Legal Aid Queensland ('LAQ') provides legal information, advice and representation to financially disadvantaged people in relation to various matters arising under State and Commonwealth law, including anti-discrimination law. LAQ's response to the Discussion Paper[1] is made against this background, and with the assistance of LAQ's in-house anti-discrimination lawyer.

LAQ supports the consolidation of Commonwealth anti-discrimination laws, provided that none of the current protections are lost, and the consolidation bill is drafted simply and clearly so that persons and organisations with rights and obligations under the legislation are easily able to understand those rights and obligations. LAQ supports a user-friendly anti-discrimination system.

MEANING OF DISCRIMINATION

While the objects of the consolidation bill have not been referred to in the Discussion Paper, LAQ supports the Discrimination Law Experts' Group[2] and Australian Human Rights Commission ('the Commission')[3] submissions in relation to the objects of the consolidation bill. The objects must be clearly linked with Australia's international obligations on human rights as contained in the relevant Conventions and must make the beneficial purpose of the legislation clear.

Question 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?

It is submitted that 'discrimination' should be clearly defined in the legislation rather than, for example, the United States and Canadian models, which leave the courts to determine the meaning of discrimination. A unified test is not supported due to the 'risk of diminution of protections'[4]. In determining the best way to define discrimination, LAQ makes the following submissions:

Direct discrimination

LAQ supports the removal of the 'comparator' test, which, as identified in the Discussion Paper[5], is marred with difficulties in its application, making litigation more complex (and therefore costly) and providing unpredictable results.

The creation of an artificial comparator imbued with all characteristics of the complainant, apart from the attribute, can create bizarre outcomes that may frustrate the objects of the legislation. This results from the necessity to invoke a comparison in circumstances that are 'not materially different'.

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[1] Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws, Discussion Paper* (September 2011).
[2] Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws*: *Submission* (13 December 2011), 7.
[3] Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination law: Submission to the Attorney-General's Department* (6 December 2011), 5.
[4] Attorney-General's Department (Cth), above n 1, [27].
[5] Ibid.

The difficulties with the comparator test are particularly evident in cases where it is impossible to construct a comparator who does not have the attribute. An example of this can be seen in *Fetherston v Peninsula Health*[6] where the complainant, a medical practitioner, suffered from a diabetes-related vision impairment impacting on his ability to perform his role as effectively as colleagues with full use of their sight. It is absurd to have to identify a comparator who does not have full sight, but who does not have a disability.

The ACT[7] and Victoria[8] have removed the need for a formal comparator. LAQ prefers their 'detriment' test, where it is necessary to show that a person is treated unfavourably because of their protected attribute (see below under 'Definition of discrimination' for an example of how it might be framed).

It is acknowledged that a comparison exercise may still be relevant to the decision-maker's consideration of the basis for the unfavourable treatment, but it is just one factor to be weighed up amongst all the relevant facts and circumstances, and is not a 'discrete test'[9], as it is now. Put another way, 'Identifying a comparator is an evidential matter and should not be elevated to the status of a statutory requirement'[10]. Failure or inability to satisfy a technical legal test should not necessitate failure of an otherwise meritorious claim in this beneficial jurisdiction.

Indirect discrimination

LAQ supports the tests for indirect discrimination used in the *Age Discrimination Act (Cth)* ('ADA')[11], the *Sex Discrimination Act 1984 (Cth)* ('SDA')[12] and the Victorian[13], Tasmanian[14] and ACT[15] anti-discrimination legislation, whereby the complainant is not required to prove that they did not, or cannot comply with the term, condition or practice.

Current authority suggests that the requirement that the complainant does not or cannot comply, is not as literal as the words imply, having been interpreted to include a situation where compliance with a term would cause 'serious disadvantage' to a complainant[16]. However, this is not always the case[17]. In our view the test is still too high, and as stated in the Discussion Paper, the current wording is 'likely to mislead users of the legislation who are not familiar with the case law'[18]. Removing this requirement altogether will mean complainants with legitimate discrimination claims will not be prevented from succeeding in their discrimination claim, just because they could 'cope' with a discriminatory term.

In terms of showing disadvantage, a test of 'detriment' or 'disadvantage', such as that in the ADA[19] is supported in preference to a proportionality test, such as that in the Qld Act[20]. A proportionality

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[6] [2004] FCA 485 (Unreported, Heerey J, 23 April 2004).
[7] *Discrimination Act 1991* (ACT) s 8(1).
[8] *Equal Opportunity Act 2010* (Vic) s 8(1).
[9] Terri Butler, 'Protection from dismissal and 'adverse action' for discriminatory reasons : the new Fair Work Act provisions' (2009) 94 *Precedent* 10, 15 referring to *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257.
[10] Department for Communities and Local Government, *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, A Consultation Paper* (2007), 11 referred to in University of Cambridge, Cambridge Pro Bono Project, Faculty of Law, *Equality for all: Submission on Australia's proposed reform of anti-discrimination legislation* (18 March 2011), 28.
[11] s 15(1).
[12] s 5(2).
[13] *Equal Opportunity Act 2010* (Vic) s 9(1).
[14] *Anti-Discrimination Act 1998* (Tas) s 15(1).
[15] *Discrimination Act 1991* (ACT) s 8(1)(b).
[16] *Hurst v Queensland* (2006) 151 FCR 562.
[17] For example, *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 476 [115]-[116] and *Ball v Silver Top Taxi Service Ltd* [2004] FMCA 967, [70].
[18] Attorney-General's Department (Cth), above n 1, [38].
[19] s 15(1)(c). See also *Disability Discrimination Act 1992* (Cth), s6(1)(c) and *Equal Opportunity Act 2010* (Vic) s 9(1)(a).

test presents complainants with significant difficulties in identifying a base group [21] and providing evidence to prove they are proportionally disadvantaged.

Rather than having a specific 'reasonableness' exemption for indirect discrimination, our preferred approach is the adoption of a general limitations clause (please see discussion below under question 20).

In the event that a specific 'reasonableness' exemption, such as those in the Qld Act[22] and SDA[23], is included, we recommend an indicative list of factors relevant to determining reasonableness be enumerated.

For example, section 11(2) of the Qld Act states:

> Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example–
> (a) the consequences of failure to comply with the term; and
> (b) the cost of alternative terms; and
> (c) the financial circumstances of the person who imposes, or proposes to impose, the term.

LAQ further recommends that it be made clear that these factors must be viewed in the context of the objects of the Act.

Definition of discrimination

LAQ supports the Discrimination Law Experts' definition of discrimination[24]:

> **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.

To this definition, we would add the concept of 'proposed discrimination' to ensure the highest level of protection currently available remains[25]. The *Disability Discrimination Act* (Cth) ('DDA')[26], ADA[27], SDA[28] and the Qld Act[29] all cover proposed discrimination.

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[20] s 11(1)(b).
[21] *Australian Iron & Steel Pty Ltd v Banovic* (1987) 168 CLR 165.
[22] s 11(2).
[23] s 7B.
[24] Discrimination Law Experts' Group, above n 2, 8-9.
[25] See also Australian Human Rights Commission, above n 3, [46].
[26] s 5 and s 6.
[27] s 14 and s 15.
[28] s 5(2) – regarding indirect discrimination only.
[29] s10(1) and s 11(1).

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

It is submitted that the burden of proof should shift to the respondent once the complainant has established a *prima facie* case of discrimination.

Under the *Fair Work Act 2009* (Cth) ('FWA'), once an act of discrimination is alleged, this is presumed to be the reason for the adverse action unless the respondent proves otherwise[30]. The Explanatory Memorandum to the Fair Work Bill 2008 explains the principles behind the section:

> This has been a long-standing feature of the freedom of association and unlawful termination protections and recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason.[31]

We also refer to the following passage in *Glasgow City Council v Zafar*[32] in which Lord Browne Wilkinson pertinently observed:

> [Discrimination claims] present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.

The evidence the complainant can give is about the stated reasons for the unfavourable treatment and the 'facts and circumstances that cast doubt on any assertion by the employer that the reasons did not include a discriminatory reason'[33].

A significant issue our clients with discrimination complaints in the employment area consistently face is that co-workers decline to provide witness statements as they fear for their own job security.

LAQ supports the *prima facie* case model, such as that in the UK[34], as it balances the interests of complainants and respondents, supporting genuine claims.

Another issue is that the complainant must disclose their case in a written complaint in order to commence proceedings, however respondents are not required to, and rarely, make a written response to a discrimination complaint. The complainant is therefore in a weaker position in the conciliation conference setting, where they hear the respondent's position for the first time.

To deal with this issue, we support the introduction of a statutory 'questionnaire procedure'[35].

Case study

- The complainant became pregnant after having worked casually for the respondent company for over five years.
- Shortly after advising her employer of her pregnancy, she was summarily dismissed. Minor issues were cited such as problems with a work uniform.
- Upon attendance at the conciliation conference she heard for the first time that they had proof that their takings dropped every time she worked. They also alleged she

[30] *Fair Work Act 2009* (Cth) s 361.
[31] Explanatory Memorandum to the Fair Work Bill 2008 (Cth) 234.
[32] [1998] 2 All ER 953, cited with approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40] (Heerey, Mansfield and Hely JJ) referred to in Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating gender equality, 1 September 2008, [156]
[33] Terri Butler, above n 9, 14.
[34] *Equality Act 2010* (UK) s 136.
[35] Dominique Allen, 'Reducing the burden of proving discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

had been given numerous verbal and written warnings about her performance, which they said they could produce evidence of.
- The complainant believed she would not be able to get any witnesses to support her claims that she had not been warned.
- While she could have taken her case forward and hoped the decision-maker would draw the inference the dismissal was because of her pregnancy, she settled for an amount significantly less than what she would have been entitled to had a decision gone in her favour.

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?

LAQ supports the achievement of substantive equality through a single special measures provision covering all protected attributes. The definition of special measures should be consistent with those in the international conventions[36].

LAQ does not support the imposition of 'negative' special measures, such as the interventions associated with the *Northern Territory National Emergency Response Act 2007* (Cth), without widespread consultation with and support of the affected group[37].

LAQ supports the proposal of the Discrimination Law Experts' Group [38] for a mechanism for advance authorisation for 'special measures', and agree that 'special measures' should be present in the general limitations clause.

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

Reasonable adjustments assist to achieve substantive equality and there is no policy reason why they should not apply across all protected attributes.

LAQ supports 'reasonable adjustment' being made a stand-alone duty applicable to all attributes on the basis that it clarifies what is already an implicit duty in the *Racial Discrimination Act 1975* (Cth) ('RDA'), SDA and ADA, and an express one in the DDA[39]. This express duty can be seen in the Discrimination Law Experts' Group's definition of discrimination.

LAQ does not support a 'reasonable adjustment' provision being modeled on the current DDA approach, particularly the provisions in relation to indirect discrimination, as it appears to create an unintended conceptual difficulty[40]. Section 6(3) states that if the requirement is reasonable, subsection (2) does not apply. Therefore, there is no obligation arising out of section 6(2) to make reasonable adjustments so that a person with a disability can comply with a reasonable requirement.

It is presumed that section 6(2) was probably intended to operate in the following way: a requirement that students attend classes is reasonable. However, if the classroom is on the third floor, and a student with a disability uses a wheelchair, then the university will have indirectly

[36] For example, the *International Convention on the Elimination of all Forms of Racial Discrimination,* Article 1(4).
[37] UN Committee on the Elimination of Racial Discrimination, *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination* (24 September 2009) CERD/C/GC/32 <http://www.unhcr.org/refworld/docid/4adc30382.html> [accessed 26 January 2012].
[38] Page 9 and 14-15.
[39] s 5(2) and s 6(2).
[40] We acknowledge Simon Hamlyn-Harris, Barrister-at-Law for his analysis of section 6 of the DDA.

discriminated against that student if the student could comply with the requirement to attend classes if the university made reasonable adjustments for the student, but the university fails to do so. A reasonable adjustment might be to hold the classes on the ground floor or to provide lift access.

However, if the requirement in question (e.g. to attend classes) is reasonable, then the subsection does not apply (see subsection (3)), and the opportunity to consider reasonable adjustments does not arise. The effect of subsection (3) is that it is only when there is an unreasonable requirement that a person with a disability could comply with if reasonable adjustments are made, that the question of whether reasonable adjustments have been made ever arises. Therefore, in order to formulate a complaint of indirect discrimination in contravention of section 6(2) it is necessary first to identify an unreasonable requirement that has been imposed, and then to identify reasonable adjustments that, if they had been made, would have enabled the person with a disability to comply with that unreasonable requirement.

The Discrimination Law Experts' Group definition would appear to do away with this possibly unintended conceptual difficulty.

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

LAQ supports public sector organisations having a positive duty to eliminate discrimination and harassment due to their role in leading the community.

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

The DDA explicitly prohibits disability harassment in employment[41], education[42] and the provision of goods and services[43]. Tasmania[44] and WA[45] have provisions covering some attributes in some areas.

Case law[46] indicates that even without specific legislative protection, harassment of a person on the basis of their attribute constitutes unlawful discrimination. However, to remove any uncertainty, LAQ supports the prohibition of harassment covering all protected attributes in all areas of public life.

The prohibition could be framed in this way: It is unlawful for a person to harass another person who has an attribute or is presumed to have an attribute, in relation to the attribute.

Harassment should be clearly defined. Two possible models are:

1. The definition in Article 2 of the European Union Directive 2000/78/EC, which states that harassment is deemed to be a form of discrimination:

   when unwanted conduct…takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

[41] s 35.
[42] s 37.
[43] s 39.
[44] *Anti-Discrimination Act 1998* (Tas) s 17(1).
[45] *Equal Opportunity Act 1984* (WA) Part III, Division 3A.
[46] For example, *Daniels v Hunter Water Board* (1994) EOC ¶92-626.

The majority of member states have adopted a similar definition of harassment[47].

2. A definition such as that in the *Anti-Discrimination Act 1998* (Tas)[48]:

   A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute…in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

LAQ prefers the latter approach, which is more consistent with the approach to sexual harassment in the SDA[49] and Qld Act[50].

There should also be a specific obligation on employers to prevent harassment in the workplace in respect of all protected attributes.

The consolidation bill should also protect against **vilification** based on all protected attributes.

PROTECTED ATTRIBUTES

Question 7 - How should sexual orientation and gender identity be defined? [51]

It is submitted that sexual orientation and gender identity should be defined conceptually to allow evolving concepts to be recognised.

Sexual orientation

The Commission's Consultation report on 'Addressing sexual orientation and sex and/or gender identity discrimination' asserts that the majority of those consulted supported the term 'sexual orientation' over 'sexuality'. Reasons included[52]:

- it is generally accepted as a broad and inclusive term
- it is consistent with the Yogyakarta Principles
- 'sexuality' or 'sexual preference' focuses on choice or can be misleading.

The definition suggested in the Discussion Paper, encompassing 'the broad concept of a person's sexual attraction to, and sexual activity with, people of a particular gender'[53] may be appropriate.

In our experience, people may not identify as one of the currently utilised 'labels', or prefer not to be categorised as such. Should a definition that retains labels be considered, such as those in the State and Territories' legislation, the definition should be 'inclusive' rather than restrictive. Rather than adopting a provision like that in the Qld Act[54], which states: 'sexuality means heterosexuality, homosexuality or bisexuality', the provision could say, for example: 'sexual orientation' *includes* heterosexuality, homosexuality, lesbianism, bisexuality, asexuality and same-sex attraction'.

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[47] European Commission, *Developing Anti-Discrimination Law in Europe: The 27 EU Member States Compared* (November 2010), <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KE3210576> 34.
[48] s 17(1).
[49] s 28A.
[50] s 119.
[51] We acknowledge the LGBTI Legal Service Inc for its assistance in relation to our answer to this question.
[52] Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation report* (April 2011), 22.
[53] Attorney-General's Department (Cth), above n 1, [74].
[54] s 4.

Gender identity

The definition of gender identity should be broad, and again, should be inclusive rather than restrictive.

Support for a broad definition can be found in the recent High Court case of *AB v Western Australia*[55], where the Court considered the *Gender Reassignment Act 2000* (WA), which provides for the issue of a recognition certificate, which is conclusive evidence that a person has undergone a reassignment procedure and 'is of the sex stated in the certificate'. The decision deals with the rather narrow point relating to those who have undergone a reassignment procedure. In LAQ's experience, people wish to make complaints of 'gender identity' discrimination under the Qld Act at a range of different points – very few have reached and fulfilled the reassignment stage. However, this Full Court decision reflects the changing attitudes towards gender in its opening paragraphs:

1. For many years the common law struggled with the question of the attribution of gender to persons who believe that they belong to the opposite sex. Many such persons undertake surgical and other procedures to alter their bodies and their physical appearance in order to acquire gender characteristics of the sex which conforms with their perception of their gender. Self-perception is not the only difficulty with which transsexual persons must contend. They encounter legal and social difficulties, due in part to the official record of their gender at birth being at variance with the gender identity which they have assumed.

2. Lockhart J in *Secretary, Department of Social Security v 'SRA'*[56] and Mathews J in *R v Harris*[57] reviewed decisions in Australia and overseas which dealt with the question of the recognition to be afforded by courts to the gender of a transsexual person who had undertaken a surgical procedure. In each case it was[58] held that the decisions in *Corbett v Corbett*[59] and *R v Tan*[60], which applied a purely biological test, should not be followed. Lockhart J in *SRA* observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, led to that conclusion. His Honour said that gender should not be regarded merely as a matter of chromosomes. It is partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual.[61]

In the consultation process for the Commission's report on 'Addressing sexual orientation and sex and/or gender identity discrimination', A Gender Agenda suggested the use of the following terms in a definition of 'gender identity'[62]:

1. **Biological Sex Characteristics:** This refers to all biological indicators of sex – for example chromosomal sex, endocrine activity, genitals and reproductive organs/capacity, menstruation, breasts, facial and body hair, depth of voice etc.
2. **Gender Identity:** This refers to how an individual identifies in their own gender – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.
3. **Gender Expression:** This refers to how the individual's gender is identified by others – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.

Expand definition of 'sex' or include protected attribute of 'Intersex status'

[55] [2011] HCA 42 (6 October 2011).
[56] [1993] FCA 573; (1993) 43 FCR 299.
[57] (1988) 17 NSWLR 158.
[58] Footnote omitted.
[59] [1971] P 83.
[60] [1983] QB 1053.
[61] *Secretary, Department of Social Security v 'SRA'* [1993] FCA 573; (1993) 43 FCR 299 at 325.
[62] Australian Human Rights Commission, above n 52, 27-28.

Another option for the protection of intersex persons is that suggested by the Human Rights Law Centre: by 'expanding the definition of sex to include 'sex characteristics' or by including an additional protected attribute of 'intersex status''[63].

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

It is submitted that the consolidated legislation should contain a provision for protection against discrimination against a person based on the attribute of an associate applicable to all protected attributes, similar to the provision contained in section 7(1)(p) of the Qld Act. This is a simple and clear way to include such discrimination.

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

This question relates to attributes that are not currently protected under the DDA, RDA, SDA or ADA, but that may be protected, to varying degrees of success, elsewhere.

International Labour Organization discrimination

Discrimination in employment is prohibited on grounds of (amongst others) religion and political opinion by the International Labour Organization Convention No.111[64], which was ratified by Australia in 1973. In 1989 Australia added the following grounds (amongst others) for our own domestic purposes: nationality, trade union activity, criminal record and medical record[65].

These attributes are currently protected to a limited degree in the employment area under the *Australian Human Rights Commission Act 1986* (Cth) ('AHRCA')[66]. Complaints may be conciliated but outcomes are unenforceable and no complaint lies to the Federal Courts. It is submitted that these attributes should receive full protection in the consolidation bill.

Religious belief or activity, political belief or activity, trade union activity and nationality are covered under the Qld Act. Our clients prefer to take the enforceable legal action available there over the AHRCA complaint system. Medical record and criminal record are not covered in the Qld Act, and therefore the only recourse available is an AHRCA complaint.

Discrimination on the basis of an irrelevant criminal record, not just in employment, but in accommodation and goods and services (etc), prevents former offenders from participating in the community and results in further social exclusion.

Other new attributes

We also support the inclusion of lawful sexual activity (that is, status as a lawfully employed sex worker), which is currently covered in the Qld Act[67], and the following attributes which currently

[63] 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), 20.
[64] *Australian Human Rights Commission Act 1986,* Schedule 1.
[65] SR 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989 and *Australian Human Rights Commission Regulations 1989* (Cth) r 4.
4.
[66] Part II, Division 4.
[67] s 7(l)

have no protection in Queensland: physical features[68], homelessness (or 'accommodation status'[69]), socio-economic status[70] and victims and survivors of domestic or family violence.

LAQ supports the Commission's submissions in relation to discrimination on the basis of domestic or family violence[71]. The following case studies demonstrate some circumstances in which victims of domestic or family violence can face discrimination.

Case studies

A client was refused tenancy at a number of real estate agents because the client's ex-husband had previously damaged property (smashed windows and doors) during an act of domestic violence. The client was also hospitalised for an assault. However, it was later learned that the client's name was placed on a tenancy database due to the property damage, despite it being proven that she was not the cause of the damage to the property. The solicitor advocated to have her name removed from the tenancy database. The client then approached a real estate agent to obtain a new property for herself and her children. She was refused a property because the real estate agent considered her to be a high-risk tenant due to her past association with her ex-husband.

Another client lost her job for excessive sick days and due to her domestically violent partner continually calling her at work and abusing other staff. She was eventually reinstated after the solicitor advocated for her.

There have been cases where clients have eventually withdrawn their application for a protection order because they were unable to have further time off work without their employment being terminated.

Currently protected attributes

We also note that the recent amendment to the SDA following the 2008 'Report by the Senate Standing Committee on Legal and Constitutional Affairs' on the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality' failed to extend the coverage of discrimination on the basis of family responsibilities in the work area to indirect discrimination[72]. The consolidation bill must ensure that people with family responsibilities receive both formal and substantive equality in the workplace through protection against both direct and indirect discrimination[73].

Further, 'family responsibilities' should be extended to cover 'carer responsibilities' in order to better reflect the complex nature of families, and to include cultural understandings of families, including kinship groups[74].

The attribute of 'marital status' should be renamed 'relationship status' and should include same-sex couples.

[68] *Equal Opportunity Act 2010* (Vic) s 6(j). Physical features is section 4 as 'a person's height, weight, size or other bodily characteristics'.
[69] As suggested in Australian Human Rights Commission, above n 3, 24.
[70] This could be defined as being unemployed and/or receiving social security assistance.
[71] Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law: Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department* (23 January 2012).
[72] s 7A.
[73] We note that the *Anti-Discrimination Act 1991* (Qld), s 7(o) and s 9, protects against both direct and indirect discrimination on the basis of family responsibilities.
[74] See also Equality Rights Alliance, *Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (19 December 2011), 13.

Extent of protection

It is submitted that discrimination on the basis of protected attributes should cover past, present and future attributes, characteristics and imputations of attributes, and presumed attributes.

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

LAQ supports protection against intersectional discrimination. Our clients are disadvantaged both socially and financially, and they often face disadvantage on more than one level. A snapshot of our client base would show that more than half are women, some suffer from a disability, some are homeless, some have criminal records, about 10% come from culturally and linguistically diverse backgrounds. It may be difficult for our clients to identify specifically which area of disadvantage is causing them to be treated less favourably.

There is also the instance where the discrimination is occurring because of a combination of two or more attributes, for example, an Aboriginal woman who has a degenerative illness affecting her ability to walk, may be constantly harassed by the police for being drunk in a public place – it is a combination of an unfair imputation to her race and a disability that causes the less favourable treatment.

While the Commission 'routinely accept[s]'[75] complaints where more than one attribute is identified, once a matter proceeds to court, it becomes very difficult for complainants to particularise their complaints under separate Acts, each with unique definitions, exemptions and liability provisions. This difficulty adds further barriers to our most marginalised and disadvantaged communities accessing redress.

The Qld Act impliedly covers intersectional discrimination – complainants can easily identify more than one attribute listed in section 7. The consolidation of the commonwealth anti-discrimination laws will in itself assist with implied coverage, however, we recommend an express provision on intersectional discrimination. For example, the Canadian section states[76]: 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'.

Such a clear provision would appear to leave no room for doubt.

PROTECTED AREAS OF PUBLIC LIFE

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

The right to equality before the law is currently only covered in the RDA[77]. LAQ supports that right being extended to all attributes to accord with our international human rights obligations[78].

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

[75] Australian Human Rights Commission, above n 3, [96].
[76] *Canadian Human Rights Act 1985* (Canada) s 3.1.
[77] s 10.
[78] For example, Article 26 of the *International Covenant of Civil and Political Rights* and Article 15(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women*.

As a starting point, we recommend discrimination be defined as suggested by the Discrimination Law Experts' Group as follows:

> **1. Unlawful discrimination**
> Discrimination is unlawful in public life unless it is justified within the scope and objects of this Act.

'Public life' may then be defined to include, but not be limited to, activities within the areas that are currently covered.

Rather than enumerating the specific activities in which discrimination may occur in the various areas, it is submitted that a more simple, less prescriptive approach be taken to defining areas of public life to which the legislation applies.

An example is section 22(1) of the *Anti-Discrimination Act 1998* (Tas) which prohibits discrimination by or against a person engaged in any activity *in connection with* specified areas of public life, such as, work, education, membership and activities of clubs. Jurisprudence would need to develop in relation to the 'in connection with' test, but clear Explanatory Memorandum, general principles of statutory interpretation, for example, that beneficial legislation should be given a liberal construction[79]) and the Tasmanian experience would be of assistance.

An alternative suggestion, which would retain the protections currently available under the RDA, is to prohibit discrimination 'in the political, economic, social, cultural or any other field of public life'[80].

We also support a submission that law enforcement and corrections be included in areas of public life.

Sexual harassment should be retained as a separate protection. Further, it is recommended that the Commonwealth adopt the current Queensland position in relation to sexual harassment[81], which provides for a general prohibition on sexual harassment, without reference to particular areas.

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

At the Commonwealth level, voluntary workers are currently only protected under the RDA[82].

Given the undesirability of discrimination, and the important role that volunteers play in the community, it is submitted that voluntary workers should be protected from discrimination and harassment by the extension of the definition of employment in the legislation to include voluntary employment. Many voluntary workers volunteer to gain work experience to re-enter the workforce following an absence, for example due to illness, injury or an extended period of unemployment. This has social and economic benefits for the voluntary worker and the community.

LAQ supports the definition of employment contained in the *Anti-Discrimination Act 1998* (Tas)[83] which includes 'employment or occupation in any capacity, with or without remuneration'.

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[79] *IW v Perth* [1997] HCA 30; (1997) 146 ALR 696; (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J) and *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J).
[80] s 9(1).
[81] *Anti-Discrimination Act 1991* (Qld) Chapter 3.
[82] They are also protected under the *Anti-Discrimination Act 1991* (Qld) s 4, see definition of 'work'.
[83] s 3.

Case Study

- An older woman commenced a voluntary position with a company on the basis that she would in time be able to apply for paid work.
- The company subsequently refused to consider her for a full-time job due to purported performance issues in the voluntary role, and because they did not expect a woman of her age would be able to work full-time hours.
- She alleged that she had been discriminated against on the basis of age by the company in its failure to consider her for full-time work.
- She commenced her matter at the state level and settled her claim.

Case Study

- A woman volunteered for a not-for-profit organisation run by a particular racial group after a significant period away from the workforce following a mental illness.
- Despite having ably performed her duties as a volunteer, she was allegedly harassed and vilified on multiple occasions by senior members in the organisation on the basis of her race (she had a different race than those running the organisation).
- She was eventually forced to resign from her position as a volunteer due to continuing threats of physical and verbal abuse, and the stress and anxiety that this caused her – creating a setback in her ultimate return to paid work.
- She commenced her matter at the state level and settled her claim.

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

While discrimination of any type and in any area is undesirable, it would be difficult to enforce the prohibition because decisions about employing a domestic worker in a private house are more likely to be made on the basis of the person seeming like the type of person the employer would like working in the house, perhaps caring for their children or an elderly relative, rather than merely on the basis of who is best qualified. There is also the risk that people could be subject to the inconvenience and expense of spurious litigation that has no chance of success.

However, employment agencies and labour hire businesses should be subject to anti-discrimination laws.

Case Study

- A young woman worked as a carer through an agency.
- She was placed with a woman who required assistance with personal care. The woman reported back to the agency that she did not like having a young woman around as she might flirt with her husband.
- Rather than placing her with another client who did not have prejudices against her, the agency dismissed the young woman.

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

It is submitted that generally, clubs and member-based associations should not be exempt from the coverage of the consolidated legislation, apart from justification by way of a general limitations clause. If the legislation were to include specific exemptions, it is submitted that they should be narrow and either confined to small, not for profit organisations or defined by cash turnover, with

the turnover required for inclusion being relatively low. Licensed clubs should not be exempt. Organisations receiving government funding should not be exempt.

LAQ recommends the approach taken in the DDA of applying the legislation to clubs and incorporated associations, broadly defined, in relation to all protected attributes, but exempting small social clubs that do not maintain facilities from their funds.

Case Study

- The complainant was born male but had identified as a female for her whole adult life. She had not had full reassignment surgery.
- The complainant had been a member of, and regular attendee at, a club for several years. The club charged membership fees, had a large gaming machine room and other entertainment facilities. The club was licensed and served alcohol.
- Security guards told the complainant that transgendered persons were not welcome at the club due to some problems caused by another transgendered person in the past.
- The complainant was then denied membership at the club. She later came to know that this was due to the general manger's prejudice against transgendered persons.
- The club claimed the exemption in section 46(2) of the Qld Act – that it was an association established for social, literary, cultural, political, sporting, athletic, recreational, community service or other similar lawful purposes; and did not carry out its purposes for the purpose of a making a profit.
- The complainant settled for a lower amount than she would have been entitled to had the complaint successfully proceeded in the Tribunal to avoid the risk of the Tribunal finding the club was exempt.

Case Study

- The complainant had dark skin colour. He worked as a sub-contractor.
- The first respondent was an incorporated association which was established for the purpose of promoting the industry the complainant and second respondent worked in.
- The second respondent was another sub-contractor.
- All sub-contractors paid fees that funded corporate memberships of the first respondent.
- The first respondent had government contracts to co-ordinate the provision of services to the community.
- Whilst the second respondent was providing a service paid for under the government contract, he racially abused the complainant after a disagreement about work practices and then physically assaulted him.
- The first respondent argued that they were exempt from the provisions of the Qld Act in the services area because they contended they were a not for profit association under section 46(2) of the Qld Act.
- While the case did not proceed for unrelated reasons, it is LAQ's view that industry associations should not be exempt, particularly where they are delivering government services.

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

LAQ does not provide a response to this question.

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

LAQ supports 'sport' being specified as an area of public life. Justification for discrimination would be available through the general limitations clause on a case by case basis.

Case Study

- A client was born and raised male. She had identified as female from an early age and was diagnosed as intersex later in life.
- For medical reasons she cannot undergo a full sex reassignment, however she has commenced having surgical procedures to become more anatomically female.
- She actively participated in a particular amateur sporting activity.
- Her physical stature and other characteristics are more similar to that of a woman than a man (both before and after her surgery).
- She was barred from playing as a woman. She would only be recorded as a male player and could only participate in male competitions under male rules and dress code.
- She has basically stopped participating in the sport altogether, which has impacted on her physical and mental health.

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

It is submitted that the simple, clear approach in the Qld Act[84] or the *Equal Opportunity Act 2010* (Vic)[85] which prohibit requests for irrelevant information that can enable discrimination, be adopted. This is preferable to the current commonwealth anti-discrimination legislation because it is easier to understand and apply. Requests for information to enable employers to determine whether a person can perform the inherent requirements of a job, or to identify necessary reasonable adjustments should not be included in the prohibition.

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

Specified relationships

LAQ supports the ADA[86] and DDA[87] approach, which covers the relationship between employer and employee, and between principal and agent, but also, for companies, relationships between the company and directors, employees, and agent.

Connection between unlawful act and employment relationship required to establish vicarious liability

LAQ prefers the approach to vicarious liability for discrimination taken in the RDA[88] and SDA[89] of requiring the unlawful act to be 'in connection with' the person's employment or duties as an employee or agent to establish liability. It does not support the ADA[90] and DDA[91] test that requires

[84] s 124.
[85] ss 107 and 108.
[86] s 56 and s 57.
[87] s 122 and s 123.
[88] s 18E.
[89] s 106.
[90] s 57(1).
[91] s 123.

the act to be committed 'within the scope of [the person's] actual or apparent authority'. A respondent would rarely commit an act of discrimination within the scope of their authority.

Defences to vicarious liability

LAQ supports the approach taken in the RDA[92] and SDA[93] of excusing employers or principals from vicarious liability if they took all reasonable steps to prevent the employee or agent from doing the act complained of. This is a simpler concept than 'due diligence'[94], and therefore preferable in the interests of those who are required to comply with, apply or advise on the legislation.

EXCEPTIONS AND EXEMPTIONS

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

The exemptions contained in the commonwealth anti-discrimination laws are inconsistent, confusing and do not reflect current community standards or the objects of anti-discrimination legislation. There is also the risk that they will exclude 'too much or too little depending on the circumstances'[95].

We initially had reservations about a general limitations clause, as such clauses are inherently imprecise and have the potential to create uncertainty for duty-holders and complainants alike. There is also a risk that a body of judge-made exemptions will begin to develop.

However, we now consider that provided specific exemptions are removed, a general limitations clause in line with that proposed by Victoria Legal Aid would create a simplified, and flexible framework for exemptions to operate.

> **Justifying discrimination**
> The matters to be taken into account in deciding whether discrimination is not unlawful because it is justified include whether:
> (a) the impugned conduct is intended to achieve a legitimate purpose;
> (b) there is a rational connection between the conduct and the purpose;
> (c) the conduct is in fact reasonably necessary to achieve the purpose; and
> (d) the conduct is a proportionate means of achieving the purpose.

To this we add, the Discrimination Law Experts' Group proposals of:

> (e) if the discrimination relates to conduct under s 2(c), the nature of the adjustment required and the consequences for the complainant and other people in similar circumstances to the complainant if such an adjustment is not made;
> (f) the availability, cost and feasibility of an alternative that is not discriminatory;
> (g) Whether the discrimination is justified as a special measure; and
> (h) If the discrimination is in the protected area of work, the inherent requirements of the relevant work[96].

[92] s 18E(2).
[93] s 106(2).
[94] *Age Discrimination Act 2004* (Cth) s 57(2) and *Disability Discrimination Act* (Cth) s 123(2).
[95] Human Rights and Equal Opportunity Commission, *Submission to the Standing Committee on Legal And Constitutional Affairs Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (1 September 2008), [459],
[96] Discrimination Law Experts' Group, above n 2, 9.

In the event that a general limitations clause is not adopted, or in the event that it is adopted, but some specific exemptions are to remain, it is recommended that the current exemptions be reviewed in light of the objects of the consolidation bill and other reasonable and objective criteria. We support the Human Rights Law Centre's submission that the Australian public should be given reasons as to why each exemption is retained[97].

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

It is understood that a general limitations clause such as that proposed by VLA encompasses the concept of 'inherent requirements', however, given the widespread use and knowledge of the term, LAQ supports an inherent requirements exception in employment, provided it is complemented by a requirement for reasonable adjustments to be made. It can form part of the general limitations or justification clause (see above under question 20).

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

The religious exemptions are set out in the Discussion Paper[98].

Whilst it is acknowledged that the Government does not intend to remove the current religious exemptions[99], LAQ argues for the removal of those exemptions. One attribute (religious belief or activity) should not 'trump' another (such as sex, sexual orientation or gender identity) automatically, just as one human right (the right to freedom of religion) should not override another (the right to equality) without the balancing of competing interests.

This balancing process can be provided by the proposed general limitations clause, which will allow arguments to be made on a case by case basis to enable religious organisations to exercise their right to freedom of religion as balanced against the objects of the consolidated legislation.

In relation to the question of how religious exemptions should apply to the grounds of sexual orientation and gender identity, we again refer to the general limitations clause.

In the event that permanent exemptions are utilised in the consolidation bill, we submit these must be restrictive, reviewable and transparent (that is, a requirement to proactively declare the reasons for them). Where government funding has been obtained for certain activities, those activities must be undertaken in a non-discriminatory way, unless they constitute 'special measures'.

We also support the LGBTI Health Alliance's proposal[100] that religious bodies be given:

> 30. ….the opportunity to claim, as of right, the licence to discriminate on the grounds and in the areas that they specify, and on the basis of the doctrines or beliefs they detail as necessitating the claimed licence to discriminate.
>
> 31. The claim would have to be lodged with the Commission in writing and be displayed on the claimant body's website and in other promotional material so that any potential employee,

[97] Human Rights Law Centre, above n 63, 38.
[98] At [162] and [163].
[99] Attorney-General's Department (Cth), above n 1, [161].
[100] National LGBTI Health Alliance, *Draft Submission to the Attorney-General's Department in response to the Discussion Paper (September 2011) on the Consolidation of Commonwealth Anti-discrimination laws* (19 December 2011), 9.

recipient of services or other person interacting with the body can be duly alerted to the body's intended discrimination practices.

32. Although raising this proposal in the context of discrimination on the basis of the new attributes, sexual orientation and gender identity, the Alliance recommends the process apply to all attributes where a religious exemption currently applies; this means the provisions of the SDA and ADA only. It should not be extended to race and disability, however, as this would be inconsistent with the Government's commitment not to reduce any current protections against discrimination.
33. The licence to discriminate so claimed would (within its terms, and subject to the *bona fides* of the claimed justification of necessitation by and conformity to doctrine) exempt the body from the operation of the *Equality Act* in relation to anything it does in its own activities with its own adult members and guests.
34. It should not, however, apply to anything done by the body in the carrying out of any activity or provision of services funded in whole or in part by Commonwealth, State or local government, directly or through statutory authorities or other government funded entities

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?

The SDA[101], DDA [102]and ADA[103] make provision for the Commission to grant temporary exemptions for up to five years.

It is recognised that there are some legitimate exemptions and that in some cases temporary exemptions can act 'as a means of structuring movement towards compliance'[104]. LAQ supports the retention of temporary exemptions, provided the legislation specifies that temporary exemptions should only be granted in accordance with the objects of the legislation.

Criteria for granting exemptions must be published, along with details of each application and calls for public comment. Exemptions should only exist for a short time frame and where appropriate, organisations must submit action plans showing what they are doing to achieve equality by the completion of the exemption.

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?

LAQ supports the proposal of the Discrimination Law Experts' Group that the Commission be given the power to issue compliance notices, with civil penalties, and damages for a breach, harmonising discrimination law with other regulatory regimes such as occupational health and safety and Fair Work Australia[105].

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

[101] s 44.
[102] s 55.
[103] Part 4, Division 5.
[104] Australian Human Rights Commission, above n 3, 47.
[105] Discrimination Law Experts' Group, above n 2, 20.

Conciliation is a low-cost and flexible approach to resolving complaints. For certain complainants it can be an empowering process. However, for others, especially victims of sexual harassment, it creates great stress and anxiety in having to face – either personally or on the phone – the perpetrator of the discrimination. There are also some cases where respondents have used the conciliation process to further belittle and victimise complainants.

LAQ supports retention of the current conciliation process as an option for complainants, although we note our comments in relation to the burden of proof under question 2 and the recommendation of the introduction of a statutory 'questionnaire procedure'[106] meaning both parties would be on a level playing field in terms of information at a conciliation conference.

We support all complaints being made initially to the Commission rather than direct access to the Courts, as it is:

> an important opportunity for complainants, who are often unrepresented, to obtain information about the law as it applies to the issues they are raising and reflect on the possible merit of their complaint before commencing often lengthy and costly litigation[107].

However, we submit that the Commission should utilise a 'triage' model of early intervention such as that used in New Zealand[108] to quickly assess whether a complaint might be better dealt with by bypassing conciliation and being sent straight to Court. The parties views should be taken into account in that assessment.

Another significant problem our clients face is enforcement of conciliated agreements. Once outside the conciliation room, having achieved an agreement that the complaint will be discontinued, and in the absence of monitoring of compliance by the Commission, some respondents do not fulfill some or all of their obligations under agreements. We therefore support the recommendation of the Discrimination Law Experts' Group that de-identified conciliation agreements be able to be registered in a court of federal jurisdiction[109]. We also support the National Association of Community Legal Centres (NACLC) submission that applications to the court for enforcement should be simple and low cost[110].

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

Litigation costs

Complainants currently face costs orders in the event of a negative finding. LAQ supports the legislation providing that the general principle in relation to costs is that each party to a discrimination case should bear their own costs. Consideration should be given to inclusion of a power to award costs in exceptional cases (such as that in the FWA[111]), for example, where a party had acted unreasonably.

LAQ's clients are financially disadvantaged and often elect to pursue their complaints through the Queensland State system due to a fear of a costs order in the Federal courts.

Damages, compensation and other remedies

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[106] Dominique Allen, above n 35.
[107] Australian Human Rights Commission, above n 3, 58.
[108] See Equality Rights Alliance, above n 74, 23.
[109] Discrimination Law Experts' Group, above n 2, 22.
[110] National Association of Community Legal Centres, *Submission to the Commonwealth Attorney General, Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation* (March 2011), 1.
[111] s 611.

Our experience is that generally complainants who are determined to take an anti-discrimination claim through to hearing do so, not for monetary gain, but because they want to draw attention to the way they were treated and make sure it does not happen to anyone else. However, Australia has an obligation under international human rights law to provide for effective remedies for unlawful discrimination[112].

Awards in anti-discrimination matters are generally low and this provides another disincentive to proceeding with a complaint through the courts. The awards are compensatory, redressing harm to an individual complainant, but do not reflect the objects of anti-discrimination legislation in promoting equality and deterring future breaches.

As stated in the Discussion Paper, the courts have discretion to make any order they see fit in anti-discrimination cases. Examples of orders the courts may make are listed in the AHRCA[113].

LAQ supports an extension of the example list of orders available to the court to include corrective and preventative orders. We submit that exemplary or punitive damages should be available where warranted.

Specialist division

We also support the NACLC's recommendation for a specialist division of the Federal and Federal Magistrates Courts to hear and determine anti-discrimination matters[114]. Our experience is that many self-represented litigants choose not to proceed to Court because of inability to obtain legal aid or other legal assistance, and we therefore support the development of more user-friendly procedures to overcome further barriers to enforcing rights under anti-discrimination laws[115].

Representative complaints

LAQ supports the submissions by the NACLC[116] in relation to the amendment of the *Federal Court of Australia Act 1976* (Cth) to resolve the conflict with section 46P(2)(c) of the AHRCA, so that representative complaints can be brought more readily. This will assist to address systemic discrimination.

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?

The reliance on individual complaints does little to address systemic discrimination and effect change on a societal level. It relies on marginalised and vulnerable people enforcing their rights in a complex and potentially expensive legal system, often in the face of serious power imbalances.

Agency-initiated investigations and prosecutions would add another level of protection. To avoid an appearance of bias, such a role may be better undertaken by an Ombudsman, with similar functions as the Fair Work Ombudsman[117], rather than the Commission itself. The role should also include monitoring respondents' compliance with conciliated agreements and court outcomes, and facilitating and enforcing compliance where necessary.

[112] For example, *International Covenant on Civil and Political Rights* Articles 2(2) and 2(3)(a).
[113] s 46PO(4).
[114] National Association of Community Legal Centres, above n 110, 9.
[115] Ibid.
[116] Ibid, 11-12.
[117] *Fair Work Act 2009* s 682.

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?

LAQ does not provide a response to this question.

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

'Covering the field' incompatibility under the Constitution

The consolidation bill should explicitly state that it is not intended to 'cover the field' for the reasons stated in the Discussion Paper[118].

Interaction between State and Commonwealth complaints systems

A person is not entitled to make a complaint or initiate proceedings under the Commonwealth system if a complaint has already been made, or a proceeding initiated under a State or Territory anti-discrimination law[119]. It is submitted that the consolidation bill should confirm that a complaint that has been made, but not accepted, for lack of jurisdiction, under State legislation, can be made under the Commonwealth legislation. In *Barghouthi v Transfield Pty Ltd* [120] the respondent argued that the appellant was not entitled to make a complaint under the DDA as he had brought an unfair dismissal claim in the New South Wales Industrial Relations Commission in relation to the same factual circumstances. Hill J rejected that submission as the Industrial Relations Commission had dismissed the proceedings for want of jurisdiction. He stated:

> As a matter of policy anti-discrimination legislation should not be read in a way that excludes the rights of claimants to have their cases heard in a court, whether it be State (or Territory) or Federal. Parliament cannot have intended that where a claimant makes a mistake in an application to a court leading to a finding of no jurisdiction in that forum that claimant is then excluded from rights altogether. Section 13(4) operates to ensure that where a claimant elects to bring an action in either the State or Federal jurisdiction that claimant is bound by the consequences of that election but that cannot be so if the claim is not in fact heard because the chosen forum lacks jurisdiction. Although, as counsel for the respondent submitted, the opposite reading is available on the face of the text it would have absurd consequences and it cannot be accepted. I therefore reject the submission that there is no jurisdiction in this case.

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

The consolidation bill should apply to the Crown in right of the states and territories without exception.

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[118] Attorney-General's Department (Cth), above n 1, [235] – [239].
[119] *Age Discrimination Act 2004* (Cth) s 12(4), *Disability Discrimination Act 1992* (Cth) s 13(4), *Sex Discrimination Act 1984* (Cth) s 10(4), *Racial Discrimination Act 1975* (Cth) s 6A(2).
[120] [2002] FCA 666 (5 June 2002), [16].