



# **Cairns Community Legal Centre Inc**

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## **SUBMISSION TO CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS**

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## Recommendations:

**Recommendation 1: That a definition for discrimination:**

- a. maintains a distinction between elements of direct and indirect discrimination;
- b. includes a requirement to make a reasonable adjustment;
- c. refers to terms which are ‘reasonable’ in the circumstance for indirect discrimination;  
and
- d. applies to one or more protected attributes.

**Recommendation 2: Once a prima facie case has been made out by the complainant, a rebuttable presumption exists that the alleged action was taken for the stated prohibited reason.**

**Recommendation 3: That a provision for Special Measures include:**

- a. The measure must confer a *benefit* on some or all persons with a protected attribute;
- b. The *primary purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
- c. The protection given to the beneficiaries by the measure must be *necessary* for them to enjoy and exercise their human rights equally with others;
- d. The measure must be *reasonable and proportionate* to the disadvantage it is designed to address; and
- e. The objectives for which the measure is to be introduced must not have already been achieved.

**Recommendation 4: That the duty to make a reasonable adjustment be included in the definition of discrimination, thereby applying to all protected attributes in all specified areas of public life.**

**Recommendation 5: That all government agencies (and those publicly funded to exercise functions on behalf of the State or a public authority) be required to implement action plans that eliminate discrimination and promote equality.**

**Recommendation 6: That protection against harassment apply to all protected attributes in all specified areas of public life. Harassment should be clearly defined as action likely to humiliate, offend, intimidate or distress the person in relation to a protected attribute.**

**Recommendation 7: That a definition of sexuality (sexual orientation) include gay, lesbian, bisexual, transgender and intersex (GLBTI). The definition for gender identity (in relation to being male or female) should recognise that not everyone identifies exclusively with one sex or the other, and identity may vary with settings.**

**Recommendation 8: That the list of protected attributes includes ‘an association with, or relation to, a person identified on the basis of any of the above listed attributes’.**

**Recommendation 9 A: That the attribute of ‘relationship or domestic status’ be used in lieu of ‘marital status’.**

- a. The definition of relationship should apply equally to married, de facto and same sex couples.

- b. The definition of domestic status should reflect genuine living circumstances (including victim of domestic violence and homelessness).**

**Recommendation 9 B: That religious belief and activity, political belief and activity, trade union activity and irrelevant criminal or medical records be included in the list of protected attributes.**

**Recommendation 10: That the legislation protect against intersectional discrimination by having the definition of discrimination refer to ‘one or more’ attributes.**

**Recommendation 11: That the legislation include ‘equality before the law’ in the objects section, and not as a separate provision.**

**Recommendation 12: That a specific provision list all the attributes to be protected, and that separate Divisions within the legislation detail specific areas of activity where discrimination is prohibited.**

**Recommendation 13: That the definition of ‘work’ includes ‘work on a voluntary or unpaid basis’.**

**Recommendation 14: That an exemption apply to obtaining domestic, childcare and personal care services provided by residential service workers in a private household.**

**Recommendation 15: That the broad definition of clubs and incorporated associations currently found in the DDA be adopted in the consolidated legislation.**

**Recommendation 16: That the legislation apply equally to all partnerships.**

**Recommendation 17: That the legislation adopt the model used in the Victorian Act with respect to discrimination in sport.**

**Recommendation 18: That the legislation adopt the model used in the Queensland Act with respect to ‘unlawful requests for unnecessary information’.**

**Recommendation 19 A: That the legislation hold the following liable:**

- a. a person, for the conduct of their worker or agent; and**
- b. where the ‘person’ is a body corporate, for the conduct of its directors, servants or agents,  
where the conduct engaged in, in the course of their work or while acting as agent or performing duties as a director, contravenes the Act.**

**Recommendation 19 B: That a defence to vicarious liability be available where the person/principal took all reasonable steps and exercised due diligence to prevent unlawful acts of discrimination by their worker, agent or director.**

**Recommendation 20: That the legislation details specific exceptions and exemptions, and not adopt a general limitations clause.**

**Recommendation 21: That an exemption for inherent requirements of particular work (in line with section 21A of DDA) be adopted in the legislation, It should:**

- a. include genuine occupational qualifications; and**
- b. apply to all protected attributes.**

**Recommendation 22:** That exemptions for religious organisations apply to the areas of employment and education only in connection with religious observance or practice, where religious doctrines, tenets or beliefs exclude persons with protected attributes (including sexuality and gender identity).

**Recommendation 23:** That temporary exemptions be retained in the legislation. The legislation should require the Commission to consider:

- a. is the exemption necessary;
- b. would an exemption be consistent with the objects of the Act; and
- c. is an exemption, subject to terms and conditions, appropriate in the circumstances.

**Recommendation 24 B:** That co-regulation (registration of codes of conduct and certification of compliance) be adopted only if the Commission is given the authority to investigate breaches of and enforce compliance with those instruments.

**Recommendation 24 C:** That the Minister continues to have authority to formulate Standards, in relation to all specified areas of public life and all attributes.

**Recommendation 24 D:** That a process be adopted (similar to that relating to temporary exemptions) to assess and register Special Measures.

**Recommendation 25 A:** That the legislation make it compulsory to:

- a. provide a written response to the complaint;
- b. attend a conciliation conference; and
- c. (all parties) make a genuine attempt to resolve the complaint and negotiate in good faith, and that the Commission enforce compliance with these provisions.

**Recommendation 25 B:** That voluntary arbitration not be included in the legislation as an option for resolving the complaint.

**Recommendation 25 C:** That mediation conducted by in-house mediators (at the Commission) be included (with conciliation) in the legislation as an option for resolving the complaint.

**Recommendation 25 D:** That the legislation require the Commission to reject complaints if the President is satisfied that the complaint is frivolous, trivial or vexatious; or misconceived or lacking in substance.

**Recommendation 26 A:** That the legislation specifically grant a representative body standing in civil proceedings in pursuit of the discrimination complaint, where an aggrieved person has authorised that representation.

**Recommendation 26 B:** That each party bear their own costs for civil proceedings, subject to the interests of justice.

**Recommendation 26 C:** That the list of orders which the courts may make (as detailed in the AHRC Act) be expanded to include corrective and preventative orders.

**Recommendation 27 A:** That the Commission be expanded to include an Investigative Division with power to:

- a. undertake independent investigations;
- b. report to the duty holder on the alleged breaches of the legislation; and

c. if no remedial action is taken by the duty holder, to commence civil action for the breach.

**Recommendation 27 B: That the Commission be required to monitor progress on the achievement of equality and success of the legislation, and to report to Parliament annually on that progress.**

## Introduction

### Background to the Disability Discrimination Legal Service (DDLS)

The DDLS is a legal service operated by the Cairns Community Legal Centre Inc (CCLC). The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding.

The DDLS provides legal advice and case work which relates to disability discrimination complaints under the Federal *Disability Discrimination Act 1992* (DDA) and the Queensland *Anti-Discrimination Act 1991* (Queensland Act).

Community education and awareness-raising activities as well as law reform work are also an important aspect of the DDLS.

### Our interest in the consultation

We welcome this opportunity to take part in consultations on the draft of consolidated legislation which will reflect our Government's and community's commitment to meeting our human rights obligations.

Our client base is amongst the most vulnerable and we put forward this submission to protect and expand the protections of their human rights.

### Australia's Human Rights Framework

We note that Australia's Human Rights Framework (Framework) and the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (Discussion Paper) both commit to compliance with the seven core UN human rights treaties to which Australia is a party.

The new Parliamentary Joint Committee on Human Rights (the Committee) will examine any new Bill to consolidate existing anti-discrimination legislation for compatibility with our human rights obligations pursuant to those seven treaties, and report to Parliament.

The seven treaties refer to existing rights or entitlement to equal protection of the law without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In our view, we therefore have an obligation to ensure that the new consolidated legislation includes all attributes which would qualify for protection under the seven treaties. If Parliaments purposely omits any attribute, it would be required to explain why it has chosen to do so in its statement of compatibility, to be included in the explanatory memorandum for the bill.

## Meaning of Discrimination

## Question 1: Defining discrimination

### Direct/indirect

Without actually labelling terms ‘direct’ and ‘indirect’ discrimination, we strongly support maintaining the distinction between unfavourable treatment on the basis of an attribute, and the application of terms equally to all which results in disadvantaging certain individuals because of their attribute.

When supposedly ‘equal treatment’ results in disadvantage to vulnerable people, it does not require any actual intention to discriminate (such as is generally required in direct discrimination).

The clearest example of where such (indirect) discrimination has been remedied in the past is the case of *Cocks v State of Queensland* [1994] QADT 3. Initial design and construction of the Brisbane Convention and Exhibition Centre provided only stairway access at the front entrance. The State did not deliberately exclude members of the public with mobility difficulties (that is, no direct discrimination), it just ignored their special needs. Here the Tribunal found indirect discrimination in the provision of services and in the administration of State laws and programs. The Tribunal held that members of the community had a right to equal access with dignity.

By simply requiring the aggrieved person to show that they have been disadvantaged because of actions based on the attribute, we remove the contentious elements of a comparator, and the need to identify circumstances that are ‘not materially different’ in complaints of direct discrimination.

### Who is disadvantaged

We disagree with the requirement that the aggrieved person has to prove that ‘members of a group who share a protected attribute’ are or would be disadvantaged by a particular requirement. This is not so very different from the previous definition in the DDA which required the aggrieved person to show that a higher proportion of persons without the particular attribute could comply with the requirement. If more than one individual is affected, there are already options to lodge a representative complaint.

Each complaint to the Australian Human Rights Commission (the Commission) is individual and personal, not systemic. It should be enough to show that the aggrieved person alone (the complainant) is disadvantaged, particularly where the disadvantage is due to a combination of attributes (for example, an indigenous woman with a mental disability applying for accommodation). A particular requirement may not specifically impact a group with a single attribute. However, being affected by a combination of attributes, such a vulnerable aggrieved person would otherwise be left without redress.

### Reasonable adjustment

We support keeping the requirement to make reasonable adjustments currently found in the DDA, affecting both direct and indirect discrimination.

This imposes a positive duty on providers/employers etc to make reasonable adjustments when the need for such is brought to their attention by the aggrieved person.

If the intention is truly to protect all human rights in the seven treaties, this should cover all protected attributes and apply to all specified areas of public life (not just, for example, in employment).

## Reasonable condition

We support keeping the ‘reasonable in the circumstances’ element of the definition of (indirect) discrimination, as opposed to a ‘legitimate and proportionate test’.

In *Daghlian v Australian Postal Corporation* [2003] FCA 759 the employer argued that its new policy of restricting chairs/stools for counter based work in its retail outlets (which were disallowed for Occupational Health and Safety reasons), was developed following an evaluation by a corporate ergonomist. Based on a ‘legitimate and proportionate test’ this may well have been accepted and the complaint dismissed. In addition, it would have been extremely difficult for the employee to disprove that defence. However, the Court in this case found no indication that the employee’s use of a stool in her particular workstation had caused any other employee or herself to trip in the workplace, and held that the employer did discriminate against her.

It would not be difficult for an employer or service provider to use ‘experts’ to provide a ‘reasonable and proportionate’ solution (but which may well incorporate components that discriminate) to a perceived ‘legitimate objective’. The heavy onus would fall on the complainant to disprove such a defence. The respondents have far greater resources to develop a pre-emptive defence. Just as some litigants engage in forum shopping, and both applicants and respondents engage experts who are supportive of their claims (especially in personal injury matters), we would expect that including such an element in the combined legislation would increase the duration and cost of the legal process.

## Characteristics

We support the inclusion in the definition of a protected attribute, any characteristics that appertain generally or are generally imputed to persons with a protected attribute.

### **Recommendation 1: That a definition for discrimination:**

- e. maintains a distinction between elements of direct and indirect discrimination;**
- f. includes a requirement to make a reasonable adjustment;**
- g. refers to terms which are ‘reasonable’ in the circumstance for indirect discrimination;**  
**and**
- h. applies to one or more protected attributes.**

### **Sample definition:**

For the purposes of this Act, discrimination means:

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of one or more protected attributes, (including on the basis of characteristics that appertain generally or are generally imputed to persons with a protected attribute) which has or is likely to have the purpose or effect of disadvantaging the person with the protected attribute(s);
- (b) any relevant circumstance (including any unreasonable terms, conditions, requirements or practices imposed or proposed by the discriminator) which, because of one or more protected attributes, has or is likely to have the purpose or effect of disadvantaging the person with the protected attribute(s); and
- (c) any situation where the discriminator does not make, or proposes not to make, reasonable adjustments for the person with one or more protected attributes, and the failure to make

the reasonable adjustments has, or would have, the effect of disadvantaging the person with the attribute(s).

## Question 2: Burden of proof

Bearing in mind that many complainants are unrepresented, and in order to promote consistency in the application of various Federal Acts, we support the proposal that once a ‘prima facie’ case has been made out, a rebuttable presumption exists that the alleged action was taken for the stated prohibited reason.

The respondents have greater facility to prove any non-discriminatory reason for their actions, or that the conditions imposed were reasonable in the circumstances, than the complainants have to prove otherwise.

This would also encourage the respondents to provide an early response in the complaints process and not catch the complainant with unfair surprise at a conciliation conference, often with no time to assess statements made or to seek out contrary evidence or witnesses to challenge the assertions made. If a genuine, non-discriminatory reason exists, the complainant may well withdraw the complaint before a scheduled conference. This would result in cost savings for all concerned.

**Recommendation 2: Once a prima facie case has been made out by the complainant, a rebuttable presumption exists that the alleged action was taken for the stated prohibited reason.**

## Question 3: Special measures

We support special measures applying to all protected attributes in all specified areas of public life. A single provision can apply as follows:

### Special Measures

The measure must confer a *benefit* on some or all persons with a protected attribute;

The *primary purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

The protection given to the beneficiaries by the measure must be *necessary* for them to enjoy and exercise their human rights equally with others;

The measure must be *reasonable and proportionate* to the disadvantage it is designed to address; and

The objectives for which the measure is to be introduced must not have already been achieved.

We also recommend that where Government agencies or other providers intend to implement special measures, they should undergo a process similar to that where temporary exemptions are currently sought from the Commission. This will ensure that adequate public consultation is undertaken, and the Commission can determine (with qualifications and limitations if necessary) whether the measures do indeed comply with the legislative provisions. The Commission can also set a timetable for reviewing when the objectives of the special measure have been met, and the measures are no longer required (and therefore removed from the register).

Once a measure has been determined to be a special measure, it should be registered by the Commission. Any complaints, by persons who are not beneficiaries of the special measure, of discrimination related to the special measure, can be rejected on the grounds of lacking in substance, and not proceeded with. This would result in cost savings for all concerned.

**Recommendation 3: That a provision for Special Measures include:**

- f. The measure must confer a *benefit* on some or all persons with a protected attribute;**
- g. The *primary purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;**
- h. The protection given to the beneficiaries by the measure must be *necessary* for them to enjoy and exercise their human rights equally with others;**
- i. The measure must be *reasonable and proportionate* to the disadvantage it is designed to address; and**
- j. The objectives for which the measure is to be introduced must not have already been achieved.**

#### **Question 4: Duty to make reasonable adjustments**

As we stated above in Question 1, we support the retention of the positive duty to make reasonable adjustments as currently found in the DDA. If the intention is truly to protect all human rights in the seven treaties, this should apply to all protected attributes (not just disability) and apply to all specified areas of public life (not just, for example, in employment). A defence of ‘unjustifiable hardship’ should also be available across all fields.

If the duty is included in the definition of discrimination, there would be no need to have a separate, stand alone provision.

The explanatory memorandum should make it clear that the duty is to provide an adjustment to assist the person with the protected attribute to exercise their rights and freedoms equally with others who do not have the attribute, and is not preferential treatment of that person. The adjustment is not meant to reduce discrimination generally.

We also consider it important to make it clear that an adjustment is not reasonable where its subjects the person, for whose benefit it was implemented, to another detriment. For example, a worker with a disability is assessed as being able to competently work 30 hours per week (in lieu of full time hours of 38 hours). If the employer then reduces the employee’s hours to only 25 hours or less, the adjustment is no longer reasonable, as the person with a disability is subjected to an unjust financial detriment.

**Recommendation 4: That the duty to make a reasonable adjustment be included in the definition of discrimination, thereby applying to all protected attributes in all specified areas of public life.**

#### **Question 5: Duty to eliminate discrimination and harassment**

The seven treaties all require the government to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms.

In the Framework the Government commits to developing a new National Action Plan outlining the programs and actions to be taken by all levels of government for the promotion and protection of human rights in this country.

We therefore consider it appropriate for the new legislation to include provisions requiring all government agencies (and those publicly funded to exercise functions on behalf of the State or a public authority) to implement action plans that eliminate discrimination and promote equality.

Any private agency primarily involved with persons with a protected attribute, should also be required to have equivalent action plans to eliminate discrimination within the boundaries of their business/service. This should not include any general duty to undertake community education to promote equality.

As a risk management tool, private companies would ordinarily include non-discrimination policies and procedures in their operations. Therefore we do not consider it necessary to subject them to these particular provisions.

**Recommendation 5: That all government agencies (and those publicly funded to exercise functions on behalf of the State or a public authority) be required to implement action plans that eliminate discrimination and promote equality.**

### **Question 6: Harassment (and other objectionable conduct)**

If the intention is truly to protect all human rights in the seven treaties, the prohibition against harassment (and other objectionable conduct listed below) should apply to all protected attributes (not just disability) and apply to all specified areas of public life (not just employment, education and goods and services).

We recommend that harassment be located in a separate Part of the new legislation listing Associated Objectionable Conduct, to include:

- requests for unnecessary information
- harassment
- vilification
- victimisation

Harassment should be clearly defined as action likely to humiliate, offend, intimidate or distress the person in relation to a protected attribute.

Vilification should be clearly defined as a public act which incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of a protected attribute. Serious vilification, where physical harm is threatened against person or property, or others are incited to threaten physical harm against person or property, should be an offence with heavy penalties, including imprisonment.

**Recommendation 6: That protection against harassment apply to all protected attributes in all specified areas of public life. Harassment should be clearly defined as action likely to humiliate, offend, intimidate or distress the person in relation to a protected attribute.**

## Protected Attributes

### Question 7: Sexual orientation and gender identity

Rather than refer to ‘sexual orientation’ it may be preferable to use the term ‘sexuality’. A widely accepted representation of (diversity of) sexuality includes gay, lesbian, bisexual, transgender and intersex (GLBTI). This representation is understood and accepted by the community, including professional groups and Government agencies developing policy framework and action plans. We recommend that this definition be adopted.

Gender identity, where a person’s sense of identity (in relation to being male or female) does not match their biological sex, should be included as a protected attribute. However, since not everyone identifies exclusively with one sex or the other, and identity may vary with settings (resulting in ‘cross-dressing’), the definition in the proposed legislation should not be too narrow. It should not be limited to or require persons to prove that they live or seek to live as a member of a particular sex (as currently required by Queensland legislation).

We rely on submissions by relevant advocacy organisations to fully brief the government on this particular issue. In general, we recommend that sexual orientation (sexuality) and gender identity be included in the list of protected attributes and be covered in all specified areas of public life.

**Recommendation 7: That a definition of sexuality (sexual orientation) include gay, lesbian, bisexual, transgender and intersex (GLBTI). The definition for gender identity (in relation to being male or female) should recognise that not everyone identifies exclusively with one sex or the other, and identity may vary with settings.**

### Question 8: Associates

If the intention is truly to protect all human rights in the seven treaties, the prohibition against discrimination should apply to all protected attributes and apply to all specified areas of public life.

We recommend that the list of protected attributes include: ‘an association with, or relation to, a person identified on the basis of any of the above listed attributes’. This will protect such associates in all specified areas of public life, in relation to all protected attributes.

**Recommendation 8: That the list of protected attributes includes ‘an association with, or relation to, a person identified on the basis of any of the above listed attributes’.**

### Question 9: Current/additional attributes?

In seeking to protect all human rights in the seven treaties, in all specified areas of public life, we recommend that the list of attributes currently protected by federal legislation be expanded to include all those found in State legislation (including religious belief and activity, political belief and activity, and trade union activity). Irrelevant criminal or medical records should also be included as listed attributes, ensuring full access to remedial action through the Courts.

Since the Government refuses to consider changing the *Marriage Act 1961*, the current reference to ‘marital status’ is itself discriminatory, as it excludes same sex couples. Given the decreasing number of official marriages, the increasing number of de facto relationships, and State recognition of civil

unions between same sex couples, we recommend that the relevant attribute be listed as ‘relationship or domestic status’ (in lieu of ‘marital status’).

The definition of ‘relationship’ should apply equally to de facto couples as to married couples, including those who have separated or ended their relationship, and should explicitly include same sex couples.

We also recommend that the definition of ‘domestic status’ be upgraded to reflect genuine domestic (living) circumstances, and not simply be used to support or demonstrate the fact of a relationship. If required, it may be listed as a separate attribute. The definition can include ‘victim of domestic violence’ (whether or not the person is married, in a de facto or in a same sex relationship), which is being considered in this consultation. Domestic status could also apply to being homeless, another potential attribute put forward for consideration. This would be an important inclusion, especially regarding indirect discrimination (equal treatment resulting in disadvantage) and the duty to make reasonable adjustments, particularly in the area of employment, accommodation and government laws and programs.

**Recommendation 9 A: That the attribute of ‘relationship or domestic status’ be used in lieu of ‘marital status’.**

- c. The definition of relationship should apply equally to married, de facto and same sex couples.
- d. The definition of domestic status should reflect genuine living circumstances (including victim of domestic violence and homelessness).

**Recommendation 9 B: That religious belief and activity, political belief and activity, trade union activity and irrelevant criminal or medical records be included in the list of protected attributes.**

## Question 10: Intersectional discrimination

As covered in our sample definition above in Question 1, we recommend that any definition of discrimination simply include that it relates to ‘one or more attributes’ in the legislation. There would be no need then to have separate provisions addressing intersectional discrimination, thereby simplifying the legislation, and reducing administration costs.

Failing that, we strongly support the inclusion of a provision specifically dealing with the cumulative effect of discrimination relating to more than one attribute.

**Recommendation 10: That the legislation protect against intersectional discrimination by having the definition of discrimination refer to ‘one or more’ attributes.**

## Protected Areas of Public Life

### Question 11: Equality before the law

As noted above, the seven treaties refer to existing rights or entitlement to equal protection of the law without discrimination of any kind.

Prior to the implementation of the Framework, we would have supported the inclusion of a clause ensuring that rights are enjoyed, notwithstanding conflicting provisions in other Commonwealth or State laws.

However, the Framework and scrutiny of legislation (including Statement of Compatibility) requires the Government to review existing legislation, policies and practices for compliance with the core human rights in the seven treaties, and allows for Parliament to pass legislation which may breach its obligations not to discriminate, for particular reasons which it must state.

We do not support having a provision in the consolidated legislation that overrides that process or Parliament's right to pass laws as it determines are needed in the circumstances. In our view, continuation of the provision currently found in the RDA would not add anything to the consolidated legislation operating within this process. It would sufficient to include equality in the Objects section of the legislation.

**Recommendation 11: That the legislation include 'equality before the law' in the Objects section, and not as a separate provision.**

### **Question 12: Areas of public life**

We consider it important that consolidated legislation includes a specific provision listing all the protected attributes, and that the Act prohibits discrimination on the basis of those attributes.

This will ensure that all discrimination prohibited under the legislation is equally justiciable in the Courts.

Separate Divisions in the legislation can then detail specific areas of activity where discrimination is prohibited (employment, education etc).

**Recommendation 12: That a specific provision list all the attributes to be protected, and that separate Divisions within the legislation detail specific areas of activity where discrimination is prohibited.**

### **Question 13: Voluntary workers**

We recommend that the consolidated legislation include a definition of 'work' as currently found in the Schedule of the Queensland Act, which includes: 'work on a voluntary or unpaid basis'.

This will cover all workers, regardless of their particular circumstances. This supports the intention under the Framework to strengthen human rights protections.

**Recommendation 13: That the definition of 'work' includes 'work on a voluntary or unpaid basis'.**

### **Question 14: Domestic workers**

Since the consolidated legislation concerns itself with prohibiting discrimination in protected areas of public life, it should not apply to situations occurring in a person's home.

For example, though a service provider employing staff to provide personal care and support to persons with severe disabilities must not discriminate in that employment relationship or in the provision of the service, the recipient/purchaser of that personal care and support service retains the right to decide who and when they allow others to enter their home to provide that service.

We therefore support the exemption where residential service workers provide domestic, childcare and personal care services in a private household. This exemption should apply only to the recipient/purchaser of such services, not to any employing agency.

**Recommendation 14: That an exemption apply to obtaining domestic, childcare and personal care services provided by residential service workers in a private household.**

### **Question 15: clubs and member-based associations**

If the purpose of the consolidated legislation is to eliminate discrimination and to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms, then provisions relating to clubs should be widely drawn and interpreted.

Many rural and regional areas would be hard pressed to attract more than 30 regular members, with a common interest in a particular social or cultural pursuit, to form an official club (whether incorporated or not). Even fewer would have the wherewithal (or need) to seek and obtain a liquor licence. The very nature of these clubs promotes social inclusion, and excluding members for discriminatory reasons is contrary to the purpose of the consolidated legislation.

We strongly support the approach in the DDA covering clubs and incorporated associations, broadly defined, in relation to all protected attributes.

Since the Government is committed to ensuring existing protections are not reduced in the consolidated legislation, any limitation currently found in the SDA would necessarily require exceptions for people with disabilities. For simplicity and consistency, the new provisions should apply equally to all attributes.

**Recommendation 15: That the broad definition of clubs and incorporated associations currently found in the DDA be adopted in the consolidated legislation.**

### **Question 16: Partnerships**

Since a proprietary company may have a single director (and would be liable for any alleged discrimination by its director or employees), it would be inconsistent to exclude small partnerships from the coverage of the consolidated legislation.

**Recommendation 16: That the legislation apply equally to all partnerships.**

### **Question 17: Sport**

We support the adoption of the model in the Victorian *Equal Opportunity Act 2010* (Victorian Act) which prohibits discrimination on the basis of all protected attributes, and has limited exceptions relating to specific competitive sporting activities (which do not include the non-competitive practice of a sport). This model is in line with the objects of the consolidated legislation and provides broader protection than that found in the DDA.

**Recommendation 17: That the legislation adopt the model used in the Victorian Act with respect to discrimination in sport.**

## Question 18: Discriminatory requests for information

We support the use of current provisions in the Queensland Act relating to unlawful requests for unnecessary information. The provisions are simple and clear and cover all attributes. A defence is available where it can be proven that the information was reasonably requested for a purpose that did not include discrimination.

The provisions in the Victorian Act, though similar to the Queensland Act, appear to be needlessly complex (resulting in a defence that the information could be used to form the basis of discrimination, but wasn't).

Labelling the information 'unnecessary' rather than 'discriminatory' flags that the information is not necessary to determine the matter at hand (for example, wide-ranging medical information requested in deciding eligibility in employment). This simplifies the concept and is easier to argue in a complaint.

**Recommendation 18: That the legislation adopt the model used in the Queensland Act with respect to 'unlawful requests for unnecessary information'.**

## Question 19: Vicarious liability

We recommend that the consolidated legislation hold the following liable:

- a person, for the conduct of their worker or agent; and
- where the 'person' is a body corporate, for the conduct of its directors, servants or agents, where the conduct engaged in, in the course of their work or while acting as agent or performing duties as a director, contravenes the Act.

The only defence to be available is if the relevant person/principal took all reasonable steps and exercised due diligence to prevent unlawful acts of discrimination.

Using 'in the course of work' etc will avoid the situation where an employer argues that the alleged unlawful discriminatory action was not 'authorised' and therefore they are not liable, thereby not even needing to rely on the defence.

The requirement to 'prevent' unlawful discrimination, rather than to 'avoid' it, is a stronger, positive duty.

**Recommendation 19 A: That the legislation hold the following liable:**

- c. a person, for the conduct of their worker or agent; and**
- d. where the 'person' is a body corporate, for the conduct of its directors, servants or agents, where the conduct engaged in, in the course of their work or while acting as agent or performing duties as a director, contravenes the Act.**

**Recommendation 19 B: That a defence to vicarious liability be available where the person/principal took all reasonable steps and exercised due diligence to prevent unlawful acts of discrimination by their worker, agent or director.**

## Exceptions and Exemptions

There is a real need to clarify within the legislation what is meant by the terms and in what circumstances they are valid.

We interpret an exception as operating in specified, limited circumstances where discrimination may be found pursuant to the legislation, and would ordinarily attract a remedy for being unlawful (for example, where a reasonable adjustment necessary to avoid the discrimination is not made because it would cause the discriminator unjustifiable hardship). The exception (unjustifiable hardship) would in effect be a defence to having a penalty/remedy imposed by way of Court Order.

An exemption is where the legislation does not apply at all, in particular specified circumstances. We see this as a jurisdictional issue, related to Parliament's particular policy decisions, or consistency with other legislation (such as Workplace Health and Safety). It would serve as a threshold to a complaint proceeding.

### Question 20: General limitations clause

As we discussed above in Question 1 relating to reasonable condition, we strongly disagree with any proposal to use the test of 'reasonable and proportionate' means to achieving a 'legitimate objective'. It is too broad and not supportive of the people whose rights and freedoms are being protected.

On that same basis we object to any proposal which introduces a general limitations clause framed in this way in the consolidated legislation.

It would not be difficult for an employer or service provider to use 'experts' to provide a 'reasonable and proportionate' solution (but which may well incorporate components that discriminate) to a perceived 'legitimate objective'. The respondents have far greater resources to develop a pre-emptive defence. A heavy onus would fall on the complainant to disprove such a defence. Just as some litigants engage in forum shopping, and both applicants and respondents engage experts who are supportive of their claims (especially in personal injury matters), we would expect that including such an element in the combined legislation would increase the duration and cost of the legal process.

In addition, such a limitations clause may well discourage complainants from pursuing their matter through the courts. If individual incidents of discrimination (while part of a reasonable and proportionate solution) are expected to be tolerated (and exempted) for the greater good (a legitimate objective), the vulnerable people whom this legislation is meant to protect will be further disadvantaged. The already small percentage of complaints to make it through to a final determination by the courts will diminish even further and a body of case law will fail to be developed.

In our view, it is far preferable for Parliament to make clear its intentions through detailed, specific exceptions or exemptions. This will provide greater certainty and reduce potentially unnecessary legal processes and transaction costs.

**Recommendation 20: That the legislation details specific exceptions and exemptions, and not adopt a general limitations clause.**

### Question 21: Inherent requirements / genuine occupational qualifications

We believe it would create more uncertainty for employers and employees alike, and make it more difficult to prosecute a complaint of discrimination, if the person had to prove that the duties in the 'Job Description' was a 'proportionate means of achieving a legitimate end or purpose', as well as proving they were medically fit (or that any other protected attribute did not interfere with their ability) to perform those duties (with reasonable adjustments if necessary).

We recommend that the current provision in section 21A DDA relating to inherent requirements of particular work (together with the reasonable adjustment), be retained in a modified form in the consolidated legislation:

- It can be upgraded to cover any protected attribute (instead of only relating to a disability).
- It should be framed as an exemption, meaning that the employment situation would not fall under the jurisdiction of the consolidated legislation in circumstances where the complainant was unable to carry out the inherent requirements of the particular work, even if reasonable adjustments were made.
  - Inherent requirements should include genuine occupational qualifications.
  - The onus of proof would fall on the complainant to demonstrate that they could indeed carry out those requirements (part of establishing the prima facie case that discrimination occurred).
- If it is to be argued that the particular job description was too narrowly drafted (to exclude persons for discriminatory reasons) and therefore included terms were not necessary to perform the functions of the particular job, the complainant can argue (to counter the exemption claim):
  - particular terms were not actually 'inherent' to the performance of the job; and
  - indirect discrimination (terms not reasonable in the circumstances).

**Recommendation 21: That an exemption for inherent requirements of particular work (in line with section 21A of DDA) be adopted in the legislation, It should:**

- c. include genuine occupational qualifications; and**
- d. apply to all protected attributes.**

## **Question 22: Religious exemption in relation to sexual orientation (sexuality) or gender identity**

We note that the Government does not intend to alter the current religious exemptions, apart from perhaps in relation to sexual orientation (sexuality) or gender identity.

As we advised in Question 7 above, we recommend that sexual orientation (sexuality) and gender identity should be included in the list of protected attributes in the consolidated legislation, and be covered in all specified areas of public life.

In our view, current exemptions should not apply at all to education providers, as defined in *Disability Standards for Education 2005* (Education Standards), which receive Government funding, except in connection with religious observance or practice (for example, in the teaching of religious education classes).

Given the push for consistent education standards and a national curriculum, it is inconsistent with the objects of the Framework to allow discrimination in general education (whether in employment of teachers or in the provision of education and training to students) on the basis of a protected attribute. It would also be inconsistent for discrimination against students to be prohibited on the basis of their

sexuality or gender identity (and programs implemented to stop bullying of such students), but then allows those same student to be subjected to discrimination when they become adults.

The current escape clause in the SDA that action, taken in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed, will not be discrimination, is too broad in today's society. Many adherents of religion are part of the diversity of sexuality, so how should a court decide whose sensibilities have been offended?

If the current provisions relating to exemptions for religious bodies are to remain, we recommend that those exemptions apply to sexuality and gender identity in the areas of employment and education only in connection with religious observance or practice, where religious doctrines, tenets or beliefs exclude person of those protected attributes.

**Recommendation 22: That exemptions for religious organisations apply to the areas of employment and education only in connection with religious observance or practice, where religious doctrines, tenets or beliefs exclude persons with protected attributes (including sexuality and gender identity).**

### Question 23: Temporary exemptions

We support the retention of the process of temporary exemptions in situations where discrimination may exist but steps are planned to overcome it.

We recommend that the basis for deciding whether an exemption will be granted by the Commission be included in the relevant provision, rather than simply constitute a guideline published by the Commission.

To make it clear that a temporary exemption under this specific provision is not a grant to continue the discrimination indefinitely, we recommend that consolidated legislation include the following provision:

In granting a temporary exemption, the Commission must consider the following:

- (a) is the exemption necessary;
- (b) would an exemption be consistent with the objects of the Act; and
- (c) is an exemption, subject to terms and conditions, appropriate in the circumstances.

Notes can clarify that:

- I. an exemption would be 'necessary' if discrimination could be established, and no defence or other exception or exemption applied; and
- II. an exemption would be appropriate only if steps were committed to (in a registered Plan) to overcoming or removing the discrimination within the period of the temporary exemption.

**Recommendation 23: That temporary exemptions be retained in the legislation. The legislation should require the Commission to consider:**

- d. is the exemption necessary;**
- e. would an exemption be consistent with the objects of the Act; and**
- f. is an exemption, subject to terms and conditions, appropriate in the circumstances.**

## Complaints and Compliance Framework

### Question 24: Other mechanisms for providing certainty and guidance regarding obligations

#### Action plans

As discussed above in Question 5, the Framework commits the Government to developing a new National Action Plan outlining the programs and actions to be taken by all levels of government for the promotion and protection of human rights in this country. It would be consistent with that Framework to include provisions in the consolidated legislation requiring all government agencies (and those publicly funded to exercise functions on behalf of the State or a public authority) to adhere to that process by developing their own individual Action Plans to eliminate discrimination within their service.

It is right and proper for private enterprises to also commit to Action Plans for the promotion and protection of human rights and elimination of discrimination within the bounds of their particular business. However, their involvement should be voluntary.

The process of developing an Action Plan to be registered with the Commission will focus the attention of agency, service provider or employer on its obligations under the consolidated legislation. The Commission already provides excellent guidelines for this process. It is to be hoped that as a result, the potential for discrimination and resultant complaints will be greatly reduced.

However, it has been our experience that there can be a wide divide between high minded, written policy and aspirations, and how that is put into effect at the lowest levels. We have assisted clients (State and Federal public service employees) who have alleged discrimination in the workplace, even though the various Departments and agencies have documented policies committed to providing a working environment that 'values diversity and inclusion' and 'supporting staff to reach their full potential'.

In the DDA the existence of a registered Action Plan may be considered in deciding whether unjustifiable hardship can be made out. The mere existence of such a Plan should not be used to increase the burden on a complainant who alleges a reasonable adjustment was refused. As we discussed above in Question 1, an adjustment requested by a complainant is particular to that person and that circumstance. It is not reflective of all persons with that protected attribute that may have been considered in developing an Action Plan. It should be recognised that an Action Plan does not include an exhaustive list of all actions that would eliminate discrimination.

#### Co-regulation

Pursuant to the *Australian Human Rights Commission Act 1986* the Commission has the function (among others) to inquire into, and attempt to conciliate, complaints of unlawful discrimination. It has no investigative powers with respect to individual complaints or general compliance with anti-discrimination legislation, nor does it undertake any enforcement activities.

We note that the public hearing and determination process previously undertaken by the Human Rights and Equal Opportunity Commission (HREOC) was transferred to the federal courts with effect 13 April 2000.

Contrast this with the Australia Communications and Media Authority (ACMA) which carries out compliance and enforcement activities under several Acts and legislative and other instruments, including codes of practice. For example:

- the *Spam Act 2003* prohibits the sending of unsolicited commercial electronic messages (emails, mobile phone messaging and instant messaging of a commercial nature).
- The Australian eMarketing Code of Practice (the Code) was developed by representatives from peak industry associations, consumer groups, message service providers, government regulatory agencies and corporate business.
- The Code was registered on 16 March 2006. Registration means that ACMA can enforce compliance with the Code rules on all members of the e-marketing industry, as defined by the *Telecommunications Act 1997*, and not just signatories to the Code.
- The Code allows for an industry-based complaint handling process, with escalated complaints referred to nominated Recognised Industry Bodies. The Code also sets out safety-net provisions whereby complaints can be referred to ACMA.
- If the ACMA determines that the (Code and) the *Spam Act 2003* has been breached, it can issue a formal warning or enter into an enforceable undertaking with the respondent (including penalty payments to the ACMA), and may apply to the Courts for compensation where the person who alleged the breach suffered loss or damage.

In a similar way, the Privacy Commissioner can investigate breaches of the National Privacy Principles and the *Privacy Act 1988*. It can make orders for compensation for non-economic loss (for example, injury to feelings and humiliation, anxiety and physical symptoms), economic loss and aggravated damages.

We note that the Productivity Commission *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004) (Productivity Commission Report), being considered in this consultation suggested that the practical effect of registering and certifying compliance with a code of conduct would protect an organisation which complies with the code from complaints under the general provisions of the legislation.

Apparent compliance with a code of conduct may yet disadvantage a person with a protected attribute, leading to an allegation of indirect discrimination. Registration and certification would deny this person access to the complaints and courts process.

In addition, codes usually require aggrieved persons to complain first to the agency (which is alleged to have breached the code) and allow time for it to respond. If there is no response or if the person is not satisfied with the response, then they can take the matter further (to the Commission in the suggested process). Taking into account that many complainants are unrepresented and vulnerable (particularly those with disabilities), this extra step may discourage persons from pursuing remedies at all for alleged discrimination, and delay justice for those who do.

In our view, it would be a serious miscarriage of justice to allow the Commission to register any co-regulatory instruments (thereby avoiding the jurisdiction of the Commission and the Courts for discrimination arising from an alleged breach of the instrument) without giving the Commission the power and authority to investigate and enforce compliance with those same instruments. Giving the Commission the necessary powers would require a major rewrite of current legislation.

Requiring ‘public consultation’ and periodic reviews (suggested as every five years) is no guarantee of ‘flexibility to deal with a variety of different circumstances and changes over time’ as suggested by the Productivity Commission.

We note that the first review of the Disability Standards for Accessible Public Transport 2002 (Transport Standards) was due in 2007. However, the public consultation only started in April 2007. The agency conducting the public consultations on behalf of the government advertised the consultation widely, reviewed 93 written submissions it received, conducted 17 public hearings, produced a draft report for further submissions, and delivered a final report to the government in October 2009. That 353 page Report contained 15 general recommendations, together with findings and recommendations that pertained to each Part of the Transport Standards. In June 2011, the Government responded with a 15 page document, seven pages of which addressed the recommendations by the independent consultant, supporting 10 recommendation ‘in principle’, and ‘noting’ the remaining five.

We do not consider that this demonstrates the effectiveness of the process suggested by the Productivity Commission.

We therefore strongly recommend that co-regulation is not a feature of the consolidated legislation.

## Standards

As we discussed above, we recommend that all protected attributes should be covered in all specified areas of public life. This also applies to the powers of the Attorney-General to make Standards with respect to protected attributes.

The provisions in the DDA are not restricted to technical issues (such as physical access to buildings and public transport). The existing Education Standards address reasonable adjustments and preventing harassment.

The protected attribute of race may give rise for a Standard to be developed in relation to treatment of refugees. This is not meant to undermine the authority of the *Migration Act 1958*, but to set standards of how refugees and those seeking assessment as refugees are to be treated, in order to ensure their rights are protected and that we meet our obligation under international treaties and conventions.

We recommend that the power currently in the DDA with respect to formulating Standards be retained in the consolidated legislation and cover all attributes in all specified areas of public life.

## Certification of special measures

As we discussed in Question 3 above, we support the use of special measures to assist vulnerable person to participate equally in public life.

We recommend that agencies seeking to implement special measures to overcome discrimination, undergo a process similar to that where temporary exemptions are currently sought from the Commission. This will ensure that adequate public consultation is undertaken, and the Commission can determine (with qualifications and limitations if necessary) whether the measures do indeed comply with the legislative provisions. The Commission can also set a timetable for reviewing when the objectives of the special measure have been met, and the measures are no longer required (and therefore removed from the register).

Once a measure has been determined to be a special measure, it should be registered by the Commission. Any complaints, by persons who are not beneficiaries of the special measure, of discrimination related to the special measure, can be rejected on the grounds of lacking in substance, and not proceeded with. This would result in cost savings for all concerned.

**Recommendation 24 A: That all government agencies (and those publicly funded to exercise functions on behalf of the State or a public authority) be required to implement action plans that eliminate discrimination and promote equality.**

**Recommendation 24 B: That co-regulation (registration of codes of conduct and certification of compliance) be adopted only if the Commission is given the authority to investigate breaches of and enforce compliance with those instruments.**

**Recommendation 24 C: That the Minister continues to have authority to formulate Standards, in relation to all specified areas of public life and all attributes.**

**Recommendation 24 D: That a process be adopted (similar to that relating to temporary exemptions) to assess and register Special Measures.**

## Question 25: Changes to the conciliation process

### Voluntary / compulsory conciliation

We note that even though the Commission has the authority to require production of information and compel attendance at a conciliation conference, its usual practice is to conduct the process on a voluntary basis.

It is our experience that this failure by the Commission to comply with the legislative provisions and intent of Parliament, leads to a failure to resolve complaints where the respondent in effect challenges the complainant to pursue the matter by a costly and uncertain path through the Courts. Vulnerable complainants are disadvantaged by not being informed of the respondents' answer to the allegations of discrimination, and facing the considerable risk of commencing civil action where they may be caught out by unfair surprise.

On the other hand, a vexatious complainant/litigant (often unrepresented) has in the past, requested immediate referral of the complaint to the Courts without making any attempt to resolve the matter through conciliation.

In any alternate dispute resolution process, it is important that all concerned parties sort out the 'real issues' and have sufficient information to make an informed decision. Enforcing the legislative requirement for a written response and attendance at the conciliation conference encourages parties to deal realistically with the allegations in the complaint.

We suggest that the inclusion of a provision requiring parties to make a genuine attempt to resolve the complaint and negotiate in good faith (with failure to do so being considered in the question of costs if the matter is pursued in the courts) would improve the outcomes for vulnerable persons, and reduce the impetus for and duration and costs of legal processes.

We recommend that the current powers to require production of information and attendance at conciliation conference be retained and enforced, together with a new provision requiring the parties to make a genuine attempt to resolve the complaint and negotiate in good faith.

## Voluntary arbitration

Properly conducted arbitration can be a quicker and cheaper alternative to the courts (not to an initial complaint handling process involving conciliation or mediation). However, there is no real advantage where procedures of a court are mimicked in the arbitration process.

The most important decision affecting the efficiency of (commercial and industrial) arbitration is the choice of arbitrator – which professional to choose and who is available (lawyer, engineer, builder or architect). We question whether there would be sufficient experts available to fill the roles of arbitrator needed to determine the range of discrimination complaints arising from the expanded list of protected attributes? If this was a real option, how would this service be funded?

In view of the fact that arbitration is not available under the *Fair Work Act* for alleged discriminatory conduct in breach of the general protections provisions (within the narrow area of employment), we do not support the use of this process for determining discrimination complaints under the consolidated legislation. In our considered opinion, any determination in discrimination matters needs to be appealable to a higher court.

## Mediation

We support the development of a mediation process using accredited, in-house (Commission) mediators who are fully trained in the legislation and can assist both complainants and respondents to identify issues correctly.

## Other

Currently the Commission may ‘terminate’ a complaint if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance. This means that the Commission initially accepts all complaints, regardless of merit, and attempts to conciliate them. Any complaints not resolved can then be pursued in the courts.

We prefer the provisions in the Queensland Act which requires its commissioner to ‘reject’ a complaint if the commissioner is of the reasonable opinion that the complaint is frivolous, trivial or vexatious; or misconceived or lacking in substance. This requires the complainant to meet a basic threshold before the complaint will be accepted for conciliation. Furthermore, a complainant has a right to request referral of the complaint to the Tribunal only after a conciliation conference has been held and the complaint has not been resolved, or if the commissioner believes that the complaint cannot be resolved by conciliation.

Adopting this process will weed out complaints which lack merit, thereby preventing them from being pursued in the courts.

### **Recommendation 25 A: That the legislation make it compulsory to:**

- d. provide a written response to the complaint;**
- e. attend a conciliation conference; and**
- f. (all parties) make a genuine attempt to resolve the complaint and negotiate in good faith, and that the Commission enforce compliance with these provisions.**

**Recommendation 25 B: That voluntary arbitration not be included in the legislation as an option for resolving the complaint.**

**Recommendation 25 C: That mediation conducted by in-house mediators (at the Commission) be included (with conciliation) in the legislation as an option for resolving the complaint.**

**Recommendation 25 D: That the legislation require the Commission to reject complaints if the President is satisfied that the complaint is frivolous, trivial or vexatious; or misconceived or lacking in substance.**

## Question 26: Improvements to the court process

### Representative actions / Standing

The Courts require litigation guardians or ‘next friends’ where applicants lack legal capacity, and allow parties to be joined where a defined commercial relationship exists (such as insured/insurer and tenant/landlord).

The *Fair Work Act 2009* authorises an industrial association, that is entitled to represent the industrial interests of the employee, to apply to Fair Work Australia (FWA) to deal with a dispute where employment has been terminated for prohibited reasons (including discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin).

In our view, it would be right and proper for a vulnerable aggrieved person to authorise a representative body, such as an advocacy organisation or trade union, to ‘stand with’ them in civil action where their complaint to the Commission has not been resolved.

### Litigation costs

We support a proposal that generally each party should bear their own costs for the proceeding, subject to the interests of justice.

The *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) does not allow costs to be awarded against a child, and set out what the tribunal will consider in awarding costs against a party or their representative, in the interests of justice.

### Remedies

Though not an exhaustive list, expanding the list of orders which the court may make will give clearer information to duty holders regarding consequences for breaches of the legislation.

**Recommendation 26 A: That the legislation specifically grant a representative body standing in civil proceedings in pursuit of the discrimination complaint, where an aggrieved person has authorised that representation.**

**Recommendation 26 B: That each party bear their own costs for civil proceedings, subject to the interests of justice.**

**Recommendation 26 C: That the list of orders which the courts may make (as detailed in the AHRC Act) be expanded to include corrective and preventative orders.**

## **Question 27: Changes to the role and functions of the Commission**

In our view it would be consistent with the objects of the Framework (protect and respect) for the Commission to have an internal Division which has powers to undertake its own investigations into systemic discrimination matters brought to its attention by individuals or advocacy organisations. It could then report to the relevant duty holder on the alleged breaches of the legislation.

If that duty holder does not make changes to overcome the identified breaches, the Commission should have power to commence civil action for the continuing breaches.

We support a requirement for the Commission to monitor progress on the achievement of equality and the success of the legislation, and to report to Parliament annually on that progress.

**Recommendation 27 A: That the Commission be expanded to include an Investigative Division with power to:**

- d. undertake independent investigations;**
- e. report to the duty holder on the alleged breaches of the legislation; and**
- f. if no remedial action is taken by the duty holder, to commence civil action for the breach.**

**Recommendation 27 B: That the Commission be required to monitor progress on the achievement of equality and success of the legislation, and to report to Parliament annually on that progress.**

## **Other consideration**

Currently, under the Commonwealth Community Legal Services Program, the Government funds a variety of services which provide advice and representation to disadvantaged and vulnerable persons in our community, perform community legal education and undertake law reform activities. Those services include:

- Disability Discrimination Legal Services
- Women's Legal Services
- Youth Legal Services
- Civil Litigation Project
- Indigenous Women's Outreach Project
- Rural Women's Outreach Lawyer Services

Our questions to the Government are these:

1. With the consolidation of the anti-discrimination legislation and the expansion of the attributes and areas of public life, will there be a concurrent expansion in the role and number of current services assisting aggrieved person with discrimination matters?

2. Will the Government commit to funding services adequately to meet its obligations in the Framework to uphold its human rights obligations (including with respect to the complaints process)?

We thank you for taking the time to consider our submission and ask that you contact Sue Tomasich of our office should you have any queries.