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Executive Director

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## Response to Consolidation of Commonwealth

### Anti-Discrimination Laws Discussion Paper

#### Introduction

The Equal Rights Trust (ERT) works to promote equality and combat discrimination on all grounds and in all areas of life. It undertakes advocacy, research, documentation and litigation in support of those who suffer discrimination or disadvantage because of who they are, what they believe or their status in society.

Through its advocacy and projects, ERT has consistently supported the development and improvement of legislation to ensure that it offers comprehensive protection of the right to equality. Fundamentally, the realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

We note the significant number of informative and authoritative submissions from other organisations calling for simplification and strengthening of Australian anti-discrimination law in line with Australia's international obligations. We support and endorse those arguing, *inter alia*, that the consolidation of anti-discrimination laws in Australia should be used as an opportunity to promote substantive equality and eliminate discrimination.

This submission seeks to complement these existing submissions. It will not attempt to answer all the questions posed in the discussion paper, but rather to elucidate the key principles that should guide the drafting of the consolidated Act. It will focus on the opportunity presented by the consolidation project to ensure Australia not only meets its international legal obligations but implements and contributes to best practice in the area of equality law. It will draw in particular on the Declaration of Principles on Equality.

## Declaration of Principles on Equality

The Declaration of Principles on Equality (the Declaration)<sup>1</sup> reflects a moral and professional consensus among human rights and equality experts. It contains 27 principles that establish a new paradigm on equality, drawing on established and emerging principles of international law. It has been described by the High Court of Delhi as reflecting the “current international understanding of Principles on Equality”.<sup>2</sup>

The principles were formulated and agreed by 128 experts from 44 countries following a two-year long consultative process and are based on concepts and jurisprudence developed in international, regional and national legal contexts. The Declaration is intended to assist efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality, in particular through developing effective equality legislation and policies.

The legal basis of the 27 Principles is found (i) in the Charter of the United Nations<sup>3</sup> which recognises the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world; (ii) Article 1 of the Universal Declaration of Human Rights<sup>4</sup> proclaiming that all human beings are born free and equal in dignity and rights; and common Article 2 of the International Covenant on Civil and Political Rights<sup>5</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>6</sup>; (iii) the recognition, in Article 26 of the International Covenant on Civil and Political Rights, of the right to non-discrimination as an autonomous human right and the correlative obligation of States to realise this right; (iv) a number of provisions in other international and regional treaties<sup>7</sup>; (v) non-binding opinions, recommendations, and interpretations by organs of international and regional organisation including the Council of Europe; and (vi) jurisprudence of international, regional and national courts related to equality.

## Object and Purpose of Equality Law

As the Discussion Paper notes:

*The consolidation of federal anti-discrimination laws provides an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the*

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<sup>1</sup> *Declaration of Principles of Equality*, published by The Equal Rights Trust, London 2008.

<sup>2</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001 at 93.

<sup>3</sup> United Nations Charter, 1 UNTS XVI, entered into force 24 October 1945.

<sup>4</sup> Universal Declaration on Human Rights, General Assembly resolution 217 A (III), 10 December 1948.

<sup>5</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force 23 March 1976.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, entered into force 3 Jan 1976.

<sup>7</sup> In particular, Convention on the Rights of Persons with Disabilities, United Nations Treaty Series vol. 2515, p. 3, entry into force 3 May 2008; Convention on the Elimination of All Forms of Discrimination against Women, United Nations Treaty Series vol. 1249, p.13, entry into force 3 September 1981; International Convention on the Elimination of All Forms of Racial Discrimination, United Nations Treaty Series vol. 660, p.195, entry into force 4 January 1969.

*legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community.*<sup>8</sup>

ERT welcomes the government's commitment to go beyond anti-discrimination measures to ensure the protection of substantive equality. The consolidation project presents an opportunity to provide express protection of an expansively defined right to equality, including transformative measures, measures that place positive duties to ensure equality to participate in all areas of life regulated by law. Consideration should be given to including an object and purpose clause in the consolidated Act which reflects a modern understanding of equality consistent with the Declaration of Principles on Equality.

It is recommended to define the right to equality broadly, as a right which entails equal participation in all areas of life in which human rights apply, and which is autonomous. The definition provided in the Declaration of Principles on Equality is an example.

*The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.*<sup>9</sup>

As ERT's Executive Director, Dr Dimitrina Petrova notes:

*[T]his understanding entails a strong and serious positive obligation of the duty-bearer (the State) to take steps to realising equality in a proactive way and with societal reform in mind. This approach does not diminish the role of legal enforcement of the right to non-discrimination by individual or group claimants but enables more comprehensive measures of improving the position of disadvantaged groups in society.*<sup>10</sup>

<p><b>Recommendation 1:</b> Realising the right to equality should be the central objective of the consolidated Act.</p>
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### Discrimination

Discrimination should be defined in the consolidated Act in a way encompassing the different forms and manifestations of discrimination and disadvantage, and the right to non-discrimination should be a free-standing right, not dependent on or related to the recognition of any other civil, cultural, economic, political or social right. As the Declaration states, "the right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality."<sup>11</sup>

### Definition of Discrimination

The exact drafting of the definition of discrimination should reflect the national context and experience of the jurisdiction in which equality law will operate. However, the Declaration offers useful guidance which can inform the consolidated Act.

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<sup>8</sup> Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, September 2011, p. 5.

<sup>9</sup> See above, note 1, Principle 1.

<sup>10</sup> Petrova, D., "The Declaration of Principles on Equality: A Contribution to International Human Rights Law", *The Equal Rights Review*, Volume 2, December 2008, p. 62.

<sup>11</sup> See above, note 1, Principle 4.

In Principle 5 the Declaration defines three forms of prohibited conduct which constitute discrimination: direct discrimination, indirect discrimination and harassment. All three concepts reflect current expert opinion on the definitions of the different forms of discrimination in international and regional law.<sup>12</sup> The definitions of direct and indirect discrimination and harassment provided are:

**Direct discrimination** occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

**Indirect discrimination** occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

**Harassment** constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>13</sup>

Additionally, in line with international law in this area, a denial of reasonable accommodation should be defined as constituting discrimination.<sup>14</sup> The Declaration reflects an emerging international consensus on this issue. In it the concept of reasonable accommodation “is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life.”<sup>15</sup> Thus, the duty of reasonable accommodation can arise in respect of any ground:

**Reasonable Accommodation** means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis

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<sup>12</sup> See for example: European Union Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 2(a), 2(b) and 3; European Union Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Articles 2(a), 2(b) and 3; See also: Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 10.

<sup>13</sup> See above, note 1, Principle 5.

<sup>14</sup> See, for example, Convention on the Rights of Persons with Disabilities (CRPD), G.A. Res. A/RES/61/106, (2006), Article 2; and Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities*, UN Doc. E/1995/22, 1995, Para 15: “disability-based discrimination” includes the denial of “reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”).

<sup>15</sup> See above, note 10, p. 66.

*with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.*<sup>16</sup>

**Recommendation 2:** The definition of discrimination should include: direct discrimination; indirect discrimination; harassment; and reasonable accommodation.

### Positive Action

Positive action is an important tool for accelerating progress towards substantive equality for particular groups. The consolidated Act should require positive action as a necessary element of the right to equality.

The Declaration draws upon emerging approaches in international and regional human rights law, in this case with regards to the concepts of special measures in the various instruments,<sup>17</sup> whereby “it should be noted that the Declaration captures the growing tendency of interpreting “special measures” as part of, rather than an exception to, equal treatment.” Principle 3 states:

*To be effective, the right to equality requires positive action.*

*Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*<sup>18</sup>

**Recommendation 3:** The consolidated Act should require positive action.

### Protected Attributes

A broad view regarding protected attributes should be taken. The Declaration contains both an extensive list of explicitly protected grounds and a “test” for the inclusion of further grounds:

*Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*<sup>19</sup>

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii)*

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<sup>16</sup> See above, note 1, Principle 13.

<sup>17</sup> See, for example: International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 1965, Article 1(4); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 1979, Article 4(1); Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa Article 2(1)(d).

<sup>18</sup> See above, note 1, Principle 3.

<sup>19</sup> See above, note 1, Principle 5.

*adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.*<sup>20</sup>

As Dr Petrova notes:

*The definition of discrimination in Principle 5 includes an extended list of 'prohibited grounds' of discrimination, omitting the expression 'or other status' which follows the list of characteristics in Article 2 of the Universal Declaration of Human Rights. While intending to avoid abuse of anti-discrimination law by claiming discrimination on any number of irrelevant or spurious grounds, the definition nonetheless contains the possibility of extending the list of 'prohibited grounds' and includes three criteria, each of which would be sufficient to recognise a further characteristic as a 'prohibited ground'. This approach is inspired by the solution to the open versus closed list of 'prohibited grounds' dilemma provided by the South African Promotion of Equality and Prevention of Unfair Discrimination Act (2000).*<sup>21</sup>

This approach to the issue of protected attributes is an essential component of the unified human rights perspective on equality. It provides a foundation for tackling the full complexity of the problem to be addressed - a person's lived experience of discrimination. It recognises that a single person may experience discrimination on a number of subtly interacting grounds, or on grounds not previously known to be linked to inequality, and that the cumulative impact of discrimination on different grounds can be bigger than the sum of its parts. The approach recommended in the Declaration acknowledges that the full range of grounds of discrimination must be addressed as aspects of a single problem, if any one of them is to be effectively challenged.

**Recommendation 4:** The following grounds should be expressly included in the consolidated Act: race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness.

**Recommendation 5:** The list of protected grounds should be open and additional grounds should be protected where discrimination against persons with that additional ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the expressly listed grounds.

In line with this recognition of the complexity of the problem to be addressed, discrimination based on association or perception should be prohibited. The Declaration states:

*Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*<sup>22</sup>

<sup>20</sup> See above, note 1, Principle 5; South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Section 1 (xxii) (b).

<sup>21</sup> See above, note 10, p. 63.

<sup>22</sup> See above, note 1, Principle 5. See also Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 16.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

**Recommendation 6:** The consolidated Act must prohibit discrimination on the basis of association or perception.

Additionally, under international law states are required to protect persons from discrimination based on multiple grounds.<sup>23</sup> The Declaration adopts this approach, recognising that individuals have multiple identities and cannot always be classified according to or as defined by a single characteristic. The concept of “multiple discrimination” is used in the Declaration to describe:

*a) discrimination on more than one ground in a cumulative (additive) sense, e.g. where a woman is discriminated against on grounds of her gender and, separately, also on grounds of her race (disability, age, etc), and in this case the discriminator otherwise discriminates both against women and against racial minorities; b) discrimination on more than one ground in a syncretic sense, based on a combination of grounds, where it is only the combined characteristics of, for example, gender and race that trigger discrimination, while each of them alone does not.*<sup>24</sup>

**Recommendation 7:** Multiple discrimination should be prohibited.

#### Protected Areas of Life (Scope of Application)

Comprehensive anti-discrimination law should be broad in scope. The Declaration states that the right to equality applies “in all areas of activity regulated by law”.<sup>25</sup> This approach means that the activities of public and private actors, including transnational corporations will be subject to anti-discrimination law.<sup>26</sup> The phrase “regulated by law” covers both areas actually regulated by the state in fact as well as those that should be subject to legal regulation.<sup>27</sup>

This approach is firmly based in international human rights law. The Human Rights Committee, interpreting the scope of the right to be protected against discrimination, stated that Article 26 of the International Covenant on Civil and Political Rights “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”<sup>28</sup> Furthermore, the Committee noted that: “the right to equality before the law and freedom from discrimination, protected by Article 26, requires States to act against discrimination by public and private agencies in all fields.”<sup>29</sup> Additionally, this is in line with the Committee’s approach to the State’s obligations to protect against human rights violations by private actors in relation to all Covenant rights:

<sup>23</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 17.

<sup>24</sup> See above, note 10, p. 66.

<sup>25</sup> See above, note 1, Principle 8.

<sup>26</sup> See above, note 10, p. 64.

<sup>27</sup> *Ibid.*

<sup>28</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination*, 1989, Para 12.

<sup>29</sup> Human Rights Committee, *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc. CCPR/C/21/Rev.1/Add.10, 2000, Para 31.

*The positive obligations on States Parties to ensure Covenant rights will not be fully discharged if individuals protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.*<sup>30</sup>

**Recommendation 8:** The consolidated Act should protect from discrimination in all areas of activity regulated by law. It should cover public and private actors such as clubs, member-based associations and partnerships, and include protection for voluntary and domestic workers.

#### Exceptions and Exemptions

Exceptions and exemptions should be as narrow and as limited as possible. The Declaration provides guidance in relation to exceptions appropriate to different types of prohibited conduct. Crucially it should be noted that exceptions or exemptions in relation to conduct that can be considered direct discrimination may be permitted only when they can be justified against strictly defined criteria.<sup>31</sup>

**Recommendation 9:** The consolidated Act should expressly recognise that direct discrimination may be permitted only very exceptionally, and only when it can be justified against strictly defined criteria.

A more general exception is appropriate for indirect discrimination. This allows a discriminatory provision criterion or practice where it “is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.<sup>32</sup> The Committee on Economic, Social and Cultural Rights provides a useful elucidation of this exception:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.*<sup>33</sup>

**Recommendation 10:** A general exemption on indirect discrimination which allows discriminatory acts where they are objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary should be provided.

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<sup>30</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 8.

<sup>31</sup> See above, note 1, Principle 5.

<sup>32</sup> *Ibid.*

<sup>33</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 13.

## Right-holders and Duty-bearers

The Declaration defines the holders of the right to equality as “all persons present in or subject to the jurisdiction of a State”.<sup>34</sup> This means that:

*[t]he right to equality is to be freely exercised by all individuals, irrespective of nationality or statelessness, including asylum seekers, refugees, migrant workers, irregular migrants and other persons who may find themselves in the territory or subject to the jurisdiction of a State. The right to equality is also to be freely exercised by those within the power or effective control of the forces of a State acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State assigned to an international peace-keeping or peace-enforcement operation.*<sup>35</sup>

**Recommendation 11:** The consolidated Act should incorporate an inclusive understanding of the right-holder in respect to the rights to equality and non-discrimination, to cover all persons present in or subject to the jurisdiction of a State.

The state is the key duty bearer. The Declaration recognises the state’s duties but also those of non-state actors.<sup>36</sup> Importantly it recognises that the state’s obligations remain even in respect of functions that have been privatised. This is well established in international law. For example, the Inter-American Court of Human Rights held this was the case in relation to health care and private health care institutions in the case of *Ximenes-Lopes v. Brazil*, Judgment of 4 July 2006. The European Court of Human Rights has also held that where a state relies on private actors to perform essential public functions it retains responsibility for breaches of rights.<sup>37</sup>

**Recommendation 12:** The consolidated Act should incorporate a clear understanding of the state as duty-bearer, with responsibilities to respect, protect and fulfil the right to equality; as well as of the duty of non-state actors to respect the right to equality.

## Complaints and Compliance Framework

In line with international law a complaints and compliance framework should “effectively address the individual and structural nature of the harm caused by discrimination.”<sup>38</sup>

## Burden of Proof

In order to reflect the difficulty of bringing a discrimination claim and the reality that the information required by the court is most likely to be held by the discriminator, the consolidated Act should allow for a shifting of the burden of proof in civil proceedings. This

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<sup>34</sup> See above, note 1, Principle 9.

<sup>35</sup> See above, note 10, pp. 64-5.

<sup>36</sup> See above, note 1, Principle 10.

<sup>37</sup> See for example, *Van der Musselle v Belgium* (1984) 6 EHHR 163 (European Court of Human Rights).

<sup>38</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 40.

approach, adopted in the Declaration in Principle 21, has been particularly well established under European Union legislation.<sup>39</sup> The Declaration states:

*Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.<sup>40</sup>*

**Recommendation 13:** The burden of proof in civil proceedings should shift to the respondent once the claimant has established a prima facie case of discrimination.

### Access to Justice

The protection of the right to equality be must practical and effective, rather than theoretical and illusory. This requires putting in place the legal and administrative mechanisms which guarantee victims of discrimination effective access to justice.<sup>41</sup>

Effective access to justice requires that victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “affordable, accessible and timely” and “legal aid and assistance” must be provided where necessary.<sup>42</sup> The Declaration provides the following guidance:

*Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.<sup>43</sup>*

Additionally, effective access to justice requires that those involved in bringing discrimination claims must be protected from victimisation. The Declaration offers a clear prohibition of victimisation:

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<sup>39</sup> See for example, Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which contains identical wording. Additionally, the Preamble to the Directive states that:

“[T]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.”

<sup>40</sup> See above, note 1, Principle 21.

<sup>41</sup> Human Rights Committee, *General Comment 31: The nature of the general legal obligation imposed on states parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 15.

<sup>42</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: On the core obligations of states parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010, Para 34.

<sup>43</sup> See above, note 1, Principle 18. See also Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 40.

*States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.<sup>44</sup>*

**Recommendation 14:** Legal redress for discrimination complaints must be as accessible as possible with consideration given to costs, legal aid and rules about representation.

**Recommendation 15:** Those involved in bringing discrimination claims must be protected from victimisation.

### Standing

Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similarly discriminatory treatment to bring claims as a group, if the systemic nature of discrimination is to be effectively addressed. The Declaration recognises the importance of flexibility in rules concerning standing in Principle 20:

*States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.<sup>45</sup>*

**Recommendation 16:** The rules of standing should allow actions to be brought on behalf of persons subject to discrimination in appropriate circumstances.

### Remedies and Sanctions

Under international human rights law Australia must:

*[E]nsure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.<sup>46</sup>*

It is essential that remedies are designed so as not only to address the needs of the individual bringing claim, but to address more structural causes of the discrimination experienced by the individual in the case, which are likely to affect others. In this respect, the Committee on the Elimination of Discrimination against Women has said:

*This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such*

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<sup>44</sup> See above, note 1, Principle 19.

<sup>45</sup> See above, note 1, Principle 20.

<sup>46</sup> Human Rights Committee, *General Comment 31: The nature of the general legal obligation imposed on states parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 15.

*remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.*<sup>47</sup>

Sanctions imposed on discriminators must be effective, proportionate and dissuasive.<sup>48</sup> Importantly, they must serve to compensate not only material damage suffered by the victim, but also the injury to feelings caused by the particularly humiliating experience of discrimination.

Under international law remedies and sanctions should not be limited to damages.<sup>49</sup> The Declaration provides guidance on the range of remedies and sanctions that should be considered:

*Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.*<sup>50</sup>

**Recommendation 17:** Remedies must be effective, proportionate and dissuasive. They should not be limited to damages.

### Specialised Bodies

In addition to judicial remedies, effective administrative mechanisms such as a National Human Rights Institution or an independent equality body are important protectors of the right to equality.

Such bodies should also promote respect for the enjoyment of human rights without any discrimination, review government policy, monitor legislative compliance, and educate the public.<sup>51</sup> The Declaration highlights the importance of these bodies in relation to the right to equality:

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<sup>47</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: On the core obligations of states parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 2010, Para 32.

<sup>48</sup> See above, note 1, Principle 22.

<sup>49</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 40.

<sup>50</sup> See above, note 1, Principle 22.

<sup>51</sup> See for example, Committee on the Elimination of Racial Discrimination, *General Comment No. 17: Establishment of national institutions to facilitate implementation of the Convention*, UN Doc. A/48/18, 1993, Para 1. See also Principles relating to the Status of National Institutions (the Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993, available at: <http://www2.ohchr.org/english/law/parisprinciples.htm>.

*States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.*<sup>52</sup>

**Recommendation 18:** The Australian Human Rights Commission should be strengthened in line with the Paris Principles to allow it to function as an effective equality body.

### Conclusion

The consolidation of Australian anti-discrimination laws presents an important opportunity for Australia to become a leader in equality law. In order to seize on this opportunity the consolidated Act should not only aim to meet Australia's international legal obligations but to implement and contribute to the development of best practice in the area of equality law. The consolidated Act should protect an expansively defined right to equality in line with the Principles set out in the Declaration.

The Equal Rights Trust, through its work on the Declaration and its global projects, has extensive experience in this area. Should the Australian government require technical assistance at any stage of the consolidation project, ERT would be most happy to place this expertise at the government's disposal.

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<sup>52</sup> See above, note 1, Principle 23.