

The Commission considers that establishing a balance between the right to a private life and the right to non-discrimination may be satisfied by a narrow exemption that applies only in relation to specific criteria.

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

Under the SA Act the term used is 'associations' and no definition is provided. This allows for a broad interpretation regarding the types of clubs and member-based associations to which it applies. The Commission favours the broad definition of clubs and associations similar to that contained in the SA Act and in the DDA.

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

The SA Act covers partnerships of all sizes and the Commission sees no reason why small partnerships should be exempt from Commonwealth discrimination legislation.

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

The SA Act provides for exemptions in relation to sport under the grounds of sex, age and disability. In relation to sex it states that exclusion is not unlawful in a 'competitive sporting activity in which the strength, stamina or physique of the competitor is relevant'. In relation to disability, the exclusion of a person is not unlawful if:

- (a) the activity requires physical or intellectual attributes that the person does not possess; or
- (b) in the case of a sporting activity conducted wholly or mainly for persons who have a particular disability, the person's disability is not of that kind.

Finally, in relation to age, it is not unlawful to exclude persons of particular age groups from participation in a competitive sporting activity.

Those persons who identify as a sex other than their registered sex may be excluded from participating in sports as their chosen gender. Positive duties could be introduced in relation to sport that specifies a person be allowed to compete in sporting activities of their chosen gender (as defined by the Act). However, the Commission agrees that further consultation needs to be undertaken with those sports clubs that may be impacted as to possible outcomes.

In terms of separate coverage for sport, the Commission is open to discussion but sees merit in the Victorian model where sport is specifically included as an area, applying to all protected attributes with specific exemptions for sex, gender identity, disability and age.

18. How should the consolidation bill prohibit discriminatory requests for information?

Under the SA Act there is no specific provision that addresses discriminatory requests for information. However, where information is used for a discriminatory purpose, this is captured by the SA Act. The Commission is not opposed to the proposition that the consolidated act include a specific provision that addresses requests for information, provided it is done so in a manner that puts the onus on the person requesting the information to show that it is not to be used for discriminatory purposes.

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

Section 91 of the SA Act provides that employers are vicariously liable for a discriminatory or unlawful act of an agent or employee while acting in the course of their employment or agency. As with current federal laws, a defence is available where the employer can show that all 'reasonable steps' were taken. The SA Act goes further and effectively states what will amount to 'reasonable steps', namely, that an appropriate policy was in force at the time, that reasonable steps had been taken to make employees aware of the policy and that any alleged discriminatory act was subject to prompt investigation and appropriate action.

A similar provision in a consolidated act may assist in providing more guidance to employers.

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

The SA Act allows for two categories of exemptions; those that are specifically prescribed in the Act and exemptions that are granted by the Equal Opportunity Tribunal for on a case-by-case basis.

The SA Act only uses the term 'exemptions' in relation to both general exemptions and those that need to be applied for. The need for consistency and clarity of terminology used ("exception" or "exemption") should be a priority in drafting a consolidated bill.

The Commission believes that, on balance, a general limitation clause is likely to provide greater consistency. However, as noted in the Discussion Paper, one of the primary aims of the consolidated act is to remove uncertainty and introducing a new test for the courts to apply may result in unintended consequences. What is a 'legitimate aim' may be interpreted inconsistently thereby undermining the intention of the consolidated act.

To mitigate any possible diminution of rights that could be a consequence of a general limitations clause, extensive guidelines would need to accompany the legislation to provide instruction as to the application of the clause.

In relation to enforcement of a general limitation clause, if an entity introduces a discriminatory recruitment policy in the belief that it was for a legitimate aim, would the AHRC have investigative powers to ensure that the exemption was lawful? Or, alternatively, would exemptions be investigated on a reactionary basis once a complaint was received? Having 'own motion' powers would enable the AHRC to 'audit' exemptions introduced, thereby ensuring adherence to the law is not dependent upon a complaint being made.

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

The Commission believes that this could be covered by a general limitations clause.

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

The SA Act provides for religious exemptions on the basis of sex, sexuality and chosen gender and the Commission believes that these could be encompassed in a general limitations clause. However, the question should be asked whether religious exemptions should remain and whether such exemptions legitimise what would otherwise be unlawful conduct. Any religious exemption should be strictly restricted to the inherent requirements of the religious belief or activities rather than apply more broadly to employment related conduct.

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?

If a general limitations clause only covers 'exceptions', those being individual allegations of unlawful conduct, then 'exemptions' should be defined as a temporary permissive ability to engage in conduct that would otherwise be deemed unlawful.

Under the SA Act an exemption may be granted on application to the Equal Opportunity Tribunal. Exemptions are granted on a temporary (3 year) basis only.

It would need to be assessed how a consolidated commonwealth act and state Equal Opportunity legislation would interact with regards to temporary exemptions. It is envisaged that a general limitations clause would apply only to 'exceptions' and not to temporary exemptions.

The Commission considers that a consolidated act should allow for temporary exemptions within strict parameters and a renewal process that necessitates reapplication. The AHRC could grant the exemptions and be afforded investigative powers to ensure the exemption sought is proportionate and for a legitimate aim.

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?

The Commission has not formed a particular view on possible preferred mechanisms, but sees merit in some of those proposed in the Discussion Paper. In particular, the Commission supports an approach which will assist to build the capacity of duty

holders to manage their obligations. This may be achieved by introducing codes and guidelines developed in partnership with industry sectors.

- 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?**
- 26. Are any improvements needed to the court process for anti-discrimination complaints?**
- 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?**

Conciliation and the Tribunal

In South Australia the conciliation process is highly effective with over 56% of complaints resolved by conciliation. This provides a free, timely and effective service for those wishing to address their grievances. Much of the success of the conciliation process rests on the skill and expertise of conciliation officers and resources should continue to be focussed in this area.

The Commission does have the power to compel parties to attend a conciliation conference, however, this rarely happens in practice as parties are more likely to engage in the conciliation process if they have chosen to take part, rather than are compelled to do so.

The Commissioner does have the power to refer matters to the Equal Opportunity Tribunal where, in the Commissioner's view, they are not able to be conciliated, which, in some cases, means the complainant effectively 'bypasses' the conciliation process. A similar provision in a consolidated act could be considered.

The Commission has concerns regarding the enforcement of conciliation agreements and welcomes further discussion around the ability of the AHRC to enforce agreements under a consolidated act.

Funding for parties

As noted in the Discussion Paper, the cost of litigation creates a significant barrier for complainants who wish to take their matter to Court.

Under a somewhat unique provision in the SA Act, where a matter cannot be conciliated and the complainant wishes to have their matter heard by the Equal Opportunity Tribunal, the Commissioner may provide assistance (namely legal representation) for the complainant. The provision of such assistance is conditional upon certain criteria. When determining whether or not to provide assistance, the Commissioner must apply public funds judiciously and must take into account:

- The capacity of the complainant to obtain their own representation or represent themselves ;
- The nature and circumstances of the alleged contravention;
- Any other matter considered relevant.

The Commission believes there may be merit in including a similar power on the part of AHRC in a consolidated act. The applicable parameters should include a 'public interest' test. This approach will ensure that cases that highlight serious or systemic discrimination will not fail to be heard on the basis of lack of funding for the complainant.

Compensation

The current level of compensation awarded in discrimination cases is paltry compared to that awarded in other legal claims. The average award of damages in the South Australian Equal Opportunity Tribunal is between \$3,000 and \$5,000. A system that provides guidance to tribunals and courts as to suitable levels of compensation, taking into account all adverse affects on a complainant, is recommended. A scale of damages similar to that used in various personal injury jurisdictions is one possible means of ensuring compensation received is fair and consistent.

Interaction between the AHR Commission and the state and territory counterparts

The introduction of positive duties and the use of own motion powers to enforce those duties will result in the AHRC and the Commissions in each state and territory working together to ensure compliance. A consolidated act could allow for the AHRC to delegate power to investigate and instigate own motion powers to their counterparts at the state level. This would ensure that the consolidated act can be enforced at a more 'grass-roots' level.

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?

The Commission does not offer any comments on this issue as the relationship between the AHRC and the FWA is not an area with which we have any direct experience.

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

Any consolidated act should be capable of operating concurrently with the discrimination laws of the states and territories. Further, the Commission considers there is merit in the provisions contained in the DDA which allows regulations to be made exempting acts done in direct compliance with specified State and Territory laws.

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

The Commission believes that the consolidation bill should apply to all State and Territory Governments and instrumentalities to ensure consistent and thorough coverage across Australia.

If you would like any further information regarding the above submission, please do not hesitate to contact me.

Yours sincerely,

ANNE BURGESS
COMMISSIONER FOR EQUAL OPPORTUNITY

