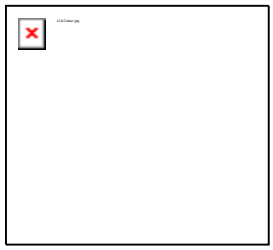

Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper

Attorney-General's Department

1 February 2012

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Acknowledgement

The Law Council acknowledges the assistance of the following bodies in the preparation of this submission:

- The Law Council's Equalizing Opportunities in the Law Committee
- The Law Society of NSW's Employment Law Committee
- The Law Institute of Victoria
- The Law Society of South Australia
- The Law Society of Western Australia
- The Queensland Law Society
- The Industrial Law Committee of the Law Council's Federal Litigation Section

Executive Summary

1. The promotion of equality and the need for adequate protection against discrimination have been key components of the Law Council's advocacy for many years. Therefore, the Law Council has welcomed the Commonwealth Government's project to consolidate anti-discrimination laws (the consolidation project).

2. The Law Council provides this submission on the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (the Discussion Paper) having already provided preliminary views and a Policy Statement to the Attorney-General's Department (AGD).

3. The Law Council also looks forward to providing further comments on the consolidation project prior to or on the release of exposure draft legislation by the AGD.

4. In this submission, the Law Council addresses existing inconsistences and difficulties under the current Commonwealth anti-discrimination laws relating to:

   (a) The definition of discrimination;

   (b) The burden of proof;

   (c) Special measures;

   (d) Reasonable adjustments;

   (e) Harassment;

   (f) Protected attributes;

   (g) Vicarious liability;

   (h) Exceptions and exemptions;

   (i) Conciliation and court processes; and

   (j) Interactions with other laws.

5. The Law Council also addresses some possible enhancements to the current Commonwealth anti-discrimination regime relating to:

   (a) A positive duty to eliminate discrimination and harassment;

   (b) Protection against discrimination based on sexual orientation and gender identity;

   (c) A general limitations provision; and

(d) Mechanisms to assist duty holders with compliance.

6. The Law Council considers that reforms are necessary to the Commonwealth anti-discrimination regime to promote substantive equality in Australian society and considers that the issues raised in the Discussion Paper represent a good start towards achieving this aim. However, the scope of the issues and the complexity of some of the issues require further consideration by the Law Council and the Government.

Introduction

7. The Law Council of Australia is pleased to participate in the Commonwealth Government's proposed consolidation of Commonwealth anti-discrimination laws into a single Act (the consolidation project).

8. The Law Council has previously provided preliminary views and a Policy Statement to the Attorney-General's Department (the AGD) in relation to the consolidation project.[1] The Law Council is now pleased to provide this response to the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (the Discussion Paper).[2]

9. The promotion of equality and the need for adequate legal protection against discrimination in line with Australia's international human rights obligations has been a component of Law Council advocacy for many years.

10. The Law Council welcomes the consolidation project as a key initiative within the Australia's Human Rights Framework (the Framework) and a response to a recommendation made following the 2009 National Human Rights Consultation.[3]

11. The consolidation project is described in the Framework as:

    (a) Focusing on removing unnecessary regulatory overlap, addressing inconsistencies across existing anti-discrimination laws and making the system more user-friendly in order to reduce compliance costs for individuals and business;

    (b) Including consideration of the complaints handling processes and the related role and functions of the Australian Human Rights Commission; and

    (c) Feeding into the development of nationally harmonised laws across Australia, a project currently being progressed through the Standing Committee Attorneys-General[4] (now the Standing Committee on Law and Justice).

12. When announcing the consolidation project, the then Attorney-General and the then Minister for Finance and Deregulation noted that there would be no diminution of existing protections under federal legislation.[5]

13. In launching the Discussion Paper the then Attorney-General and the Minister for Finance and Deregulation also noted that it provided the opportunity for the

[1] See http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=04CF8FA8-0C07-3BC0-6DD7-DE5550A29111&siteName=lca
[2] See http://www.ag.gov.au/antidiscrimination
[3] See http://www.humanrightsconsultation.gov.au/
[4] See http://www.ag.gov.au/humanrightsframework
[5] See http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation

community to provide its views on the recommendations of the Senate Committee on Legal and Constitutional Affairs' reports on inquiries into the Effectiveness of the Commonwealth *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting Gender Equality (the SDA review) and the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009.*[6] The Law Council made submissions to both of these inquiries, as well as to an inquiry into the *Sex and Age Discrimination Amendment Bill 2010*, which implemented some of the recommendations of the inquiry into the *Sex Discrimination Act 1984.*[7]

14. The Ministers also noted that the consolidation project provided the opportunity to ensure consistency with the *Fair Work Act 2009* (the FWA) and to introduce prohibitions on discrimination on the grounds of sexual orientation and gender identity. The Ministers also noted that the Discussion Paper does not deal with the *Marriage Act 1961* or same sex marriage.[8]

15. The Discussion Paper notes that in examining options for reform, the Government will consider clarifying and enhancing protections where appropriate. However, the Discussion Paper also notes that the Government does not propose to remove current religious exceptions apart from considering how they might apply to discrimination on the grounds of sexual orientation and gender identity.[9]

16. Consultations on the Discussion Paper are to inform the development of exposure draft legislation to be released in early 2012.[10] The Law Council looks forward to making further submissions prior to or at the time of release of the exposure draft.

17. The Law Council notes that a number of submissions on the Discussion Paper have already been made, including a submission by the Discrimination Law Experts' Group of 13 December 2011 (the experts' submission).[11] This submission develops views expressed by the experts in an earlier report (the experts' report).[12] The Law Council will refer to this report and this submission below. The Law Council will also refer to the submission of the Australian Human Rights Commission (AHRC).

18. The Law Council provides its detailed comments below in relation to issues raised in the Discussion Paper. The Law Council makes a number of recommendations in relation to these issues.

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[6] See http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_ThirdQuarter_LaunchofdiscussionpaperonnewantiDiscriminationlaw

[7] See http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE88237E-1E4F-17FA-D247-A7DB436B110F&siteName=lca; http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE88EF98-1E4F-17FA-D23F-371C2D097BB0&siteName=lca; http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=98E548FF-BEE6-4CC0-E219-F821886DB8B2&siteName=lca

[8] See note 6

[9] See note 2

[10] ibid

[11] See http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_ConsolidationofCommonwealthAnti-DiscriminationLaws

[12] The experts issued a report on 29 November 2010, which was updated on 31 March 2011. See http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Roundtable_Report_revised_31Mar2011.pdf

19. Due to the scope of the issues in the Discussion Paper and the complexity of some of those issues, the Law Council's Executive and Board have not had the opportunity to consider all of the issues on which some of the constituent bodies of the Law Council have expressed views. These views are included in this submission to assist the Attorney-General's Department in its consideration of these issues. The Law Council will also consider these issues further and provide comments on them prior to or on the release of the exposure draft legislation.

20. The recommendations and issues for further consideration are summarised below and detailed further under specific headings in this submission.

Recommendations

21. The Law Council recommends that the objects provisions in the Discrimination Law Experts' Group Submission of 13 December 2011 be adopted.

22. The Law Council recommends that the standard of proof under a consolidated Act should be the normal civil standard and it should be made clear that the *Briginshaw* test does not apply to discrimination claims under a consolidated Act.

23. The Law Council recommends that there be a special measures provision in a consolidated Act which aligns with characteristics drawn from international conventions in relation to special measures; relevant State legislation and the principles established in *Gerhardy v Brown*. The Law Council also recommends that historical issues associated with the current special measures provisions in Commonwealth anti-discrimination laws be taken into account in the drafting of any special measures provision.

24. The Law Council recommends that a prohibition against harassment in a consolidated Act should apply to all protected attributes. The Law Council also recommends consideration of: the prohibition against harassment in the *Equality Act 2010* (UK); adaptation of the prohibition against sexual harassment in the *Anti-Discrimination Act 1991* (Qld); and similar stand-alone provisions or the inclusion of attribute-based harassment within the meaning of discrimination.

25. The Law Council recommends that a consolidated Act be framed to achieve the broadest coverage of people of all sex and/or gender identities.

26. The Law Council recommends that a consolidated Act include protection from discrimination of associates of a person with a protected attribute and that further consideration is given to relevant State and Territory legislation as to how an associate is defined.

27. The Law Council recommends that a consolidated Act specifically provide protection against intersectional discrimination and that any combination of protected attributes be covered by such a provision.

28. The Law Council recommends that a consolidated Act apply to partnerships without any minimum size requirement.

29. The Law Council recommends that:

    (a) Temporary exemptions continue to be available in a consolidated Act (although a question remains in relation to racial discrimination);

    (b) The matters to be taken into account in granting a temporary exemption should include the objects of anti-discrimination law; the need to grant exemptions cautiously, for the shortest possible time and with the narrowest coverage (as suggested in the experts' submission); the need to consider any exceptional hardship being addressed and the temporary circumstances justifying the exemption; and

    (c) The process for granting temporary exemptions should be as outlined in the experts' submission.

30. The Law Council recommends that mechanisms to provide greater certainty and guidance to duty holders to assist them to comply with their obligations be provided under a consolidated Act.

31. The Law Council recommends that a consolidated Act include provisions for:

    (a) Complainants to have the option of not participating in AHRC conciliation and proceeding directly to court. However complainants should participate in relevant ADR processes associated with the court proceedings;

    (b) Assistance to be provided to complainants in drafting a complaint;

    (c) Practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconference or videoconference;

    (d) Referral of matters for mediation or arbitration by the AHRC; and

    (e) Guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes including conciliation.

32. The Law Council recommends that provisions in a consolidated Act:

    (a) Relating to remedies awarded by courts be based on a review of the effectiveness of monetary and non-monetary remedies for discrimination matters;

    (b) Relating to orders that can be made by courts in discrimination matters include legislative guidance that common law principles relevant to the termination of employment be applied where the discrimination involves such termination;

    (c) Could be based on the approach to costs taken under the FWA where a party may be ordered to pay the other party's costs in certain circumstances, such as where proceedings were conducted vexatiously or without reasonable cause.

33. The Law Council recommends that Commonwealth, State and Territory anti-discrimination laws should be harmonised.

34. The Law Council recommends that a consolidated Act should apply to State and Territory Governments and instrumentalities.

Issues for Further Consideration

35. The Law Council will consider the following issues further:

(a) The definition of discrimination;

(b) The burden of proof;

(c) Clarification of the application of the reasonable adjustments duty in the *Disability Discrimination Act 1992* (Cth) and its extension to other attributes;

(d) A positive duty for public sector organisations;

(e) The protection of additional attributes;

(f) The extension of the right to equality before the law beyond the attributes of race and sex;

(g) The articulation of the areas of public life in which anti-discrimination laws should apply;

(h) The protection of voluntary workers from discrimination and harassment;

(i) The protection of domestic workers from discrimination;

(j) The best approach to coverage of clubs and member-based associations;

(k) The best approach to coverage of sport;

(l) The best approach to prohibition of discriminatory requests for information;

(m) The best approach to clarification of vicarious liability provisions;

(n) A general limitations provision;

(o) A single inherent requirements/genuine occupational qualification exception;

(p) Religious exceptions to discrimination on the grounds of sexual orientation or gender identity;

(q) Temporary exemptions from racial discrimination;

(r) The types of mechanisms which could provide greater certainty and guidance to duty holders;

(s) Changing the role and functions of the Australian Human Rights Commission;

(t) Improvements to mechanisms for managing the interactions between Commonwealth anti-discrimination laws and the *Fair Work Act 2009* (Cth); and

(u) Amendments to the provisions governing interactions with other Commonwealth, State and Territory laws.;

Objects of a Consolidated Act

36. The Discussion Paper commences with consideration of the concept and meaning of discrimination. However, the Law Council agrees with the experts' submission that it is also necessary at the outset to consider the objects of a consolidated Act. [13] The Law Council maintains the position set out in its Policy Statement that there should be a preamble for the consolidated Act, including a number of objects, as follows.

37. The Law Council supports a preamble to the Act which:

(a) Makes specific reference to the inherent dignity and equality of human beings, founded in the Universal Declaration of Human Rights and makes specific reference to the right to equality as a key obligation that Australia has accepted under international law;

(b) Clearly sets out the objects and purpose of the Act, which should include:

(i) To achieve substantive equality, including equality before the law in Australian society;

(ii) To eliminate, as far as possible, discrimination against persons on the grounds protected under the Act

(iii) To ensure, as far as practicable, that persons with the attributes protected under the Act have the same rights to equality before the law as the rest of the community; and

(iv) To promote recognition and acceptance within the community of the principle that persons with such attributes have the same fundamental rights as the rest of the community.

38. One of the Law Council's constituent bodies, the Law Institute of Victoria has recommended that in order to provide guidance on the interpretation of a right to equality before the law provision (discussed below), the preamble to a consolidated Act should include a specific reference to the right to equality as a key obligation that Australia has accepted under international law, including Articles 2 and 26 of the International Covenant on Civil and Political Rights (the ICCPR).

39. Article 2 of the ICCPR includes the statement that:

[13] See note 8 at pp 7 - 8

Each State Party…undertakes to respect and to ensure to all individuals…the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status…

40. Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

41. The Law Council notes that the experts' submission recommends the following provisions for the objects of the consolidated Act.

(1) The object of this Act is to eliminate unlawful discrimination, and to give effect to Australia's obligations under the United Nations human rights instruments set out in the Schedule. In pursuing these objects, regard shall be had to the following:

(a) In this Act regard shall be paid at all times to the aims of eliminating discrimination on the basis of attributes covered by this Act, and Australia's obligations under the United Nations human rights instruments set out in the Schedule;

(b) The values of equality, respect and human dignity shall be shown to all persons regardless of attribute. This includes a right to be free from harassment and victimisation;

(c) The principle of equality shall be interpreted to mean substantive equality, not merely formal equality;

(d) It is recognised that the attainment of substantive equality may require special accommodation and special measures;

(e) In the case of a finding of discrimination, a remedy may include a proactive initiative that benefits those with the same attribute as the complainant and recognises the systemic nature of discrimination;

(f) This Act enables the Australian Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;

(g) This Act enables the Australian Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Federal Magistrates Court and the Federal Court for resolution of such disputes.

(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further its objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.

42. The Law Council supports the objects proposed in the experts' submission. The Law Council notes that several of the proposed objects reflect those proposed in the Law Council's Policy Statement. Other proposed objects reflect policy positions previously outlined by the Law Council., such as the need for:

(a) Legislation, such as the SDA to address substantive as well as formal equality[14];

(b) Such legislation to accommodate special needs and special measures; [15]

(c) Such legislation to address systemic discrimination with remedies which redress the reasons for the discriminatory conduct in order to prevent continuing or future breaches, as well as redressing the loss and damage suffered by the particular complainant;[16]

(d) Such legislation to provide greater enforcement powers for the Australian Human Rights Commission (the AHRC);[17] and

(e) Direct access by complainants to the courts in some instances. [18]

Recommendation

43. The Law Council recommends that the objects provisions in the Discrimination Law Experts' Group Submission of 13 December 2011 be adopted.

Meaning of Discrimination

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

Existing Definitions

44. As the Discussion Paper notes there are three major Australian models for defining direct discrimination, which are:

(a) The 'comparator' test used in the *Age Discrimination Act 2004* (the ADA), the *Disability Discrimination Act 1992* (the DDA), the SDA and the majority of the States;

[14] Formal equality involves people being treated the same regardless of a relevant attribute. Substantive equality recognises that sometimes differential treatment is necessary to ensure an equal outcome.
[15] See Law Council Submission to Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality, 15 Aug 2008, note 7
[16] ibid
[17] Ibid
[18] See Law Council Policy Statement on Consolidation of Commonwealth Anti-Discrimination Laws, note 1

(b) The 'detriment' test used in the ACT and Victoria; and

(c) The test used in the *Racial Discrimination Act 1975* (the RDA).

45. As the Discussion Paper also notes, there are two main groups of provisions defining indirect discrimination, with common elements being:

(a) There is a condition, requirement of practice with which the complainant must comply;

(b) The conditions requirement or practice must disadvantage members of a group with a protected attribute (being a group to which the complainant belongs), and

(c) The condition, requirement or practice is not reasonable in the circumstances.

46. In the DDA, RDA and some State legislation there is an additional element that the complainant does not or cannot comply with the condition, requirement or practice.

The Law Council's Policy Statement

47. In its Policy Statement the Law Council noted the difficulties with the current definitions of direct and indirect discrimination in the four federal anti-discrimination statutes and supported consideration of the following alternative models:

(a) a definition which refers to 'unfavourable treatment' because of a protected attribute or ground, such as that contained in section 8 of the *Discrimination Act 1991* (ACT); or

(b) a definition which removes the distinction between direct and indirect discrimination and defines 'discrimination' as including "any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment".[19]

48. The Law Council has received specific views from some of its constituent bodies in relation to the definitions of direct and indirect discrimination, which are set out below.

The Law Institute of Victoria

49. The Law Institute of Victoria (LIV) considers that a consolidated Act should adopt a unified test for discrimination which removes the distinction between direct and indirect discrimination.

[19] This was the approach recommended by the Discrimination Law Experts' Roundtable, 'Report on recommendations for a consolidated federal anti-discrimination law in Australia', (29 November 2010) p. 6, see note 12

50. However, if the separate tests for direct and indirect discrimination were maintained, the LIV would support a simplification of the definitions of discrimination so that:

    (a) With respect to direct discrimination:

        (i) The comparator test is eliminated from the definition;

        (ii) The test focuses on 'unfavourable' treatment because of a protected attribute (as the 'detriment' test does); and / or

        (iii) The test addresses the adverse impact on the complainant's human rights (as the RDA test does).

    (b) With respect to indirect discrimination, the LIV suggests that:

        (i) The test in the ADA and the SDA is adopted for all attributes (that is test should not include the additional element that the complainant does not or cannot comply with the condition, requirement or practice);

        (ii) in relation to the element that the condition, requirement or practice is reasonable in the circumstances, this aspect of the test in the ADA and SDA be replaced with a requirement measuring whether the condition, requirement or practice is a proportionate means of 'achieving a legitimate aim' and the test should address the adverse impact on the complainant's human rights.

51. The LIV welcomes the newly amended definition of direct discrimination in the *Equal Opportunity Act 2010* (Vic) (the Victorian EO Act) which removes the comparator test and replaces it with a test of unfavourable treatment. The Victorian EO Act provides that: "Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute".[20]

52. Significant problems are created by the comparator test under the DDA, ADA and SDA. For example, requiring a person experiencing disability to compare her or his situation and treatment to the treatment of someone without a disability is confusing, inappropriate and almost impossible in many cases where people with disabilities often suffer multiple different types of disability, and often intersectional discrimination based on other attributes.

53. In considering whether to retain the two definitions of direct and indirect discrimination or streamline into one definition in a consolidated Act, the LIV recognises that an advantage of retaining a separate definition of direct discrimination is that it sends a distinct message to society that this type of overt discriminatory behaviour cannot be justified or legitimised in any situation.

54. Further, the advantage of retaining a separate definition of indirect discrimination gives those claiming it the benefit of a shifting onus of proof, which is not currently available to claims of direct discrimination. The onus of proof with respect to establishing the reasonableness element for indirect discrimination lies with the

[20] Sub-section 8 (1)

respondent who is generally the party with access to knowledge of why particular actions were taken.

55. The LIV notes that the concept of discrimination is used in relevant provisions of the FWA, for example, the word 'discriminates' is used to describe various forms of adverse action, as well as in other contexts[21].However, 'discrimination' is not defined in or described with reference to a particular test in the FWA. While there is little decided authority as to what the meaning of discrimination is in the FWA, there is authority to suggest that it includes direct and indirect discrimination.[22]

56. An option for a consolidated Act is that, similarly to the FWA, the word 'discrimination' is simply used in the relevant substantive provisions, but there be a separate definition or test set out as to the meaning of discrimination either elsewhere in the Act or in the relevant explanatory materials.

57. Assuming that the burden of proof issues are resolved so that the burden shifts to the respondent if the complainant makes out a prima facie case of discrimination, the LIV is of the view that the consolidated Act should adopt a unified test for discrimination.

58. The LIV supports the unified definition provided for in the November 2010 experts' report[23] which provides:

> *A single definition will ease the regulatory burden and will assist understanding and compliance. As well as making compliance easier, a single definition of discrimination will more closely align Australia with internationally recognised definitions of discrimination, better fulfilling our international human rights treaty obligations.*
>
> *Accordingly, we recommend the following definition, based on the International Labour Organization Convention 111 and the Convention on the Elimination of All Forms of Discrimination against Women. It is similar to s.9(1) of the Racial Discrimination Act and reflects the current Canadian approach which makes no definitional distinction between direct and indirect discrimination [24]*
>
> *'Discrimination includes any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.'*
>
> *The consolidated Act should provide that discrimination occurs when what is done has more than one 'purpose or effect' (cf s.10 DDA).*

[21] See, for example, sections 194-195 of the FWA prohibiting discriminatory terms in enterprise agreements and s 341 in relation to adverse action.
[22] See, for example*, Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693.
[23] Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia,* 29 November 2010, Definition of discrimination, p6, see note 12.
[24] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

59. The LIV notes the following important elements of this definition:

- The definition actually uses the word “discrimination” to give it proper meaning;
- Discrimination is kept inclusive of different types of behaviours by using “includes”;
- “Purpose or effect” is a simple way to include direct and indirect discrimination without having to provide separate definitions; and
- Discrimination on the basis of more than one attribute would be covered if the definition includes a provision similar to that of s10 of the DDA as suggested.

60. The LIV recommends, for certainty and clarity, that the relevant explanatory material should make it clear that the definition is intended to include both direct and indirect types of discrimination and is intended to promote substantive equality.

61. The Law Council notes that the experts’ submission incudes a revised position in relation to retaining separate definitions of direct and indirect discrimination. The Law Council has not yet had an opportunity to consult its constituent bodies on this revised position.

The Law Society of South Australia

62. The Law Society of South Australia (LSSA) notes with concern that there are significant differences between the anti-discrimination legislation in the different Australian jurisdictions and indeed between different Commonwealth legislation, including the tests for direct and indirect discrimination. These differences can make it particularly difficult for lawyers to advise their clients as to which jurisdiction they should elect to bring a complaint, bearing in mind that complaints are not able to be made to both state and federal agencies concerning the same matter.

63. The LSSA supports the recommendation of the November 2010 experts’ report that the definition of “unlawful discrimination” in the consolidated Act should be a streamlined statement that abandons the current legislative distinction between direct and indirect discrimination. At present no Australian jurisdiction uses such a unified test for unlawful discrimination. However, it is considered that the adoption of a unified test would avoid the confusing distinctions which have arisen from the case law between direct and indirect discrimination and would more closely align the consolidated Act with international law.

64. As noted above, the experts’ submission incudes a revised position in relation to retaining separate definitions of direct and indirect discrimination. The Law Council has not yet had an opportunity to consult its constituent bodies on this revised position.

The Queensland Law Society

65. The Queensland Law Society (the QLS) supports improvement and consistency in defining discrimination.

66. In Queensland, the distinction between direct and indirect discrimination has been criticised by some. For example, in *Perry v State of Queensland & Ors*[25], President Dalton SC (as she then was) of the former Anti-Discrimination Tribunal Queensland said:

> *The distinction between direct and indirect discrimination is in my view fallacious and undesirable… Furthermore, having determined to make a distinction between direct and indirect discrimination, it seems to me wrong in principle, and inequitable, that different requirements, in substance, are required to be shown to establish the different types of discrimination and that the availability of moderators, such as reasonableness… should differ as between the two types of discrimination.*

67. The definition of direct discrimination in the Queensland legislation (the comparator model) can be difficult conceptually for some attributes, and is not without difficulty in application in some cases.

68. The element of treatment of 'a person with an attribute less favourably than another person without the attribute', taken literally, is impossible for the attributes of sex, age and race. Most people have a gender, and we all have an age and race, so in reality the comparator can only be a person with a different subset of the attribute. For impairment, sometimes the appropriate comparator is a person with a different impairment rather than a person without impairment at all.

69. The difficulty in identifying the comparator for a worker with an impairment that meant he could only work for a certain number of hours, is demonstrated in *Cockin v P & N Beverages Aust Pty Ltd & Ors*[26], where Member Rangiah of the former tribunal said:

> *P & N Beverages acted upon Dr Edward's view that Mr Cockin's impairment made him unsuitable to work shifts other than day shifts of not longer than 10 hours. Ordinarily, an appropriate comparison might be with another worker employed by the same employer in a similar job without an impairment who was only able to work day shifts of not more than 10 hours.*
>
> *The difficulty with using such a comparator is that it is difficult to imagine a situation in which another worker could have the same restrictions for a reason other than impairment….*
>
> *In the present case, the comparison is required to be between the way in which Mr Cockin was treated and another worker without an impairment was or would have been treated in circumstances that the same or not materially different…It is entirely improbable that another worker without an impairment could only work day shifts of 10 hours or less.*
>
> *I should add that a comparison between Mr Cockin and another worker who chooses to only work day shifts of not more than 10 hours is not appropriate. The circumstances would be materially different because Mr Cockin did not work fewer*

[25] [2006] QADT 46 at para 135
[26] [2006] QADT 42 at paragraphs 64-68

hours by choice. Rather, he was only able to work day shifts of not more than 10 hours a week because of his impairment.

In my view, therefore, the appropriate comparison is between the way in which Mr Cockin was treated and the way in which another employee of P & N Beverages without an impairment was or would have been treated as to the amount of work offered. The circumstances that are the same or not materially different for the purpose of s.10(1) are merely that the comparative employee was employed by P & N Beverages as a cleaner and machine operator, as Mr Cockin was.

70. The distinction between direct and indirect discrimination can be difficult for complainants, particularly those that are self-represented. In *Perry* (above) the complainant's claim of sex discrimination was lost because the complainant presented her case on the basis of direct discrimination rather than indirect discrimination.

71. Difficulties in identifying the attribute for the purposes of direct discrimination were commented on by President Dalton SC of the former tribunal in Edwards v Hillier and Educang Ltd[27]:

Philosophically there is a risk that in closely defining attributes within the meaning of s7 of the Act and conceptually separating them from their sequelae, the notion of what an attribute comprises will be stripped of meaning, so that s10 of the Act [meaning of direct discrimination] will only operate to prohibit the grossest kind of discrimination. To take a hypothetical example, s10 would operate if an employer received an application for a job from a parent and immediately discarded the application on the basis that it would not employ parents. However, it would not operate in circumstances where the employer granted the parent an interview, ascertained that the parent preferred to work part-time because of their family responsibilities, and on that basis discarded the application. Be that as it may, I think that the facts of this case fail to be considered as indirect discrimination on the basis of the authority above. The case may have been different in this respect if the complainant had attempted to prove that a characteristic which a parent with family responsibilities generally has is the ability only to work part-time – s.8(a) of the Act. There was no attempt made to prove this. Indeed it may not be the case, I am not prepared to take judicial notice of it. In this respect the question is different from that which arises in considering s.11(1)(b) of the Act [meaning of indirect discrimination].

72. Attributes defined on the basis of 'status' or 'belief' also present problems in identifying the comparator for direct discrimination. In the Queensland legislation these attributes include:

- Parental status – defined as meaning 'whether or not a person is a parent';
- Relationship status - defined as meaning whether a person is single, married, separated, divorced, widowed or a de facto partner;
- Religious belief – defined as meaning 'holding or not holding a religious belief'; and

[27] [2006] QADT 34 at paragraph 86

- Lawful sexual activity – defined as meaning ‘a person’s status as a lawfully employed sex worker whether or not self-employed’.

73. In a recent decision of the Queensland Civil and Administrative Tribunal on a complaint by a lawful sex worker relating to extra charges and denial of motel accommodation, the tribunal found that the appropriate comparator was a person who was not a lawful sex worker but with the same desire to obtain a room for the purpose of prostitution. The tribunal found that the complainant was not treated less favourably than another person, who is not a lawfully employed sex worker, in circumstances where that person seeks a room for the purpose of engaging in prostitution, and not subjected to direct discrimination. The decision is under appeal.

74. In relation to indirect discrimination, the former tribunal was not concerned with a stringent application of the ‘proportionality‘ element, as occurred in other jurisdictions. However, there should be a consistent test applying to all attributes, and the model in Victoria, Tasmania, ACT, the SDA and ADA is preferred.

75. The QLS concludes that while there would seem to be support for a unified test for discrimination, the uncertainty and loss of jurisprudence would indicate that improving the definitions of direct and indirect discrimination, in a way that does not lessen coverage, is to be preferred.

The Law Society of NSW

76. The Law Society of NSW’s (LSNSW) Employment Law Committee considers that it would be preferable to maintain the current definition of discrimination as constituting "less favourable treatment because of [attribute]". The advantages of doing so is that the language is familiar after many decades of anti- discrimination legislation, it is readily understood by the general public and encapsulates the ordinary understanding of the meaning of discrimination. The removal of the distinction between direct and indirect discrimination is not supported. To remove the distinction and then seek to rely upon avoidance of doubt provisions, legislative examples or statement of intent in extrinsic materials would be an unsatisfactory approach to legislative drafting.

The Law Society of Western Australia

77. The Law Society of Western Australia (LSWA) notes that the Hon Michael Kirby espoused the difficulties associated with indirect discrimination in *New South Wales v Amery*[28]:

> “*The concept of indirect discrimination posited by provisions such as s.24(1)(b) was said in Styles to be “concerned not with form and intention, but with the impact or outcome of certain practices”...*
>
> *Even if one takes the start of proceedings as October 1997(the date on which the points of claim were filed by the respondents in the Equal Opportunity Tribunal of New South Wales as then existing) their duration, the multiplicity of the issues, the*

[28] [2006] HCA 14

complexity of the points of law argued and the delays in decision-making, have all added to the burdens facing people like the respondents, seeking to vindicate the rights afforded to them by law to obtain relief against indirect discrimination. When there is now added the ultimately unfavourable outcome in this Court…the respondents could be forgiven for doubting the utility of the remedies ostensibly afforded to them by the AD Act [Anti-Discrimination Act 1977 (NSW)], and for wondering why they ever bothered to invoke its protection."

78. The LSWA does not agree that a unified test for discrimination (incorporating both direct and indirect discrimination) would be clearer and preferable but is of the view that the separate tests for direct and indirect discrimination could be improved. With respect to defining 'discrimination', the definition in the Western Australian legislation is preferred.

The Experts' Submission

79. The Law Council notes that the December 2011 experts' submission proposes a different definition of discrimination to that proposed in the November 2010 experts' report (which was updated in March 2011) The experts' submission no longer proposes a unified definition, despite the merits of such a definition.

80. The experts' submission proposes retaining the concepts of direct and indirect discrimination and using wording from existing legislation because it has some familiarity to the public and the legal profession. However, the experts' submission stresses that the concepts should not be considered mutually exclusive.

81. The experts' submission proposes the following definition:

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

2. Discrimination includes:

    a) Treating a person unfavourably on the basis of a protected attribute;

    b) Imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person; or

    c) Failing to make reasonable adjustments if the effect is that the aggrieved person experiences less favourable treatment under (a) or is disadvantaged under (b).

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

82. As noted above, the Law Council has not yet had an opportunity to consult its constituent bodies on this revised position.

Further Consideration

83. The Law Council will consider the issue of the definition of discrimination further and hopes to be in a position to provide further comments prior to the or on the release of exposure draft legislation.

Burden of Proof

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

The Law Council's Policy Statement

84. In its Policy Statement, the Law Council supported consideration of the approach to the burden of proof adopted under the FWA and in the United Kingdom.[29] Under this approach, a complainant must establish an arguable case, and then the respondent has the evidentiary burden of establishing the reasons for the impugned conduct or conditions.

85. The Law Council has received specific views on from some of its constituent bodies in relation to the burden of proof which are set out below.

The Law Institute of Victoria

86. The LIV has noted that the current distinction in onus of proof between federal anti-discrimination laws and federal industrial relations law effectively encourages employees to bring a complaint under the FWA rather than under anti-discrimination laws because it is, at least in theory, easier to bring a successful action. As noted in the Discussion Paper, this distinction is significant because most anti-discrimination complaints are made in an employment context (the majority of sex, age and race complaints).

87. The LIV notes that modelling provisions on those in the FWA would harmonise anti-discrimination law in employment at the federal level, thus minimising the difficulties associated with having different legislative schemes applying to the same subject matter and this would enable case law about both sets of provisions to develop together.

88. In support of this view, the LIV has also noted that few overseas jurisdictions follow the Australian approach of imposing the full burden of proof on the complainant. It is difficult under federal anti-discrimination laws to bring a successful claim of direct discrimination, particularly in the case of disability or age, as the complainant is required to prove the reasons for the respondent's conduct which is inherently difficult.

[29] See for example, *Fair Work Australia Act 2009* (Cth) ss 361 and 783; *Igen v. Wong* (2005) IRLR 258. This approach was also supported by the experts' report at p 8, see note 12 and by the experts' submission at pp 11-14, see note 11.

The Law Societies of South Australia and Western Australia

89. The LSSA and that LSWA also support the view that the burden of proof in the consolidated Act should be harmonised with the relevant provisions in the FWA as such an approach is consistent with legislation in the European Union and Canada, as well as the UK.

The Queensland Law Society

90. The QLS also supports the FWA approach to the burden of proof as it spreads the burden between the parties more evenly, provides a threshold for complainants which is not too onerous and makes the respondent accountable in the process.

The Law Society of New South Wales

91. The LWSNW's Employment Law Committee notes that the onus of proof for adverse actions under the FWA is to be considered by the High Court and therefore it is preferable to await its decision before further comment on this approach in the anti-discrimination legislation. Special leave has been granted by the High Court in *Board of Bendigo Regional Institute of Technical & Further Education v Barclay & Anor*[30], to be heard in 2012. Although awaiting the decision in this matter may not be ideal or possible given the timeframes, the Committee cautions against being too hasty in responding to the FWA approach to the onus of proof for all discrimination complaints before the High Court hears this case.

The Law Council's Industrial Law Committee

92. In addition to the views of some of the constituent bodies of the Law Council, the Chair of the Law Council's Industrial Law Committee has also expressed the view that shifting the onus of proof should be expressed with clarity and have regard to balancing the interests of complainants and respondents. In this regard, there is an important distinction to be borne in mind between a situation where a complainant is required to establish an arguable case before the evidentiary burden shifts onto the respondent and the case where the burden shifts simply on the complainant alleging the existence of proscribed conduct or reasons. The latter approach imposes on unfair, and often very costly, burden on a respondent.

Further Consideration

93. The Law Council will consider the issue of the burden of proof further and hopes to be in a position to provide further comment on the issue prior to or on the release of exposure draft legislation.

Standard of Proof

94. Although the Discussion Paper does not deal with the issue of standard of proof, the Law Council considers that a consolidated Act should clarify the confusion

[30] [2011] FCAFC14. Special leave was granted on 2 September 2011.

surrounding the *Briginshaw* test, which involves a 'closer scrutiny of the evidence' where a civil case involves allegations of criminal conduct or 'moral wrongdoing'.[31]

95. As academic commentators have pointed out, the complainant's task in proving discrimination is made more difficult by regular application of the *Briginshaw* test, which requires courts to proceed particularly carefully when evaluating the evidence. These commentators have noted that the *Briginshaw* test was intended for cases of serious misconduct or cases with serious consequences but courts have consistently applied it in direct discrimination cases.[32]

96. A consolidated Act should make it clear that the standard of proof is the normal civil standard set out in section 140 *Evidence Act 1995* (Cth).[33]

Recommendation

97. The Law Council recommends that the standard of proof under a consolidated Act should be the normal civil standard and it should be made clear that the *Briginshaw* test does not apply to discrimination claims under a consolidated Act.

Special Measures

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

The Law Council's Policy Statement

98. In its Policy Statement, the Law Council supported the consolidation process as an opportunity to review the effectiveness of the existing 'special measures' provisions, which provide in effect that certain beneficial measures for particular groups are not to be considered discriminatory.[34] The Law Council supported a 'special measures' provision which aligns with how that term is understood at international law.[35]

99. As noted in the Discussion Paper, the concept of special measures is recognised under the international human rights conventions to which Australia is a party. These conventions have similar elements in relation to special measures, which are generally aimed at accelerating or achieving substantive equality and will only be

[31] *Briginshaw v Briginshaw* (1938) 60 CLR 336
[32] See Belinda Smith and Dominique Allen, "Whose Fault is It? Asking the Right Questions when Trying to Address Discrimination", University of Sydney Legal Studies Research Paper, No 11/52, October 2011, p 8 at http://ssrn.com/abstract_=1914844
[33] See *Qantas Airways Ltd v Gama* [2008] FCAFC 69
[34] Special measures provisions are currently contained in the *Sex Discrimination Act 1984* s7D, *Racial Discrimination Act 1975* s8; *Disability Discrimination Act 1992* s45; *Age Discrimination Act 2004* s 33.
[35] For example see UN Committee on the Elimination of all forms of Racial Discrimination, General Comment 32 at [18] available at http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc/36cc31561630c407c125764800498c03?OpenDocument

authorised so long as the measure is necessary. Special measures are not to be regarded as discrimination.

100. A number of characteristics of special measures can be drawn from the relevant conventions including that they are:

(a) Intended for the advancement of a certain group to enjoy human rights and fundamental freedoms equally;

(b) Not an exception to the principle of non-discrimination but integral to the meaning of that principle;

(c) For the sole purpose of securing the advancement of a certain group;

(d) To be formulated through prior consultation with the affected group and with their active participation;

(e) To be formulated after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group;

(f) To be temporary – in that once the objectives are achieved the measure implemented will cease to have effect;

(g) To be appropriate to the situation to be remedied, legitimate, necessary and respecting principles of fairness and proportionality; and

(h) To provide for a continuing system for monitoring the application of the special measure and the results using quantitative and qualitative methods of appraisal.

101. The RDA directly incorporates the definition of 'special measures' from the *Convention on the Elimination of Racial Discrimination*. The special measures provision in the RDA is the only provision of this type to have been considered by the High Court in *Gerhardy v Brown*.[36]

102. In *Gerhardy v Brown* the High Court set down principles guiding the interpretation of special measures which included:

(a) The purported special measure must benefit some or all members of a racial national or ethnic group;

(b) It must be entirely based on securing advancement of the group so that they enjoy equal human rights and freedoms;

(c) It must be necessary so the group may enjoy equal human rights and freedoms;

(d) It must be temporary and cannot continue after its objectives are achieved; and

(e) The wishes of the members of the group are relevant to determining whether a measure is taken to secure their advancement.

[36] (1985) 159 CLR 70

103. One of the Law Council's constituent bodies, the LIV has suggested the following definition of special measures based on the characteristics drawn from relevant conventions and section 12 of the Victorian EO Act, with additional amendments consistent with the *Charter of Human Rights and Responsibilities Act 2006* in Victoria.

    1) A special measure is a measure(s) taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination.

    2) A special measure does not constitute discrimination.

    3) A special measure must-

        (a) Be undertaken in good faith for achieving the purpose set out in subsection (1); and

        (b) Be reasonably likely to achieve the purpose set out in subsection (1); and

        (c) Be a proportionate means of achieving the purpose set out in subsection (1); and

        (d) Be justified because the members of the group have a particular need for advancement or assistance; and

        (e) Be designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities (or wording to this effect).

    4) A person who undertakes a special measure has the burden of proving that the measure is a special measure.

    5) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.

104. The Victorian EO Act states that "A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute."

105. The LIV has noted that the Victorian EO Act provides that these measures are taken only for "members of a group with a particular attribute" (emphasis added). This is a key shortcoming of the Victorian EO Act that should not be replicated in a consolidated Act.

106. A consolidated Act should provide adequate guidance to explain that the members of a disadvantaged group who are receiving the benefit of special measures may have more than one protected attribute, and that it may not be possible to identify which particular attribute is the source of the discrimination as they are inevitably interrelated. The wording in paragraph (1) above is suggested so that the definition is not limited to members of a group with a particular attribute. The LIV suggests that

the consolidated Act provide numerous examples in this section to illustrate special measures.

107. Another of the Law Council's constituent bodies, the LSWA has noted that different historical issues apply in different capacities and for different groups in relation to the special measures provisions in existing Commonwealth anti-discrimination laws. The Law Council suggests that these issues be taken into account in the drafting of any special measures provisions.

Recommendation

108. The Law Council recommends that there be a special measures provision in a consolidated Act which aligns with characteristics drawn from international conventions in relation to special measures; relevant State legislation and from the principles established in *Gerhardy v Brown*. The Law Council also recommends that historical issues associated with the current special measures provisions in Commonwealth anti-discrimination laws be taken into account in the drafting of any special measures provision.

Duty to make reasonable adjustments

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

The Law Council's Policy Statement

109. In its Policy Statement, the Law Council suggested that a consolidated Act should be a fully integrated Act, rather than a mere consolidation of the existing individual laws. This means that, where possible, the consolidated Act should include general provisions that apply to all grounds or attributes. However, in order to ensure that the existing protections are not diluted in any way, a consolidated Act should also maintain those provisions specific to a particular ground or attribute that currently provide protection under the individual Acts, for example the reasonable adjustments provisions in the DDA.

110. The Discussion Paper notes that the DDA is the only existing Commonwealth anti-discrimination law to contain explicit reasonable adjustments provisions. These provisions are contained in the definition of indirect discrimination. One of the situations in which indirect discrimination occurs is if the discriminator requires a person to comply with a requirement or condition, with which the person could comply if the discriminator made reasonable adjustments but the discriminator fails to do so and that failure has the effect of disadvantaging person with the disability.

111. The Discussion Paper also notes that the ADA, RDA and SDA contain implicit duties to make reasonable adjustments. The experts' submission notes that the reasonable adjustments provision has widespread familiarity and recommends its extension to other attributes.

112. The Law Council has received specific views from it constituent bodies in relation to the clarification of the reasonable adjustments duty in the DDA and its extension to other attributes. These views are set out below.

The Law Institute of Victoria

113. The LIV suggests that the requirement to make reasonable adjustments should be expressed as a stand-alone provision. In the interests of creating progressive equality legislation that reflects modern Australian society, the provision should be extended from disability to all protected attributes under a consolidated Act.

114. Section 17 of the Victorian EO Act sets out the reasonable factors that an employer must consider when it is deciding whether or not to accommodate an employee's request for flexible work arrangements due to the employee's parental/carer's responsibilities. These factors provide useful guidance on what to include in a reasonable adjustment provision in a consolidated Act, with changes to apply to all of the attributes protected under the federal anti-discrimination legislation.

115. Section 17 provides:

> *(1) An employer must not, in relation to the work arrangements of a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.*
>
> *(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that a person has as a parent or carer, all relevant facts and circumstances must be considered, including—*
>
> (a) *the person's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
>
> (b) *the nature of the role that is being offered; and*
>
> (c) *the nature of the arrangements required to accommodate those responsibilities; and*
>
> (d) *the financial circumstances of the employer; and*
>
> (e) *the size and nature of the workplace and the employer's business; and*
>
> (f) *the effect on the workplace and the employer's business of accommodating those responsibilities, including—*
>
> (i) *the financial impact of doing so;*
>
> (ii) *the number of persons who would benefit from or be disadvantaged by doing so;*
>
> (iii) *the impact on efficiency and productivity and, if applicable, on customer service of doing so; and*

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the person of not making such accommodation.

116. The LIV recognises that as the definitions of direct and indirect discrimination currently stand, a potential implication of establishing a stand alone reasonable adjustment duty is an increase in overlap with indirect discrimination complaints which would unnecessarily complicate this area of the legislation. This further supports the LIV position that the test for discrimination should be unified and the distinction between direct and indirect should be removed, while the reasonable adjustments duty should exist independently as a cause of action under a consolidated Act.

The Law Society of South Australia

117. The LSSA does not have a particular view as to any clarification of the current reasonable adjustment provisions in the DDA. This may be a matter that should be left to the ongoing case law as applies to particular facts. However, there seems to be no reason why a person with a disability is entitled to a reasonable adjustment being made, for example. in the workforce, whereas such a provision does not apply to a person of a particular sex or age in relation to their respective attributes. The LSSA would support extending the provision for reasonable adjustments to all protected attributes.

Queensland Law Society

118. The QLS supports the introduction of positive duties for employers to make reasonable adjustments to eliminate discrimination against people with a disability. The Victorian EO Act poses a duty on employers, educational authorities and providers of goods and services to make reasonable adjustments.

119. The QLS notes that the Victorian law contains clear guidelines as to what considerations must be taken into account when determining whether adjustments would be reasonable in the circumstances. Such provisions will need to be included in a consolidated Act as employers will look to the legislation to guide their understanding of what is required by this duty

The Law Society of Western Australia

120. The LSWA notes that the duty to make reasonable adjustments in the DDA is yet to be the subject of judicial interpretation and, therefore suggests that it should not apply to other attributes at this time.

Further Consideration

121. The Law Council will consider the clarification of the application of the reasonable adjustments duty in the DDA and its extension to other attributes further and hopes

to provide further comments on the issue prior to or on the release of exposure draft legislation.

Positive Duties

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

The Law Council's Policy Statement

122. In its Policy Statement, the Law Council supported consideration of the incorporation of positive duties to prevent or remove discrimination and harassment in relation to each ground or attribute under a consolidated Act.

123. The Law Council has received specific views from some of its constituent bodies in relation to a positive duty for public sector organisations to eliminate discrimination and harassment. These views are set out below.

The Law Institute of Victoria

124. The LIV proposes that a consolidated Act incorporate a positive duty to eliminate discrimination, sexual harassment and victimisation, as the Victorian EO Act does in section 15, which applies to all organisations, regardless of their public or private status.

125. The LIV recommends that the duty should not be derogated from by including the words 'as far as possible' in the drafting (as the EO Act does in sub-section 15(2)), and that a consolidated Act should strengthen this positive duty by linking it to assessable and enforceable action plans. The LIV draws attention to the experience in other jurisdictions which verifies that action plans are a practical tool to enforce a positive duty to eliminate discrimination.

126. The LIV suggests that encouraging duty holders to undertake proactive compliance with equal opportunity law by stipulating a positive duty to eliminate discrimination is a vitally important step towards achieving real equality in the community. Reframing discrimination from a negative duty to a positive duty to promote and achieve substantive equality reduces the burden on the individual to enforce the obligation through legal action, and instead places the obligation on the employer, service provider, government body or other organisation or company to strive for best practice.

The Law Societies of South Australia and Western Australia

127. The LSSA has specifically noted that the Senate Standing Committee on Legal and Constitutional Affairs, in its report on the effectiveness of the SDA, published in 2008 recommended that there should be positive duties in public sector organisations to eliminate sex discrimination and sexual harassment and to promote gender equality. The LSWA has also specifically supported a positive duty to eliminate discrimination and harassment.

The Law Society of NSW

128. The LSNSW's Employment Law Committee has noted that it is problematic to impose a positive duty on public sector organisations by law. The principal reasons for this are that fairness lies in the anti-discrimination law applicable to the public sector being the same as that for the private sector. Further, there are grey areas in defining the boundaries of the "public sector" and whether this might be taken to include those who contract with the public sector. Having the same law applicable in the public as in the private sector does not preclude the Federal Government from implementing additional programs to eliminate discrimination.

Further Consideration

129. The Law Council will consider the issue of a positive duty for public sector organisations further and hopes to provide further comments on the issue prior to or on the release of exposure draft legislation.

Attribute-based harassment

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

The Law Council's Policy Statement

130. **I**n its Policy Statement, the Law Council supported consideration of a prohibition against harassment covering all protected attributes, such as the prohibition contained in section 26 of the *Equality Act 2010* (UK).

131. Several of the Law Council's constituent bodies specifically support such a prohibition and have made suggestions for how such a prohibition could be expressed.

132. The LIV supports such a prohibition and also suggests that that this protection be extended to volunteers and should not be subject to any exceptions.

133. The LSSA specifically supports the application of the prohibitions against harassment to all protected attributes.

134. The QLS specifically recommends the consideration of Chapter 3 of the Queensland *Anti-Discrimination Act 1991* (sections 117-120) dealing with sexual harassment as a model for the prohibition on harassment applying to all protected attributes. The Queensland provisions prohibiting sexual harassment are not confined to specific areas of activity, as in most other jurisdictions. There is a general prohibition against sexual harassment, coupled with an ability for a person to make a complaint in line with the enforcement procedures contained in Chapter 7 of the Act.

135. The LSWA Society specifically supports the option for reform in the Discussion Paper to extend the prohibition on harassment to include all protected attributes, in all specified areas of public life in which unlawful discrimination is prohibited through

a standalone prohibition or by clearly including attribute-based harassment within the meaning of discrimination.

Recommendation

136. The Law Council recommends that a prohibition against harassment in a consolidated Act should apply to all protected attributes.

137. The Law Council recommends consideration of the prohibition against harassment in the *Equality Act 2010* (UK), adaptation of the prohibition against sexual harassment in the *Anti-Discrimination Act 1991* (Qld), similar stand-alone provisions or the inclusion of attribute-based harassment within the meaning of discrimination.

Protected Attributes

Sexual orientation and gender identity

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

The Law Council's Policy Statement

138. In its Policy Statement the Law Council supported the Government's commitment to additional protection against discrimination relating to a person's sexual orientation or gender status as part of the consolidation process.

139. In its November 2010 submission to the AHRC's consultation on protection from discrimination on the basis of sexual orientation and sex and/or gender identity, the Law Council did not address in detail the terminology which should be used in provisions dealing with such discrimination deferring to the experience and understanding of particular groups and individuals in relation to terminology.[37] The Law Council also observed that the Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity provide a useful tool in assessing responses needed to realise substantive equality for people subject to discrimination on the basis of sexual orientation and gender identity.[38]

140. The Law Council notes that the AHRC report of that consultation used the following terminology for sexual orientation and gender identity:

(a) Sexual orientation refers to a person's emotional or sexual attraction to another person, including, amongst others, the following identities:

[37] See Submission to Consultation on protection from discrimination on the basis of sexual orientation and sex and/or gender identity p 5 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=C0CF61FC-BFA6-FE30-FE27-CAF63B6144DF&siteName=lca

[38] Ibid, p 12; see www.yogyakarta principles.org/

heterosexual, gay, lesbian, bisexual, pansexual, asexual or same sex attracted; and

(b) Gender identity refers to a person's deeply held internal and individual sense of gender.[39]

141. The AHRC report also used the following relevant terminology:

(a) Sex refers to a person's biological characteristics. A person's sex is usually described as being male or female. Some people may not be exclusively male or female. Some people may identify as intersex and some people may identify as neither male nor female;

(b) The term intersex refers to people who have genetic, hormonal or physical characteristics that are not exclusively 'male' or 'female'. A person who is intersex may identify as male, female, intersex or as being of indeterminate sex; and

(c) Gender refers to the way in which a person identifies or expresses their masculine or feminine characteristics. Gender is generally understood as a social and cultural construction. A person's gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.[40]

142. The Law Council notes that the AHRC submission on the Discussion Paper observes that participants in the above consultation presented varying views on terminology but that the consistent message from participants was that protection from discrimination should be as inclusive as possible and that people who are intersex should be expressly included.[41] Accordingly, the AHRC has recommended that coverage of sexual orientation, sex characteristics, gender identity and gender expression in a consolidated Act be framed to achieve the broadest coverage of people of all sex and/or gender identities.[42] The Law Council supports the AHRC recommendation.

143. Several of the Law Council's constituent bodies have made similar observations to those of the AHRC.

144. The LIV specifically supports the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, which recognise that:

> *"sexual orientation refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender*

[39] See Australian Human Rights Commission *Addressing Sexual Orientation and Sex and/or Gender Identity , Discrimination*, 2011 at p5 available at http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/index.html
[40] ibid
[41] Ibid at p 22
[42] Ibid at p 23

gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".

145. The LIV is of the view that the definition of gender identity should reflect the intention of provisions relating to non-discrimination on the basis of gender identity. Gender identity should not be defined according to the "birth sex" of a person because discrimination generally occurs due to the fact that the "birth sex" is imputed to the person and not his or her affirmed sex. The "birth sex" of a person is really the sex that a person has been raised as, compared with the sex with which he or she identifies on a *bona fide* basis. The LIV proposes that the definition should respect the gender identity that a person identifies with, without the suggestion that he or she is, in fact, of another sex.

146. The LIV specifically suggests that sexual orientation should be defined to include gender expression as it incorporates the Yogyakarta Principles, and should not include references to gender "choice" (implying the person has chosen to be homosexual, for example) or gender "past" (implying that the previous sex or gender with which the person was identified is relevant to the sex or gender he or she is now). These concepts are often misinterpreted and present significant problems for persons affected by these provisions.

147. The LSSA and the LSWA specifically consider that "sexual orientation" should include heterosexuality, homosexuality, lesbianism and bi-sexuality and that "gender identity" should be defined to apply:

    (a) Equally to:

        (i) Males who identity as female;

        (ii) Females who identify as male; and

        (iii) Intersex people (that is people born of indeterminate sex) who identify as male or female;

    (b) To people who genuinely identify as a member of a particular sex, including by assuming characteristics of that sex, whether medically, by style of dress or otherwise, or by living, or seeking to live, as a member of that sex; and

    (c) Regardless of whether a person is legally recognised as a member of the sex with which they identify.

Recommendation

148. The Law Council recommends that a consolidated Act be framed to achieve the broadest coverage of people of all sex and/or gender identities.

Associate discrimination

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

The Law Council's Policy Statement

149. In its Policy Statement the Law Council supported consideration of the protection from discrimination of associates of a person with a protected attribute.

150. Several of the Law Council's constituent bodies have supported such protection and suggested mechanisms for providing this protection.

151. The LIV suggests that a consolidated Act adopt a similar provision to that contained in the Victorian EO Act which provides that discrimination is prohibited on the basis of a "*personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes*."[43]

152. The LSSA and the LSWA specifically agree with the observation in the Discussion Paper that extending the coverage for associates to all protected attributes under one provision will create consistency and clarity in the Consolidated Act.

153. The LSNSW's Employment Law Committee notes that the question raised by the Discussion Paper as to how protection against discrimination should be provided to associates of a person with a protected attribute is very important. This question is important as at the Commonwealth level only the DDA and the RDA currently provide such protection.

154. The Committee notes that "associate" is not defined in the RDA, though it is in s 4 of the DDA to include a spouse of the person; another person who is living with the person on a genuine domestic basis; a relative of the person; a carer of the person; and another person who is in a business, sporting or recreational relationship with the person.

155. While consistency is desirable in the definition, the Committee queries whether a single definition of "associate" can apply to all of the attributes. Further consideration of the definition may be needed. The Committee suggests consideration of the recent decision of the NSW Court of Appeal in *Sydney Local Health Network v QY and QZ*[44] on the meaning of "associate" in section 4 of the *Anti-Discrimination Act 1977* (NSW) where the Court held that an associate must be an associate of a person who was alive at the time that the discrimination occurred.

Recommendation

156. The Law Council recommends that a consolidated Act include protection from discrimination of associates of a person with a protected attribute and that further

[43] Sub-section 6 (q)
[44] [2011] NSWCA 412

consideration is given to relevant State and Territory legislation as to how an associate is defined.

Attributes covered by States and Territories, the *Fair Work Act* and the *AHRC Act*

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

The Law Council's Policy Statement

157. In its Policy Statement the Law Council supported consideration of the addition of grounds in a consolidated Act relating to:

    (a) Religious conviction;

    (b) Political opinion;

    (c) Association with, or relation to, a person identified on the basis of any protected grounds or attributes;

    (d) Irrelevant criminal record; and

    (e) Any other ground that causes or perpetuates systemic disadvantage, undermines human freedom, or adversely affects the equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.

158. The Law Council has received specific views from some of its constituent bodies in relation to these and other possible additional attributes. These views are discussed below.

The Law Institute of Victoria

159. The LIV has a number of suggestions for additional attributes relating to:

    (a) Attributes under the Victorian EO Act;

    (b) Irrelevant criminal record;

    (c) Homelessness; and

    (d) Other status

Attributes under the Victorian equality legislation

- The LIV considers it necessary to expand the list of attributes protected from discrimination at a Commonwealth level. The LIV considers that State, Territory and Commonwealth equal opportunity and anti-discrimination legislation should be uniform where possible so that a rights holder may access a remedy at a State,

Territory, Commonwealth or international level. A consolidated Act should build on the current list of relevant attributes to incorporate those listed in the Victorian EO Act (see below), as well as specifically provide protection on the basis of additional new attributes, some of which are already protected under particular Commonwealth legislation such as the FWA.

160. The LIV notes that it is problematic that a rights holder may access particular remedies under anti- discrimination law at the international, Commonwealth, State and Territory levels, but that access is inconsistent between jurisdictions.

161. Extending coverage to those attributes that are already protected under Commonwealth, State or Territory legislation will ensure consistency and simplify/harmonise the anti-discrimination jurisdiction for the public.

162. Section 6 of the Victorian EO Act provides:

The following are the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 4—

(a) age;

(b) breastfeeding;

(c) employment activity;

(d) gender identity;

(e) impairment;

(f) industrial activity;

(g) lawful sexual activity;

(h) marital status;

(i) parental status or status as a carer;

(j) physical features;

(k) political belief or activity;

(l) pregnancy;

(m) race;

(n) religious belief or activity;

(o) sex;

(p) sexual orientation;

(q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Irrelevant criminal record

163. The LIV specifically notes that at the international level, Australia has ratified the International Labor Organization (ILO) *Convention 111, the Discrimination (Employment and Occupation) Convention 1958* (Convention 111). This Convention is scheduled to the AHRC Act and therefore forms part of the AHRC's jurisdiction in addition to its jurisdiction under the ADA, DDA, RDA and SDA. Complaints under these Acts can be taken to court if not settled through conciliation but complaints on the Convention 111 grounds can not be taken to court.

164. Convention 111 specifies certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin. It also leaves room for parties to add further grounds of non-discrimination. In1989, Australia added "criminal record" to these grounds.[45]

165. At the federal level, the AHRC‟s regulations now extend the grounds of discrimination in the AHRC Act to include criminal record in employment (except when it is necessary to take into account the criminal record of a person because of the inherent requirements of a particular job).

166. The LIV suggests that the Tasmanian *Anti Discrimination Act* 1998 ("the Tasmanian Act") provides a good model for an additional attribute relating to irrelevant criminal record in a consolidated Act, which would mean that complaints of discrimination on the basis of this attribute would be able to proceed to court in the same way as complaints under the ADA, DDA, RDA and SDA.

167. Under the Tasmanian Act discrimination on the basis of an irrelevant criminal record is unlawful and is defined as:

In relation to a person, this means a record relating to arrest, interrogation or criminal proceedings where:

- *further action was not taken in relation to the arrest, interrogation or charge of the person; or*
- *a charge has not been laid; or*
- *the charge was dismissed; or*
- *the prosecution was withdrawn; or*
- *the person was discharged, whether or not on conviction; or*
- *the person was found not guilty; or*

[45] See wwww.hreoc.gov.au/human_rights/ilo/index.html

- *the person's conviction was quashed or set aside; or*

- *the person was granted a pardon; or*

- *the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises.*

168. On this last point the LIV suggests that it would be necessary to provide some clear guidance for defining "directly relevant" in this situation. This would aim to avoid employers using a conviction as a justification for discrimination on the basis of a policy that determines that any conviction is "directly relevant" to the position.

169. The LIV suggests that the guidance provided in conjunction with the Tasmanian Act would be useful to consider when defining irrelevant criminal record in a consolidated Act. It provides the following:

When is it lawful to discriminate?

In certain circumstances, irrelevant criminal record discrimination is permitted. The following exception applies:

Dealing with children

Section 50 states that a person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances.

Where a person/organization argues that it is exempted from the requirements of the Act because an exception applies, it is up to the organization to prove the exception applies.

Anti Discrimination Act 1998 (Tas), Section 3.

> *Spent Criminal Record*
>
> *The Annulled Convictions Act 2003 (Tas) states a conviction becomes "spent" - in that a person is not required to disclose a conviction if he or she is sentenced to imprisonment for a period of 6 months or less, and he or she has been of good behaviour for 10 years since the date of the conviction (5 years for a youth).*
>
> *Good behaviour is evidenced by not being convicted of an offence punishable by a term of imprisonment.*
>
> *The person does not generally have to disclose an annulled conviction if it is taken not to be part of their official criminal record*[46]*.*

[46] http://www.antidiscrimination.tas.gov.au/publications/irrelevant_criminal_record

Homelessness

170. The LIV notes that discrimination on the basis of "(irrelevant) criminal record" is prohibited in some Australian states[47] and at the international level. As discussed above, at the Commonwealth level, under the ILO discrimination complaints stream of the AHRC Act, discrimination on the basis of criminal record is limited to discrimination in employment in particular circumstances.

171. The LIV places particular emphasis on the grounds of discrimination on the basis of irrelevant criminal record and homelessness because it recognises that they are inextricably linked to other attributes. Thus someone experiencing homelessness or an irrelevant criminal record is more likely to experience intersectional discrimination. Homelessness and irrelevant criminal record are often linked to each other and to mental illness and other disabilities[48]. Gay men in a particular age bracket may have an irrelevant criminal record as a result of their sexual conduct before homosexual conduct was decriminalised.

172. People who are homeless and have an irrelevant criminal record are also recognised in international jurisprudence as a definable group who should be protected against discrimination on the ground of 'other status'. Articles 2(1) and 26 of the ICCPR enshrine the right to non-discrimination on the basis of a list of attributes including "other status".[49]

173. The special measures provision in the ADA also recognises the link between homelessness and age, providing the following example to explain a special measure taken because of the age of the group of persons:

> *Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people[50].*

174. For the purpose of assisting with drafting the definition of homelessness, the LIV suggests that it reflect the recommendations from the AHRC's Inquiry into National Homelessness legislation in 2009 (AHRC Paper).[51]

Recommendation 8 in the AHRC paper states:

[47] At the State level, Tasmania, Western Australia, the Northern Territory and the ACT have laws that specifically prohibit discrimination on the basis of criminal record.
[48] Currently almost one in two people with a disability lives in or near a state of poverty in Australia and Australia is ranked 21 out of 29 OECD countries for employment opportunities for people with disabilities, see PricewaterhouseCoopers Report "Disability Expectations – investing in a better life, a stronger Australia", 2011.
[49] See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.
[50] ADA sub-section 33(b).
[51] Australian Human Rights Commission Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth, 1 September 2009.

The definition of homelessness in homelessness legislation should refer to whether the person has access to adequate housing in accordance with international standards, and should build upon the Supported Accommodation and Assistance Act 1994 (Cth) (SAA Act) definition.

Paragraph 82 of the AHRC Paper provides that:

The Committee on Economic, Social and Cultural Rights (CESCR) has provided clear guidance in assessing whether housing meets the required standard of adequacy. Specifically, the CESCR states that the following factors must be taken into account in that assessment:

- *Legal security of tenure: People should possess a degree of security of tenure which guarantees legal protection against forced evictions, harassment and other threats, regardless of the type of tenure*

- *Availability of services, materials, facilities and infrastructure: To be adequate, housing must contain certain facilities essential for health, security, comfort and nutrition.*

- *Affordability: Housing costs should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.*

- *Habitability: Housing must provide adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.*

- *Accessibility to disadvantaged groups: Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Housing law and policy should take their special housing needs fully into account.*

- *Location: Housing must be located as to allow access to employment options, health care services, schools, child-care centre and other social facilities, and must not be built on or near polluted sites or sources of pollution.*

- *Cultural adequacy**:** The construction of housing, including the building materials used and supporting policies must appropriately enable the expression of cultural identity and diversity of housing.*

Paragraph 83 of the AHRC paper provides that*;*

The SAA Act defines a person as being homeless 'if and only if he or she has inadequate access to safe and secure housing'. It states that a person is taken to have inadequate access to safe and secure housing if the only housing to which he or she has access:

- *damages, or is likely to damage a person's health; or*

- *threatens a person's safety; or*

- *marginalises the person through failing to provide access to adequate personal amenities*

- *or the economic and social supports that a home normally affords; or*

- *places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.*

175. The Law Council notes that the AHRC submission suggests that further consultation is required in relation to the attribute of homelessness particularly involving organisations with specific expertise in the area.[52]

Other status

176. In addition to the list of attributes in the Victorian EO Act, the LIV suggests the inclusion of a catch all or 'other status' attribute. Wording may be drawn from the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* which prohibits discrimination on the basis of "any other ground that causes or perpetuates systemic disadvantage; undermines human freedom; or adversely affects the equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds".

The Law Society of South Australia

177. The LSSA specifically notes that political belief, industrial activity and nationality are covered by almost all jurisdictions and by the FWA in relation to employment. The Law Society believes that consideration should be given to extending coverage to these attributes in the consolidated Act so that discrimination complaints on the basis of these attributes are treated the same was as discrimination complaints under the ADA, DDA, RDA and SDA.

178. The LSSA supports a provision for prohibiting discrimination against victims of domestic violence being included in the Consolidated Act and that such an attribute could be described as 'domestic violence victim status' or 'victim or survivor of domestic violence' as suggested in the Discussion Paper.

The Queensland Law Society

179. The QLS specifically supports the addition of protected attributes relating to industrial activity, irrelevant criminal record, nationality, political opinion and religious belief.

180. In recognition of the high rates of domestic violence in Australian communities and the need for systematic change to better support victims, the QLS encourages legislative reforms to protect domestic violence victims against discrimination. The Queensland Working Women's Service Inc recently released a report outlining the

[52] See AHRC submission at p24

discrimination that victims face in the workplace and the lack of available complaint mechanisms. [53]

181. The QLS encourages the consideration of this issue which will no doubt positively affect the lives of many victims who are currently not able to seek redress and are left powerless.

182. The Law Council notes that the AHRC submission suggests that further consultation is required in relation to an attribute relating to domestic violence particularly involving organisations with specific expertise in the area.[54]

The Law Society of New South Wales

183. The LSNSW's Employment Law Committee also notes that additional attributes regulated under the AHRC Act in the area of employment (religion, political opinion, industrial activity, nationality, criminal record and medical record) overlap with some protections available to workers under the FWA. However, as also noted by the LIV, the AHRC currently has a limited function of conciliating such complaints (in keeping with ILO Convention No. 111) and complainants may not proceed to court if conciliation fails. Given the different remedies available, the Committee suggests that protections against discrimination on the basis of these attributes continue to co-exist with those available under the FWA.

The Law Society of Western Australia

184. The LSWA also specifically notes that political belief, industrial activity and nationality are covered by almost all jurisdictions and by the FWA in relation to employment.

185. The LSWA did not reach a consensus on the broader ranges of attributes covered by the ILO Convention such as social origin. However, the LSWA is of the view that consideration should be given to expansion generally whilst recognising a need for carve outs. The LSWA does not support the suggestion in the Discussion Paper to extend protection to victims of domestic violence from unlawful discrimination.

Further Consideration

186. The Law Council will consider the protection of additional attributes further and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Intersectional discrimination

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

[53] 'Domestic Violence Discrimination in the workplace: is statutory protection necessary", found at http://www.adfvc.unsw.edu.au/workplace/Qld%20WWS%20Paper.pdf
[54] See Submission to the AHRC at p 24, note 37

The Law Council's Policy Statement and submission to the SDA review

187. In its Policy Statement the Law Council supported a fully integrated Act and the structure of the *Equality Act 2010* (UK) as an appropriate model.

188. In its submission on the Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality (the SDA review), the Law Council supported legislative amendment to appropriately address discrimination on multiple grounds.[55]

189. The LSSA and the LSWA support protection against intersectional discrimination and the consideration of sub-section 14 (1) of the UK Act as a possible model.

190. Sub-section 14 (1) of the UK Act provides:

A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

191. While supporting the need for a consolidated Act to deal specifically with intersectional discrimination, the LIV notes that sub-section 14 (1) of the UK Act is limited by its reference to a combination of two characteristics and suggests that the provision dealing with intersectional discrimination refer to the unique experience of a combination of protected grounds/attributes. The LIV suggests that each claim should be assessed holistically with consideration given to all the different ways a person's attributes interact and are inextricably interconnected.

Recommendation

192. The Law Council recommends that a consolidated Act specifically provide protection against intersectional discrimination and that any combination of protected attributes be covered by such a provision.

Protected Areas of Public Life

Equality before the law

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

The Law Council's Policy Statement

193. In its Policy Statement the Law Council supported a preamble to a consolidated Act which clearly sets out the objects and purposes of the Act, including the achievement of equality before the law.

[55] See Submission to the SDA review at p 30, note 7

194. In its submission on the SDA, the Law Council suggested that there should be an equality before the law provision in relation to the attribute of sex.[56]

195. The Law Council notes that the Discussion Paper refers to the current equality before the law provision in the RDA and the recommendation of the inquiry into the review of the SDA that the provision in the RDA should be extended to the attribute of sex. The Discussion Paper suggests that extending the equality before the law provision to the attribute of disability would assist in implementing the *Convention on the Rights of Persons with Disabilities*. The Discussion Paper therefore poses the question of whether the right to equality before the law should be extended to sex and/or other attributes.

196. The Law Council notes that the Discussion Paper refers to the Productivity Commission's observation that provisions for equality before the law in the proposed DDA were removed because of concerns about the possible effect on special legal regimes for people with disabilities such as guardianship and mental health legislation. The Law Council also notes the suggestion of the LIV below that an equality before the law provision applying to all attributes could include a reference to measures taken to assist persons with a protected attribute not amounting to a breach of the provision. Such a reference may alleviate concerns about the possible effect of an equality before the law provision on groups with protected attributes.

197. The Law Council has received specific views from some of its constituent bodies on the extension of the right to equality before the law to other attributes in addition to race and sex. These views are set out below.

The Law Institute of Victoria

198. The LIV suggests that a consolidated Act replicate the provision for equality before the law as contained in sections 9 and 10 of the RDA having regard to the relevant provisions in the international treaties including Article 26 of the ICCPR which also provides for equality before the law.

199. The LIV suggests, however, that provisions in section 10 of the RDA should be more broadly framed – similar to section 8 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* which provides:

    (1) Every person has the right to recognition as a person before the law.

    (2) Every person has the right to enjoy his or her human rights without discrimination.

    (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

    (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

[56] See Submission to the SDA review at pp 7 -9, note 7

200. As discussed above, the LIV recommends that in order to provide guidance to the judiciary in interpreting a right to equality provision, the preamble to a consolidated Act should include a specific reference to the right to equality as a key obligation that Australia has accepted under international law, including Articles 2 and 26 of the ICCPR.

The Law Society of South Australia

201. The LSSA notes that Section 10 of the RDA provides for a general right of equality before the law for people of different racial or ethnic groups. The LSSA supports a similar right to equality before the law in relation to sex.

202. The LSSA is of the view that further consideration should be given to extending such a general right in relation to people with disabilities, having regarding to the comments made in the Discussion Paper in relation to the impact on special legal regimes for persons with a disability.

The Law Society of Western Australia

203. The LSWA is also of the view that the right to equality before the law should be extended to sex and/or other attributes but notes the limited practical effect at the Commonwealth level of the extension in relation to sex because of the small number of Commonwealth laws that are covered by exceptions to the SDA as noted in the Discussion Paper.

204. The LSWA is also of the view that consideration should be given to the impact on other provisions which already exist in relation to certain groups such as those with mental or cognitive disabilities appearing before a criminal court.

Further Consideration

205. The Law Council will consider the extension of the right to equality before the law beyond the attributes of race and sex further and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Mechanism for specifying areas of public life in which discrimination and harassment are prohibited

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

Law Council Submission to the SDA Review

206. In its submission to the SDA review, the Law Council supported the extension of protections against discrimination beyond the proscribed areas of public life in the SDA to all areas of public life.[57]

[57] See Submission to the SDA review at p 7, note 7

207. The Law Council has received specific views on the articulation of the areas of public life to which anti-discrimination law should apply from some of its constituent bodies. These views are set out below.

The Law Institute of Victoria

208. The LIV suggests a general provision in a consolidated Act that adopts the broad inclusive RDA approach that anti-discrimination law applies to "the political, economic, social, cultural or any other field of public life"[58], but that it should provide some scope for interpreting what constitutes public life. The LIV suggests incorporating the words "including but not limited to: employment and employment related areas, education, provision of goods and services and disposal of land, accommodation, clubs, sport and local government." These areas are listed in the Victorian EO Act. The LIV also recommends including matters relating to corrections and law enforcement.

209. The LIV also recommends that anti-discrimination law applies to all who discriminate in public life, and not be limited to 'public authorities' as the *Victorian Charter of Human Rights and Responsibilities* (Victorian Charter) is. This would bring anti-discrimination and equality to the forefront of the minds of all organisations, employers, companies and groups across society. It is also a more effective way to start redressing systemic discrimination.

210. Corrections and law enforcement are areas of public life that the LIV suggest be included in the non- exhaustive list of included areas. These areas are included under section 4 of the Victorian Charter. They are of particular significance because they expand the accepted meaning of public life, and also assist with providing an example of how private actors can be responsible under anti-discrimination law. Certain aspects of correctional services are not necessarily considered to have a connection to public life as they may be contracted out to a private company, or because holding someone in a cell is not considered a 'service'. The Charter considers that even if correctional services are contracted out to a private company, it is a service that is generally identified as being a function of the government and is therefore "public"[59].

The Law Society of South Australia

211. The LSSA notes that the ADA, DDA and SDA make discrimination unlawful in specific areas of public life. The RDA on the other hand, makes it unlawful to do a discriminatory act based on race which interferes with the enjoyment of "any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life".[60] The Society considers that the ADA, SDA and DDA should be amended to similarly include a general prohibition against discrimination in any area of public life, equivalent to Section 9 of the RDA.

[58] Section 9
[59] Section 4(2)(b), *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[60] Section 9

The Law Society of Western Australia

212. The LSWA is of the view that the current coverage of areas of public life under Commonwealth anti-discrimination law is appropriate.

Further consideration

213. The Law Council will consider further the articulation of the areas of public life in which anti-discrimination laws should apply and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Protection of voluntary workers from discrimination

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

The Law Council's Policy Statement

214. In its Policy Statement the Law Council supported consideration of enhancement of current protections by expanding the Commonwealth anti-discrimination regime to protect volunteers.

215. The Law Council has received specific views from some of its constituent bodies on the protection of voluntary workers from discrimination and harassment in a consolidated Act. These views are set out below.

The Law Institute of Victoria

216. The LIV considers that there is a need for expansion of full discrimination protection to volunteers, which would recognise the importance of their role in the Australian economy.

217. The recently released Government report on the ageing workforce in Australia recognises that:

> *Volunteering is an essential part of a well-functioning and cohesive society. It connects people, strengthens their sense of belonging and creates positive relationships that build stronger local communities. Volunteering provides individuals with the opportunity to give back to the community. The contribution of unpaid volunteers allows organisations to focus their funds on providing goods and services to others. Volunteering is also significant in the economy, with an estimated value of $14.6 billion per year (ABS, 2002). The federal government has recognised this contribution through the recent release of the National Volunteering Strategy. Importantly, the strategy considers the issue of engaging senior Australians in volunteering efforts. Senior Australians currently contribute the highest number of volunteer hours of any age group, even though they are not the largest group of volunteers (ABS, 2006).*

Volunteers bring a diverse range of skills, experiences and expectations. They increasingly want more challenging roles when they volunteer and the opportunities to exercise their business and technical skills and experience.[61]

218. The LIV notes that the protection of volunteers under the Victorian EO Act is currently limited to sexual harassment in the workplace but that they are not protected from discrimination, and that volunteers are not likely to be covered under the SDA, DDA and ADA.

219. The LIV suggests that it needs to be recognised that:

- Undertaking volunteer work is a beneficial option for those who are unemployed in order to gain work experience and re-integrate into the workforce and society; and

- those from marginalised groups are often represented in higher numbers amongst the unemployed, for example in the case of disability in Australia, the current employment rate of persons with disabilities is 39.8% compared with 79.4% for those living without a disability;[62] and

- Marginalised groups suffer more from discrimination in employment (amongst other areas) – see AHRC annual reports for statistics.

220. The LIV suggests that the Government needs to do whatever it can to assist persons with disabilities and other groups suffering from the effects of systemic discrimination to engage in the paid workforce and in society. Extending anti-discrimination protections to those who choose to undertake volunteer work is a positive step in that direction.

The Law Society of NSW

221. The LSNSW's Employment Law Committee notes that the Discussion Paper directs attention to "voluntary workers" not to "volunteers". The Committee generally supports extension of protections to "voluntary workers". However, it is important to consider the capacity in which the person is working and/or the activity that is being undertaken.

222. The Committee recommends that a distinction be made between "voluntary workers" as being those working (though not paid) in a business and typically alongside employees (such as museum guides) and "volunteers" where the activity is being carried out along with others, none of whom are employed and there is no business (such as clean up campaigns).

The Law Society of WA

223. The LSWA considers that voluntary workers should be protected against sexual harassment but the consolidation bill should not protect them from discrimination.

61

62 "Disability Expectations – Investing in a better live, a stronger Australia", PricewaterhouseCoopers, 2011.

Further Consideration

224. The Law Council will consider further the protection of voluntary workers from discrimination and harassment and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Protection of domestic workers from discrimination

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

The Law Council's Policy Statement

225. In its Policy Statement, the Law Council generally supports reforms which improve the capacity of the regime to address all forms of discrimination and where possible, streamlines exceptions in the regime.

226. The Law Council notes that the ADA, DDA, RDA and SDA contain exceptions against discrimination where a person is undertaking domestic duties or being offered employment in a private dwelling. The SDA also contains exceptions in relation to employment involving the residential care of children, which allow discrimination on the grounds of sex or marital status.[63]

227. The Law Council has received specific views from some of its constituent bodies on the extent to which domestic workers should be protected from discrimination in a consolidated Act. These views are set out below.

The Law Society of South Australia

228. The LSSA considers that a consolidated Act should protect domestic workers from discrimination, noting the current Commonwealth exceptions. The LSSA does not have a particular view as to how further protection should be provided.

The Law Society of Western Australia

229. The LSWA considers that the current Commonwealth laws provide appropriate protection for domestic workers. The exceptions apply to determining who should be offered employment but do not apply in relation to termination or discrimination and harassment during employment.

Further Consideration

230. The Law Council will consider further the protection of domestic workers from discrimination and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

[63] As referred to at p 28 of the Discussion Paper

Regulation of clubs and other member-based organisations

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

The Law Council's Policy Statement

231. The Law Council's Policy Statement generally supports reforms to the Commonwealth anti-discrimination regime that improves its capacity to address all forms of discrimination and where possible, streamlines exceptions in the regime.

232. The Law Council notes that all clubs, voluntary bodies and incorporated or unincorporated associations are prohibited from discriminating against the public in the provision of goods or services. However, different exceptions apply under the ADA, DDA, RDA and SDA in relation to membership.

233. The Law Council has received specific views from some of its constituent bodies on the best approach to coverage of clubs and member-based associations in a consolidated Act. These views are set out below.

The Law Institute of Victoria

234. The LIV supports the adoption of the option in the Discussion Paper of the broad definition in the DDA of a club as an association (whether incorporated or not) that provides and maintains facilities from the funds of the association. The LIV supports this option for the following reasons;

- All protected attributes are covered;

- Coverage would be extended to a broad range of organisations and clubs, and would no longer exempt volunteer groups such as surf lifesaving clubs and emergency services which would mean that volunteers in those groups would be protected. As noted above, it is important to recognise that volunteers contribute significantly to the Australian economy and community and deserve equal protection from discrimination in the course of their duties;

- The LIV does not support clubs and member-based associations having access to an automatic exemption for single sex clubs and associations, as recommended by the SDA Report (referenced in the Discussion Paper). The LIV has previously advocated for the Victorian EO Act to adopt the approach that clubs wishing to limit membership to persons of one sex should be required to apply for an exemption, or be required to justify the limitation/action under the "special measures" provisions. This is the most comprehensive way of protecting against sex-based discrimination;

- This approach excludes very small social clubs which do not provide and maintain facilities from the funds of the association, which the LIV supports as a practical exemption.

235. The LIV does not support the alternative option posed in the Discussion Paper of covering only licensed clubs with 30 or more members as is the current situation under the SDA. The effect of such a change would be to significantly diminish the protection for people with disabilities. The principle of non-derogation of existing protections in a consolidated Act is fundamental to the consolidation project.

The Law Society of South Australia

236. The LSSA agrees with the LIV that the approach in a consolidated Act should not diminish the current protections for people with disabilities.

The Law Society of Western Australia

237. The LSWA prefers the alternative posed in the Discussion Paper of covering only licensed clubs with 30 or more members as is the current situation under the SDA. However, the LSWA agrees that consideration would then need to be given to mitigating the diminution of protection for people with disabilities.

Further Consideration

238. The Law Council will consider further the best approach to coverage of clubs and member-based associations and hopes to be in a position to provide further comments on the issue prior to the release of exposure draft legislation.

Regulation of partnerships

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

The Law Council's Policy Statement

239. The Law Council's Policy Statement generally supports reforms to the Commonwealth anti-discrimination regime that improves its capacity to address all forms of discrimination and where possible, streamlines exceptions in the regime.

240. The Law Council supports the application of a consolidated Act to partnerships regardless of size.

241. The LSSA and the LSWA specifically support this position with the LSWA noting that temporary exemptions could be sought if this poses too great an impost in particular cases.

242. The LSNSW's Employment Law Committee observes that it is often the case that small partnerships are formed by those in close personal relationships, for example family or (life) partners. Apart from the RDA, small partnerships have been excluded from coverage.

243. The LSNSW's Employment Law Committee also observes that while there may be some consideration to legislate an exclusion in the coverage of partnerships through

a "single size" limitation (such as number of partners and/or based on the partnership's annual turnover), excluding partnerships from coverage is undesirable as it leads to inconsistencies in the application of the legislation to other (potentially smaller) proprietary limited companies. Further, using a single size limitation may not necessarily reflect the size of the business.

244. The LSNSW's Employment Law Committee also observes that it is inconsistent to limit from coverage partnerships based on their size, and not small business. Further, the size of the partnership does not necessarily reflect the size of the business. Also, from a policy perspective, the mere fact that they may be family-based does not necessarily provide strong support for exempting them from discrimination legislation. For these reasons, the committee cautions against introducing a standard exclusion for small partnerships.

Recommendation

245. The Law Council recommends that a consolidated Act apply to partnerships without any minimum size requirement.

Regulation of sport

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

The Law Council's Policy Statement

246. The Law Council's Policy Statement generally supports reforms to the Commonwealth anti-discrimination regime that improves its capacity to address all forms of discrimination and where possible, streamlines exceptions in the regime.

247. The Law Council has only received views from one of its constituent bodies on the particular issue of the coverage of sport under a consolidated Act.

248. The LSWA agrees with the suggestion in the Discussion paper that the Victorian Act provides an appropriate model that could be adopted for use in a consolidated Act.

Further Consideration

249. The Law Council will consider further the best approach to coverage of sport in a consolidated Act and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Requests for information

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

The Law Council's Policy Statement

250. The Law Council's Policy Statement generally supports reforms to the Commonwealth anti-discrimination regime that improves its capacity to address all forms of discrimination and where possible, streamlines exceptions in the regime.

251. The Law Council has only received views from one of its constituent bodies on the particular issue of prohibiting discriminatory requests for information under a consolidated Act.

252. The LSWA is of the view that the approach adopted in Victoria is appropriate for adoption in a consolidated Act. This approach involves the request being allowed only where it will be for non-discriminatory purposes and limits the further disclosure of the information. An example of a non-discriminatory purpose provided in the Discussion Paper is where employer requests information about a protected attribute to comply with occupational health and safety standards or to ensure reasonable adjustments can be made, such as not carrying out certain tasks during pregnancy.

Further Consideration

253. The Law Council will consider further the best approach to prohibition of discriminatory requests for information in a consolidated Act and hopes to be in a position to provide further comments on the issue prior to the release of exposure draft legislation.

Vicarious liability

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

The Law Council's Policy Statement and Submissions

254. The Law Council's Policy Statement generally supports reforms to the Commonwealth anti-discrimination regime that improves its capacity to promote substantive equality, which includes addressing systemic discrimination.

255. In its submission to the SDA review, the Law Council also supported measures to address systemic discrimination. As such discrimination often occurs in the employment context, including in corporations, the Law Council supports the use of appropriate vicarious liability provisions in order to address systemic discrimination more effectively.

256. The Law Council notes the observation in the Discussion Paper that vicarious liability provisions attribute liability to employers and principals for the unlawful acts of their employees and agents where employers and principals do not take reasonable steps to prevent discrimination from occurring. The Law Council also notes the observation in the Discussion Paper that the Commonwealth anti-

discrimination laws limit vicarious liability to situations where there is a sufficient connection between the unlawful act and the relationship.[64]

257. The ADA and DDA tests require the unlawful act to be committed 'within the scope of [the person's] actual or apparent authority. The RDA and SDA tests require the unlawful act to be 'in connection with 'the person's employment or duties as an agent'.

258. The Commonwealth anti-discrimination laws also provide a defence of reasonable preventative action. Under the ADA and DDA, an employer or principal will not be liable for acts of an employee or agent if he or she took 'reasonable precautions and exercised due diligence to avoid the conduct' and under the RDA and the SDA there is a defence where 'all reasonable steps' have been taken to prevent the act.

259. The Law Council has received specific views from some of its constituent bodies on the clarification of the vicarious liability provisions in a consolidated Act. These views are set out below.

The Law Institute of Victoria

260. Assuming that a consolidated Act adopts a positive duty provision for all organisations to prevent discrimination and promote equality as discussed above, the LIV is of the view that the vicarious liability provisions need to be clarified with direct reference to that duty. This would expand the vicarious liability test to consider not only whether the employee or other agent was acting 'in connection with' their duties, but to whether the employer or principal could have prevented the discriminatory behaviour, which they are required to do under their positive duty.

261. The LIV agrees that the requirement in the ADA and DDA that the unlawful act is committed "within the scope of [the person's] actual or apparent authority" is not reflective of the reality of many discrimination cases. It assumes discrimination cases are straight forward, and requires a very direct link between the unlawful act and the person's authority (that is, that the principal or employer authorised the act), but does not recognise that an employee or agent might not have been acting within the scope of their principal's or employers' authority when they undertook the unlawful act.

262. Particularly in light of the positive duty on employers to actively eliminate discrimination, it is more appropriate to adopt the broader and more flexible test from the RDA and SDA that requires the unlawful act to be perpetrated "in connection with" the person's employment or duties as an agent. This allows for the test to be interpreted in line with the higher standard of care and responsibility introduced by a positive duty.

263. The LIV supports including all of the relationships currently covered by the four Acts (employee - employer, principal - agent/contract worker, company - directors/employees/agents), as well as any relationship where a person has the capacity and right to control or direct the conduct or behaviour of others. It would be

[64] See Discussion paper at pp 34-35

useful to provide examples of these situations and relationships in the provision to provide guidance.

264. The LIV also supports the adoption of the wording “all reasonable steps” (from the RDA and SDA) in the defence to a vicarious liability provision, and recommends that the provision provide specific guidance as to what would constitute “all reasonable steps” to prevent discrimination, again in the context of the positive duty and increased standard of care and responsibility. The LIV would anticipate that this guidance would refer to the need to have appropriate policies in place, to provide training on those policies, and to implement them when an organisation receives a complaint. A vicarious liability provision should encourage the development of best practice and suitable policies.

265. To determine that steps taken to prevent discrimination or harassment were reasonable, it would be necessary to identify appropriate standards that apply to a particular industry or occupation involved in a given case[65] and that would be a process which would include taking extensive evidence.

266. What is a reasonable course of conduct or action will depend on widely diverse criteria that cannot be taken out of context. A legislative provision cannot provide meaning that would be appropriate in every situation regardless of the context, so the provision must provide extensive guidance as to what should be included in the test for reasonable conduct. However, case law indicates that reasonable preventative action involves having appropriate policies, at a minimum,, providing training on them, and implementing them when an organisation receives a complaint.

267. This guidance should explain that this standard of reasonableness is higher in light of the positive duty, and that the onus of proof is on the principal to establish that they have upheld their duty to prevent discrimination and promote equality (subject to any practical limitations such as the cost and size of the business).

The Law Society of South Australia

268. The LSSA considers that the tests set out in the RDA and in the SDA which require the unlawful act to be “in connection with” the person’s employment or duties as an agent are appropriate. Furthermore, the defence that the employer “took all reasonable steps to prevent the employee or agent from doing the act” would appear to be appropriate and would encourage organisations to develop policies which indicate to all employees the types of behaviour that are unacceptable.

[65] Chris Ronalds and Rachel Pepper, *Discrimination Law & Practice*, 2nd ed, Federation Press 2004, pp148-149.

The Law Society of Western Australia

269. The LSWA considers that the vicarious liability provisions in a consolidated Act should be consistent with those in the Model Work and Health Safety Law.[66] The Law Council will consult further with the LSWA in relation to this suggestion.

Further Consideration

270. The Law Council will consider further the best approach to clarification of vicarious liability provisions in a consolidated Act and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Exceptions and Exemptions

General limitations clause

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

The Law Council's Policy Statement

271. In its Policy Statement, the Law Council took the view that the consolidation process should look carefully at the exceptions to and exemptions from unlawful discrimination in the existing Commonwealth regime. The Law Council suggested that consideration should be given to defining an exception as conduct which, but for the operation of the excepting provision, would be unlawful discrimination.[67] The Law Council also suggested that consideration be given to defining an exemption as a permissive authorisation for conduct which, but for the operation of the exemption, would be unlawful.[68]

272. Where possible, the Law Council also supported streamlining the exceptions and exemptions in the four key Commonwealth Acts[69], although it acknowledged that in some cases, the exception may be specific to the particular ground.

273. The Law Council notes that the Discussion Paper suggests a general limitations clause as an alternative to the current method of specifically providing for a wide range of permanent exceptions. Such a clause would effectively provide that conduct is not discriminatory if it is necessary and proportionate to achieving a legitimate objective. However, such a clause would need to maintain the policy expressed in existing exceptions.

[66] See *Work Health and Safety Act 2011 (Cth)*, which is model legislation that has been adopted in all jurisdictions to date except SA, Tasmania, Victoria and WA.
[67] See Discrimination Law Experts' Roundtable, 'Report on recommendations for a consolidated federal anti-discrimination law in Australia', (29 November 2010)
[68] ibid
[69] See for *example Sex Discrimination Act 1984* s40 which provides a 'statutory authority' exception and compare the *Racial Discrimination Act 1975*, which does not

274. The Law Council has received specific views from some of its constituent bodies on the adoption of a general limitations section in a consolidated Act. These views are set out below.

The Law institute of Victoria

275. In general, the LIV does not support blanket exceptions or exemptions in a consolidated Act. Blanket exceptions and exemptions do not allow for careful balancing of competing rights and interests. The LIV suggests that permanent exceptions/ exemptions based on stereotypes undermine the purpose of the Acts and serve to perpetuate stereotyping by important institutions.

276. The LIV recommends that the provisions on exceptions and exemptions under the Commonwealth anti-discrimination Acts should be available only through application and noted as either special measures (which by their very nature are temporary) or temporary limitations.

277. A "limitation" is the Act, or a body authorized by the Act, placing a particular limitation on the human right to equality. A limitation is either justifiable on the basis of being legitimate, proportionate, justifiable and consistent with the objectives of a consolidated Act, or it is not.

278. The temporary limitations provision could operate like the general limitations clause suggested in the Discussion Paper. The LIV's suggestion to note these limitations as *temporary* is consistent with the idea that having to apply for and continue to justify the legitimate need for a limitation to the protections of a consolidated Act will provide "flexibility to adapt to changing standards and community expectations over time"[70], and that it will allow for a careful balancing of rights on a case by case basis.

279. The LIV refers to the recommended process in the experts' report for applying for a temporary exemption;

> *"Exemptions should be granted only on application, on a temporary basis, consistently with the aims of the legislation, and with procedural safeguards that ensure notification of and comment on the proposed exemption.*
>
> *Similarly to the provision for exceptions, exemptions should be approached in a manner that is consistent with the human rights underpinnings of anti-discrimination legislation, with particular emphasis on the transparency of the process and the opportunity for interested parties to be heard.*
>
> *Accordingly, we recommend that exemptions from the operation of the Act be granted in the following manner. An application for an exemption should be made to the Australian Human Rights Commission (AHRC) by the person or body seeking to rely on the exemption. The AHRC should be required to:*
>
> - *publish criteria for the granting of an exemption*

[70] See Discussion Paper paragraph 147.

- *publicly advertise each application for an exemption, calling for comment and submissions consider the application, any objections*

- *ensure that any exemption is for conduct or conditions which are not inconsistent with the objects of the legislation*

- *grant an exemption only on a temporary basis for a defined period*

- *impose conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation*

- *require a renewal of the exemption to go through the application process*

- *publish reasons for granting or refusing the exemption*

- *maintain a public register of applications made and exemptions granted and refused".*[71]

280. The LIV suggests that in the absence of certainty regarding interpretation of the temporary limitations provision it could be supplemented by guidelines that help with interpretation and application.

281. There are particular aspects of the SDA such as provisions allowing rights or privileges to women in connection with pregnancy or childbirth or services of a nature that they can only be provided to members of one sex.[72] Such provisions may be defined as "special exceptions" as suggested in the experts' submission [73] rather than being subject to the temporary limitations provision.

282. In regards to "special measures", they are by definition temporary, and they do not constitute discrimination as noted above. When the substantive equality goals of a special measure are met, it ceases to be a special measure, and would if continued become unlawful discrimination.

The Law Society of South Australia

283. The LSSA considers that a general limitations clause should be adopted. This will need to be drafted such that it does not excuse conduct which is currently unlawful under the present Commonwealth legislation. The conduct to be excused would have to be based on reasonable and objective criteria.

The Law Society of Western Australia

284. The LSWA considers that a consolidation Act should adopt a general limitations clause. However, specific exceptions would need to be retained where there are the same or similar express exceptions for all of the attributes. Otherwise there would need to be specific exceptions for specific attributes.

[71] See experts' report at p 13, note 12
[72] See sections 31 and 32
[73] See experts' submission at p 16, note 11.

Further Consideration

285. The Law Council will consider further the issue of a general limitations provision in a consolidated Act and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Inherent requirements and genuine occupational qualifications

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

The Law Council's Policy Statement

286. In its Policy Statement the Law Council suggested streamlining the exceptions and exemptions in the four key Commonwealth Acts, though it acknowledged that in some cases, the exception may be specific to the particular ground (for example, inherent requirements and disability).

287. The Discussion Paper notes that 'inherent requirements' is an exception to unlawful discrimination in work, which applies when a person with a particular attribute is unable to carry out the essential requirements of a job. The term is only used in the ADA and the DDA. The SDA refers to 'genuine occupational qualification' as an exception to discrimination where a person of a particular sex may be required to work in a particular job such as a female working in a changing room for females.

288. The Discussion Paper asks how a single inherent requirements/genuine occupational qualification should work in a consolidated Act.

289. The Law Council has received views from some of its constituent bodies on a single inherent requirements/genuine occupational section in a consolidated Act. These views are set out below.

The Law Institute of Victoria

290. The LIV considers that the inherent requirements exception is an important but potentially misunderstood concept and there is a risk that it is getting broader in its application because of this. There is general feedback from LIV members that, for example, an act such as a breach of occupational health and safety rules in a workplace is potentially being used as a basis for an employer establishing a claim that an employee is not meeting the inherent requirements of the job.

291. The LIV suggests that this lack of understanding could be improved by including examples and guidance in the Explanatory Memorandum to a consolidated Act in order to illustrate how the inherent requirements provision works in practice.

The Law Society of South Australia and the Law Society of Western Ausrtalia

292. The LSSA and the LSWA consider that the broad general inherent requirements exception, which applies to all attributes and in all areas of work, as defined in the

FWA, may be an appropriate definition for such a single inherent requirements exception.

The Law Society of New South Wales

293. The LSNSW's Employment Law Committee considers that the inherent requirements exception in the DDA should be retained along with the genuine occupational qualification in the SDA. The Committee recommends this even if it is not possible to create a single common exception.

294. The LSNSW's Employment Law Committee is also of the view that consideration should be given to the adoption of the European Union approach in Article 23 of EU Directive 2000/78/EC, which states:

In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.

Further Consideration

295. The Law Council will consider further the issue of a single inherent requirements/genuine occupational qualification exception in a consolidated Act and hopes to be in a position to provide further comment on the issue prior to or on the release of exposure draft legislation.

Exemptions for religious organisations

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

The Law Council's Policy Statement

296. The Law Council's Policy Statement supported reforms to the current Commonwealth anti-discrimination regime which would improve its capacity to address all forms of discrimination and would streamline exceptions. The Policy Statement also supported additional protection relating to a person's sexual orientation or gender status.

297. As noted above, the Law Council recommends that a consolidated Act be framed to achieve the broadest coverage of people of all sex and/or gender identities so that the widest protection on the ground of sex and/or gender identity can be provided.

298. In this context, religious exceptions will operate as a constraint on the degree of protection afforded on the grounds of sexual orientation or gender identity and should be considered carefully.

299. The Law Council notes that the Discussion Paper states that the Government does not propose to remove other current religious exceptions in Commonwealth anti-discrimination legislation.[74]

300. The Law Council has received specific views from some of its constituent bodies on how religious exceptions might apply in relation to discrimination on the grounds of sexual orientation or gender identity. These views are set out below.

The Law Institute of Victoria

301. As stated above, the LIV's position is that unjustifiable limitations should not be permitted under a consolidated Act. The LIV notes, however, that the Government proposes to retain the current religious exceptions generally, although it is seeking views on how they should apply in relation to sexual orientation or gender identity.

302. The LIV considers that religious exceptions to discrimination on the grounds of sexual orientation or gender identity should be precise, public, and subject to sunset provisions in the Act, so that Parliament has to decide after a defined period (such as 4 years), whether to retain or remove the exceptions.

303. The LIV proposes the following process for a religious organization to be granted a license to discriminate based on sexual orientation or gender identity:

(1) A body established for religious purposes may discriminate when it is necessary to do so in order to conform to the doctrines, tenets or beliefs of the relevant religion *and* to avoid injury to the religious sensitivities of adherents to that religion; (if the reference to religious sensitivities must be retained, the LIV recommends that it must be linked to the doctrines element with an "and" not an "or").

(2) The licence to discriminate (limitation on the right to equality) applies only to the attributes, areas and justification by specific religious doctrinal necessities stated in an instrument lodged with the AHRC and made available to the public by the body concerned in its promotional material, on its website and in any relevant publication such as information brochures, advertisements and annual reports. This should mandate transparency in decision-making. Discrimination not expressly referred to in this instrument remains unlawful.

(3) The licence to discriminate (limitation) does not apply to any activity or function carried out by the body paid for wholly or in part by or on behalf of government.

(4) The licence to discriminate (limitation) must be subject to a mandatory review by the Government after 4 years in order to constantly respond to "changing standards and community expectations over time".[75]

[74] See note 9
[75] See Discussion Paper paragraph 147.

304. The LIV notes that the SDA Review Report in 2008 stressed the importance of a process for balancing of rights relating to religion and rights not to be discriminated against on the grounds of sex as opposed to the use of permanent exceptions.[76] .

The Law Society of Western Australia

305. The LSWA acknowledges the Government's position not to remove the current religious exemptions (apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity).It understands that religious sensitivity must be respected but it notes that where such exemptions continue they amount to authorised discrimination.

Further consideration

306. The Law Council will consider further the issue of how religious exceptions to discrimination on the grounds of sexual orientation or gender identity might apply in a consolidated Act and hopes to be in a position to provide further comments on the issue prior to or on the release of exposure draft legislation.

Temporary exemptions

Question 23.	**Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?**

The Law Council's Policy Statement and submission to the SDA Review

307. In its Policy Statement the Law Council supported streamlining exemptions.

308. In its submission to the SDA review, the Law Council acknowledged that it was appropriate for the AHRC to grant exemptions in certain circumstances and for these exemptions to be reviewable in the Administrative Appeals Tribunal.[77]

309. As noted above the LIV supports the process suggested in the experts' submission for the AHRC to grant temporary exemptions.[78] This process is also supported by the LSNSW's Employment Law Committee, which also supports the view in the experts' submission that the process for granting temporary exemptions be made consistent across all grounds while acknowledging that this will mean an extension to racial discrimination. However, the experts' submission proposes that concerns arising from this extension can be dealt with by ensuring that the scope for exceptions other than special measures is minimised.

310. The LSSA and the LSWA consider that temporary exemptions should continue but not in relation to racial discrimination.

[76] See SDA Review Report http:www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report.pdf at paras 7.30 and 7.31
[77] See Submission to the SDA review at p 31, note 7
[78] See the experts' submission at pp 17-18, note 11

311. The Law Council notes that it has not had the opportunity to consult its constituent bodies on the views put in relation to racial discrimination and temporary exemptions in the experts' submission and will do so prior to the release of draft legislation.

312. The LSWA also suggests that the AHRC should take into account matters relating to exceptional hardship and temporary circumstances justifying the exemption in relation to granting exemptions.

Recommendation

313. The Law Council recommends that:

(a) Temporary exemptions continue to be available in a consolidated Act (although a question remains in relation to racial discrimination);

(b) The matters to be taken into account in granting a temporary exemption should include the objects of anti-discrimination law; the need to grant exemptions cautiously, for the shortest possible time and with the narrowest coverage (as suggested in the experts' submission); the need to consider any exceptional hardship being addressed and the temporary circumstances justifying the exemption; and

(c) The process for granting temporary exemptions should be as outlined in the experts' submission.

Further Consideration

314. The Law Council will consult further in relation to temporary exemptions from racial discrimination and hopes to be in a position to provide further comment prior to or on the release of draft legislation.

Complaints and Compliance Framework

Options to assist businesses to meet anti-discrimination obligations

Question 24.	**Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?**

The Law Council's Policy Statement and submission to the SDA Review

315. In its Policy Statement, the Law Council supported consideration of positive duties for duty holders to prevent or remove discrimination. The Law Council also supported a special measures provision

316. In its submission to the SDA review, the Law Council addressed the specific issue of discrimination against women in the legal profession and suggested education and training to inform employees of their rights and employees of their obligations. The Law Council also suggested the development of industry standards for education of the legal profession on gender bias and discrimination.[79]

317. The Law Council notes that the Discussion Paper suggests that mechanisms to assist duty holders could include:

    (a) Voluntary non-binding action plans;

    (b) Co-regulation;

    (c) Standards; and

    (d) Certification of special measures.[80]

318. The DDA provides that duty holders may develop voluntary action plans that specify policies and programs to help them comply with obligations under the DDA. Such plans are developed through consultation between the duty holder, the AHRC and the community. The DDA also provides that such plans may be relevant to an assessment of whether the exception of unjustifiable hardship applies where a claim of discrimination is made. The Discussion Paper suggests that such plans could be extended to other attributes.[81]

319. Co-regulation is a form of self-regulation by an industry or organisation carried out in collaboration with the Government. In the context of anti-discrimination law, this could involve an industry working with the AHRC and stakeholders to provide industry-specific detail in relation to existing obligations, such as the banking industry developing minimum standards for the design and placement of Automatic Teller Machines to facilitate access and use by person with a disability. The Discussion Paper suggests that a business which is compliant with an industry co-regulation plan may not be liable for discrimination claims with respect to matters covered by the plan.[82]

320. The DDA provides that the Attorney-General may develop binding standards in relation to matters such as access to premises and public transport. The Discussion Paper suggests that extending this power to other protected attributes could include the development of standards in relation to matters such as gender representation.[83]

321. The Discussion Paper notes the current limited use of special measures by business and suggests that it may be desirable to empower the AHRC to certify a proposed course of action as a special measure for a specified period. Such certification may allow business to adopt equal opportunity measures with more certainty.[84]

[79] See SDA submission at p 23, note 7
[80] See Discussion Paper at p 43, note 2
[81] Ibid at p 44
[82] Ibid at pp 44-45
[83] Ibid at p 45
[84] Ibid at p 46

322. The Law Council supports mechanisms to assist duty holders to comply with their obligations under a consolidated Act. Some of the Law Council's constituent bodies have made specific comments on particular mechanisms as outlined below.

323. The LIV suggests that mechanisms such as action plans, enquiries, enforceable undertakings, and guidelines are likely to strengthen positive duty obligations and should be included in a consolidated Act.

324. The use of action plans to address systemic discrimination and promote positive measures is a significant step towards promoting substantive equality. However the LIV suggests that the regime of action plans should be strengthened.

325. The LIV suggests that a consolidated Act needs to provide a link between action plans and the positive duty to eliminate discrimination. A consolidated Act should provide for action plans as a practical tool for duty holders to fulfil the positive duty to eliminate discrimination.

326. The LIV refers to the Human Rights Law Resource Centre's 2009 submission to the Review of the *Equal Opportunity for Women in the Workplace Act 1999*[85], in which the experience of Equality Action Plans in other jurisdictions is considered. Canadian and South African legislation provides for 'employment equity plans' which require the employer to specify (among other things): the objectives of the plan; the policies and practices necessary to implement the plan; the measures to be taken by the employer; the timetable for implementation; long-term goals; and the procedures and persons necessary for monitoring and evaluating the plan.

327. In addition to many of these requirements, the Swedish equivalent of a 'plan of action for equality' requires an evaluation report assessing the success of the measures taken, as well as an extensive scheme for ensuring accountability and compliance.

328. The UK provides for a 'gender equality scheme' which decrees that all public authorities must produce a gender equality scheme within three years that outlines how the authority will meet its gender equality objectives.

329. As the Government recognises that establishing and implementing an action plan is a way to address entrenched discrimination within an organisation rather than responding to issues and complaints on a case by case basis, the LIV suggests that a consolidated Act follow the international example and, at the minimum, require all public authorities to establish and implement an Equality Action Plan. This will set a minimum standard, publicly available to the community and other organisations.

330. To ensure appropriate accountability of duty holders, the LIV supports the inclusion of 'minimum requirements' (or guidelines) for action plans and further encourages the adoption of a provision ensuring that the duty holder provide relevant time frames for the implementation of its action plan, or alternatively provide that the AHRC may set relevant timeframes in this regard.

[85] http://www.hrlc.org.au/files/EOWW-Act-Submission-HRLRC.pdf

331. The LIV notes that action plans, enforceable undertakings and practice guidelines have been incorporated in the Victorian EO Act.

332. As discussed above, the LIV also supports an application process for special measures, which appears to be compatible with the certification process suggested in the Discussion Paper.

333. The LSSA considers that standards or codes could be adopted to provide greater guidance and certainty for the community and stakeholders in relation to the legislation. However, such standards or codes should not detract from the current provisions of the Commonwealth legislation.

334. The LSWA agrees that standards can be a useful mechanism for providing additional certainty and guidance on specific obligations under legislation. However, co-regulation is not supported. Where standards become benchmarks, they should be reviewable, possibly through the mechanism of delegated legislation.

Recommendation

335. The Law Council recommends that mechanisms to provide greater certainty and guidance to duty holders to assist them to comply with their obligations be provided under a consolidated Act.

Further Consideration

336. The Law Council will consult further on the types of mechanisms which could be included in a consolidated Act to provide greater certainty and guidance to duty holders and hopes to be in a position to provide further comment on the issue prior to or on the release of draft legislation.

Options for reforming the conciliation process

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

The Law Council's Policy Statement

337. The Law Council's Policy Statement noted that members of the Law Council's Constituent Bodies and Committees who regularly interact with the current Commonwealth anti-discrimination regime have identified a range of deficiencies with the existing complaints procedure, including the delay between the making of a complaint, referral to conciliation and to court if conciliation is unsuccessful.

338. The Law Council supported consideration of a mechanism for complainants to have the option to proceed directly to the court, such as the current practice in relation to the decision making tribunal under the *Equal Opportunity Act 2010* (Vic).[86.] The Law Council considered that it was important to also include a process that provides for

[86] *Equal Opportunity Act 2010* (Vic) s122 and s 133.

early court approved conciliation in the event that a complainant is given a choice to proceed directly to court.

339. The Law Council also suggested that consideration should be given to provisions whereby complainants are provided with assistance in drafting a complaint. While a complaint need not be a technical legal document, a poorly drafted complaint can undermine a complainant's case, not only at a hearing but also at the point conciliation or negotiation.

340. The Law Council also suggested a review of the types of remedies available for successful complaints under the existing Commonwealth anti-discrimination regime through the AHRC conciliation process. The Law Council supported consideration of the effectiveness of both monetary compensation remedies and non-monetary remedies, such as changes in policies and procedures used by respondents. The Law Council noted that the level of monetary compensation in anti-discrimination matters is relatively modest compared to other areas of law where personal harm has been done. These issues are equally relevant to remedies available through the court process and are discussed further below in that context.

341. The Discussion Paper notes the general conduct of conciliation by the AHRC on a voluntary basis despite current provisions for compulsory conciliation and questions whether conciliation should be compulsory or voluntary. The Discussion Paper notes that conciliation is a form of Alternative Dispute Resolution (ADR). If a compulsory ADR stage is maintained, the Discussion Paper suggests that other forms of ADR such as arbitration and mediation may be able to be considered.

342. The Discussion Paper also refers to the process under the Victorian EO Act where the voluntary conciliation process allows parties to proceed directly to court without having to undertake compulsory conciliation at the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

343. The Law Council supports changes to the conciliation process to make it more effective, such as those mentioned above and has also received specific comments from some of its constituent bodies in relation to these and other changes, which are discussed below.

344. The LIV supports the recent reforms to the dispute resolution procedure under the Victorian EO Act and notes that they will be of positive benefit to many applicants where the matter is unlikely to settle. This may be because informal attempts to settle have been unsuccessful, or the attitude of one party may be indicative that early settlement is unlikely. Ultimately, the new system recognises that not all parties are willing to attend and participate in ADR at the VEOHRC, and thus the system will increase cost-efficiency where cases will be referred to the decision-making tribunal regardless of previous ADR at the VEOHRC.

345. A similar provision in a consolidated Act would allow the applicant to file their matter directly with the decision maker, in this case the federal courts, and bypass conciliation at the AHRC. The aim of this approach is to provide faster, more flexible and individually appropriate alternative dispute resolution.

346. The LSSA considers that the current AHRC conciliation process takes far too long to be completed. It is noted that there are no AHRC officers based in South Australia for the purposes of conducting such conciliation. It has sometimes taken two or three months before it is convened, as the AHRC usually requires two or three complaints to be listed before conciliation officer will travel to Adelaide from Sydney. This is not conducive to effective resolution of complaints. The AHRC could consider a similar process that occurs with Unfair Dismissal applications with Fair Work Australia, whereby conferences are conducted by telephone or perhaps by video link up. In the alternative, the South Australian Equal Opportunity Commission conciliation officers should have delegated authority to conduct mediations on behalf of the AHRC.

347. The QLS notes that under Queensland legislation complainants can seek a referral to the decision making tribunal if conciliation has not resolved the complaint without the need to make a separate application to the tribunal. The relevant provisions provide an effective process for complainants to require a referral with timelines and associated rights explained.

348. The QLS considers that including provisions to this effect in a consolidated Act will greatly enhance flexibility and access to redress for complainants. Strict deadlines also ensure that momentum with the complaint is maintained.

349. The QLS also notes that access to complaints mechanisms with anti-discrimination systems can be burdensome and costly. Many people with legitimate claims are disempowered to pursue redress as a result. The QLS suggests a drafting approach to the legislation which focuses on enhancing the rights of potential individual complainants and readily facilitates their access to justice.

350. The LSNSW's Employment Law Committee notes that the process through the AHRC is slow, and in some cases adds unnecessary costs. It supports consideration of allowing matters to proceed directly to court where ADR mechanisms are available at the appropriate time.

351. The LSWA supports the suggestion in the Discussion Paper of offering mediation to discrimination complainants to supplement AHRC conciliation. It also supports the AHRC having the power to refer a matter to arbitration.

<u>Recommendations</u>

352. The Law Council recommends that a consolidated Act include provisions for:

    (a) Complainants to have the option of not participating in AHRC conciliation and proceeding directly to court. However complainants should participate in relevant ADR processes associated with the court proceedings;

    (b) Assistance to be provided to complainants in drafting a complaint;

    (c) Practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconference or videoconference;

    (d) Referral of matters for mediation or arbitration by the AHRC;

(e) Guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes including conciliation.;

Options to improve the court stage of the process

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

The Law Council's Policy Statement and submission to the SDA review

353. The Law Council's Policy Statement and submission to the SDA review supported a review of the types of remedies available for successful complaints under the existing Commonwealth anti-discrimination regime through the courts. As suggested above in relation to the conciliation process, the Law Council also supports consideration of the effectiveness of both monetary compensation remedies and non-monetary remedies in the court process. The level of monetary compensation awarded in anti-discrimination matters by the courts is relatively modest compared to other areas of law where personal harm has been done.

354. The Law Council noted in its Policy Statement that the provision of effective remedies for unlawful discrimination is one of the international obligations Australia has assumed under the human rights Conventions to which it is a party, including the ICCPR, which provides that State Parties must provide an effective remedy for breaches of rights.

355. The Law Council also noted in its Policy Statement that costs tend to follow the event under the four key Commonwealth laws,[87] though this was not always the case.[88]

356. The Law Council is of the view that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter potential complainants from seeking relief under the legislation, which may undermine the primary object of the consolidated Act to prevent and prohibit discrimination.

357. The Law Council supported consideration of the approach to costs taken under the FWA as a suitable model for the consolidated Act. Under the FWA, a party may be ordered to pay the other party's costs in certain circumstances, such as where proceedings were instituted vexatiously or without reasonable cause.[89]

358. In its submission to the SDA review, the Law Council suggested that the provision in the AHRC Act dealing with the orders that the court can make in discrimination matters should be amended to include legislative guidance to the effect that common law principles relevant to termination of employment cases are to be applied in cases in which discrimination results in such termination.

[87] For example *Fetherston v Peninsula Health (No 2)* [2004] FCA 594
[88] For example *Ryan v Albutt t/as Albutt Exprss Holdings Pty Ltd (No.2)* [2005] FMCA 95
[89] *Fair Work Act 2009* (Cth) s570

359. Issues relating to remedies and costs are addressed in the Discussion Paper and the Law Council has received specific comments from some of its constituent bodies in relation to these matters raised in the Discussion Paper as set out below.

360. The LSSA and the LSWA support clarifying the power of the courts to order a respondent to perform any reasonable act or acts aimed to ensuring future compliance with the provisions of the proposed Consolidated Act, through corrective and prevention orders although the LSWA agrees with the view in the Discussion Paper that such a provision may not be strictly necessary.

361. The LSWA also supports the suggestion in the Discussion Paper that consideration be given to raising costs issues earlier by providing the President of the AHRC with the discretion to issue a certificate, upon the failure of conciliation stating that the action is vexatious and without merit, in order to inform the court early in proceedings that it may be appropriate to award costs in the matter.

Recommendations

362. The Law Council recommends that provisions in a consolidated Act:

(a) Relating to remedies awarded by courts be based on a review of the effectiveness of monetary and non-monetary remedies for discrimination matters;

(b) Relating to orders that can be made by courts in discrimination matters include legislative guidance that common law principles relevant to the termination of employment be applied where the discrimination involves such termination;

(c) Could be based on the approach to costs taken under the FWA where a party may be ordered to pay the other party's costs in certain circumstances, such as where proceedings were conducted vexatiously or without reasonable cause.

Options for reforming the roles and functions of the AHRC

Question 27.	**Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?**

The Law Council's Policy Statement

363. In its Policy Statement, the Law Council supported consideration of enhancement of current protections by:

(a) Expanding the AHRC's role and powers to include:

(i) Investigating incidents of discrimination on its own volition without needing to rely upon a formal individual complaint or a reference from Government.

(ii) Providing comprehensive and enforceable remedies in relation to all forms of discrimination prohibited under the consolidated Act; and

(iii) Reporting to the Attorney-General on any organisation that fails to implement the recommendations the AHRC made pursuant to an investigation of that organisation.

Other matters raised in the Discussion Paper

364. In addition to dealing with the above matters, the Discussion Paper also deals with a number of other options for changing the role and functions of the AHRC including:

(a) Extending the definition of 'human rights' in the AHRC Act to include those of the seven core human rights instruments to which Australia is a party and which are not currently included in the Act;

(b) Extending the formal inquiry powers of the AHRC to acts and practices of the States and Territories;

(c) Monitoring the elimination of discrimination and reporting to Parliament; and

(d) Reforming the *amicus curiae* role of specialist Commissioners.

365. The Law Council has received specific views from some of its constituent bodies in relation to the above issues. These views are set out below.

The Law Institute of Victoria

366. The LIV is of the view that the current situation whereby the AHRC cannot initiate investigations into unlawful discrimination without a complaint being made is a significant barrier to addressing systemic inequality in Australia. This has been recently recognized in the Government report entitled "*Realising the economic potential of senior Australians: turning grey into gold*."

Currently, federal anti-discrimination law allows an individual to make complaints to the Australian Human Rights Commission concerning discrimination. Depending on the nature of the complaint, conciliation may be an apology, job reinstatement, the provision of goods or services, changes in an organisation's policies or practices, or financial compensation.

Because the federal system is based on individual complaints, it may not always be effective in addressing systemic discrimination. The Victorian Government recently amended its law to allow the Victorian Equal Opportunity and Human Rights Commission to investigate serious and systemic discrimination in the absence of an individual complaint.

The federal government recently launched a paper seeking views on the current federal anti- discrimination law and its ability to affect discriminatory

behaviour across society. This review should examine mechanisms for addressing systemic discrimination.[90]

367. The LIV proposes that in order to enhance the role of the AHRC, a Federal Equality (Anti-discrimination) Ombudsman (the Equality Ombudsman) be established based on the Fair Work Ombudsman (FWO) model. This Equality Ombudsman would act as a body which can act quickly and decisively to investigate and take action against discrimination in a similar way to WorkSafe Victoria issuing certificates or compliance notices, or in a similar way to the FWO who has the power to conduct assessments into systemic issues within particular industries and the impact on individuals in the workplace.

368. The Commonwealth Government is currently seeking feedback on the establishment of the statutory office of the Fair Work Building Industry Inspectorate (the Inspectorate) to replace the Australian Building and Construction Commissioner. The Inspectorate is proposed to have as core functions;

- Promoting harmonious, productive and cooperative workplace relations in the building industry and compliance with designated laws codes by building industry participants.

- Assisting building industry participants to understand and comply with their rights and obligations under designated laws and codes by providing education, assistance and advice.

- Monitoring compliance with designated laws and codes by building industry participants.

- Inquiring into and investigating any suspected contraventions by a building industry participant of designated laws and codes. Inspectors would be able to exercise various powers to investigate compliance.

369. While the LIV recognises that the over-regulation of workplaces, organisations, service providers and public life is not desirable, it also recognises that discrimination in its various forms is a widespread and common occurrence across workplaces in Australia, is not limited to a particular industry (such as building), and has devastating impacts on individuals, employers, vulnerable groups and workplace culture.

370. Empowering a body to act quickly to address incidents of discrimination is as crucial as addressing occupational health and safety issues, issues specific to the building industry or other areas of workplace relations. Allowing a discrimination matter to extend out to several years due to lengthy conciliation and court processes is highly destructive for the individuals involved and has ongoing negative impacts on society stemming from increased rates of (amongst others) unemployment, depression, anxiety, mental illness and litigation in various forms.

[90] Advisory Panel on the Economic Potential of Senior Australians, *Realising the economic potential of senior Australians: turning grey into gold*, 12 December 2011.

371. A limited range of the powers mentioned above are given to the VEOHRC under the Victorian EO Act. The LIV suggests that such powers could be given to the Equality Ombudsman and could extend to the power to issue compliance notices and impose penalties for non-compliance.

372. The Equality Ombudsman would have jurisdiction to deal with non-employment related discrimination matters and employment related discrimination matters under a consolidated Act. The FWO would have jurisdiction to deal with matters under the FWA. The Equality Ombudsman would work closely with the FWO to refer complaints appropriately and address the interaction between complaints made under adverse action provisions and those made under a consolidated Act. This type of relationship is suggested in page 5 of the explanatory memorandum to the *Building and Construction Industry Improvement Amendments (Transition to Fair Work) Bill 2011* where the government acknowledges that "*While the functions of the FWO do not exclude the building industry, it is expected that the FWO and the Director [of the Inspectorate] will work co-operatively to ensure that the Director is solely responsible for building industry matters and will carry out the full range of …functions in relation to the building industry*."

373. The Equality Ombudsman role would be distinct to the AHRC's other roles in receiving and conciliating complaints. Fair Work Australia hears complaints and conciliates and/or mediates matters arising under the FWA relating to employment. The FWO investigates systemic issues and problematic industries regarding suspected contraventions of the FWA, and plays a crucial role in public education regarding the FWA and enforcement of the FWA. The FWO"s functions include extensive powers, such as issuing notices to produce and compliance notices, as well as a variety of strategies for dealing with compliance, such as entering into enforceable undertakings with parties or litigating cases in the public interest to address systemic discrimination and inequality and to advance matters on behalf of vulnerable employees who may not have the means to take a matter to court themselves.

374. The LIV also supports the AHRC having the power to conduct inquiries into systemic discrimination without requiring the consent of the Attorney-General.

The Law Society of South Australia

375. The LSSA supports suggestions in the Discussion Paper relating to:

    (a) The AHRC having the power to conduct formal inquiries into matters within a state or territory and under state or territory laws, which would enable it to inquire into broader and systemic matters as these often overlap between jurisdictions;

    (b) The AHRC having the power to monitor progress towards eliminating discrimination and achieving equality and to report to Parliament regularly; and

(c) Clarifying that specialist commissioners of the AHRC may appear as *amicus curiae* not only in the Federal Magistrates Court and the Federal Court but in appeals from those courts.

376. Furthermore, the Society supports providing the AHRC with the power to investigate issues of discrimination without an individual complaint having been made and to seek enforceable undertakings, such as applies with the Victorian legislation.

The Law Society of Western Australia

377. The LSWA also supports the suggestions in the Discussion Paper referred to by the LSSA above.

378. Further, the LSWA considers that the definition of 'human rights' in the AHRC Act should also include the rights and freedoms recognised in the UN General Assembly *Declaration on the Rights of Indigenous Peoples*.

379. The LSWA also supports the AHRC regularly (every 3 years) reporting to the Australian Parliament on Australia's progress and compliance with its obligations under international human rights treaties and conventions to which it is a party and those recommendations made by the UN Universal Periodic Review on Human Rights.

380. The LSWA suggests that the AHRC should have the power to investigate alleged unlawful discrimination except in relation to employment which is covered by the FWA.

Further consideration

381. The Law Council will consider the issues in relation to changing the role and functions of the AHRC further and hopes to be in apposition to provide further comments on the issues prior to or on the release of exposure draft legislation.

Interaction with Other Laws and Application to State and Territory Governments

Commonwealth laws

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

The Law Council's Policy Statement

382. In its Policy Statement, the law Council noted that industrial law and in particular the FWA is increasingly being utilised to deal with certain workplace disputes which

previously tended to be almost the exclusive province of anti-discrimination law[91] This demands that particular consideration be given to the interaction between anti-discrimination laws and certain discrimination-like provisions in the FWA[92], with a view to minimising duplication.[93]

383. The Law Council has received views form some of its constituent bodies on suggestions for improvements to existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the FWA. These views are set out below.

The Law Institute of Victoria

384. As noted in the Discussion Paper, there are two main areas of potential interaction between the FWA and Commonwealth anti-discrimination laws. These are:

    (a) The power of Fair Work Australia to vary discriminatory modern awards and enterprise agreements on referral from the Commission, and

    (b) The prohibitions of adverse action in employment based on a protected attribute and of termination based on a protected attribute.

385. As discussed above, there is substantial overlap between the discriminatory conduct in employment regulated by the FWA and the provisions relating to discrimination in work in the Commonwealth anti- discrimination laws. The LIV suggests that there be more consistency between the relevant provisions of the FWA and the provisions relating to discrimination in work in the Commonwealth anti- discrimination laws, which should create more consistency and certainty in the application and development of the law in this area.

386. As also noted in the Discussion Paper, Commonwealth anti-discrimination laws also extend well beyond traditional employment relationships to include persons working for a person under a contract with a third party, partnerships, and other relevant areas (including qualifying bodies).

387. The FWA does not allow claims for discrimination in employment to be brought in multiple jurisdictions. The choice of jurisdiction is left to complainants, but an action cannot be pursued in more than one jurisdiction where it relates to the same subject matter.

388. If the claims relate to different subject matter, however, they could be pursued in different jurisdictions. For example, a matter involving a complaint of sexual harassment which preceded the complainant's dismissal could involve a complainant lodging a claim of sexual harassment under the SDA (in particular, given the uncertainty as to whether sexual harassment might be included as a form of adverse action because of sex, for example, under the FWA) but the dismissal

[91] See, for example, section 351 of the *Fair Work Act 2009*.
[92] For example *Fair Work Act 2009* ss 351 and 772(f).
[93] For further discussion see Carol Andrades, Centre for Employment and Labour Relations Law, The University of Melbourne, *Working Paper No 47 Intersections between "General Protections" Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries* (December 2009).

might separately be dealt with as a claim of adverse action because of an exercise of a workplace right (that is, making the sexual harassment complaint) under the FWA due to its shifting onus in relation to the burden of proof, instead of as a complaint of victimisation under the SDA. These issues highlight the problems with having different legislative tests and regimes covering the same subject matter.

389. As set out above, the LIV is concerned about the inconsistencies between anti-discrimination laws in Australian jurisdictions, and further inconsistency with international human rights law. It is problematic that a rights holder may access particular remedies under anti- discrimination law at the international, Commonwealth, State and Territory levels but that access is inconsistent between jurisdictions.

390. The LIV recommends that the introduction of a consolidated Act, together with harmonising State and Commonwealth anti-discrimination legislation would address some of these inconsistencies. Further, to improve the interaction between anti-discrimination legislation and the FWA, a unified set of anti- discrimination laws would mean that the application of section 351 of the FWA would be uniform across the different States and Territories, which would be simpler and easier for stakeholders to understand their rights and / or comply with their obligations.

391. The operation of State and Commonwealth anti-discrimination legislation affects the operation of the adverse action provisions under the FWA, in particular as:

(a) Adverse action does not include action that is authorised by or under laws, which include relevant anti-discrimination legislation (see section 342(3) of the FWA); and

(b) The prohibition on adverse action under the FWA does not apply to action that is not unlawful under anti-discrimination law which is in force in the place where the action took place (see section 351 of the FWA set out below).

(1) *An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:

(i) *in good faith; and*

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

392. The LIV is of the view that the effect of the above provisions is that where action is authorised by or not unlawful under relevant anti-discrimination law, either by virtue of an exception or exemption applying, then that action is not unlawful under the adverse action provisions of the FWA. This means that action which is unlawful under section 351 of the FWA in a particular State or Territory may not be unlawful in a different State or Territory if there were a particular exception which applied to that action in that State or Territory (assuming that the relevant action occurred in more than one State or Territory).

393. The LIV considers that there are a number of difficulties and potentially unsatisfactory implications regarding the way in which section 351 operates as illustrated above. Given that, currently, there are different anti-discrimination laws operating in all Australian States and Territories, the prospects of having differing applications of section 351 is significant. This means that the application of the adverse action provisions of the FWA is confusing and difficult for people to understand their rights and /or comply with their obligations.

394. Furthermore, the LIV notes that under the relevant provisions of the FWA referred to above, 'discrimination' is just one of several forms of adverse action, which also includes circumstances where an employee is injured in his or her employment, the position of the employee is altered to his or her prejudice and where an employee is dismissed. While these other forms of 'adverse action' may be included within the concept of what is constituted by 'discrimination', the LIV suggests that a similar broad definition of 'adverse action' be adopted into a consolidated Act, which includes discrimination. This would contribute to a consistent understanding of discrimination and may be particularly timely in light of the review of the FWA in early 2012.

The Law Society of South Australia

395. The LSSA notes that there is substantial overlap between the provisions prohibiting discriminatory conduct in employment, which are regulated by the FWA, and the provisions prohibiting discrimination in employment in the Commonwealth anti-discrimination laws. The Commonwealth anti-discrimination legislation also extends beyond the employment relationship to other areas. The LSSA supports the promotion of harmony between the Commonwealth anti-discrimination legislation and the FWA.

The Law Society of New South Wales

396. The LSNSW's Employment Law Committee also notes that the Discussion Paper refers to two types of interaction between the FWA and Commonwealth anti-discrimination laws. The first is the power of Fair Work Australia to vary discriminatory modern awards and enterprise agreements on referral from AHRC

and the second is between the general protections in the FWA against discrimination in employment and the Commonwealth anti-discrimination laws.

397. The first interaction results in Fair Work Australia determining complaints about breaches of Commonwealth anti-discrimination laws in the terms of modern awards and enterprise agreements. The committee considers that this process works effectively.

398. The second interaction reveals overlap as the matters covered in the FWA and the anti-discrimination jurisdictions are not the same, nor are the remedies that are available. Importantly, there are legislative limitations in multiple claims alleging discrimination in relation to employment, pre-employment and termination of employment. The complainant is required to make a choice of jurisdiction.

399. In a case on appeal to the High Court, *Board of Bendigo Regional Institute of Technical & Further Education v Barclay*[94], the High Court will give consideration to questions of the reasons for an action (s 346 FWA protection) and how that is determined in a shifting burden of proof (s 361 FWA reason for action to be presumed unless proved otherwise). This case may have implications for the scope of the FWA provisions and also for a consolidated Act if it adopts similar provisions to the FWA such as the shifting burden of proof.

The Law Society of Western Australia

400. The LSWA also notes the two areas of interaction outlined in the Discussion Paper and considers that the current mechanisms for managing the interactions are appropriate. The LSWA also considers that remedies under the FWA and anti-discrimination laws should remain mutually exclusive, not cumulative.

Further Consideration

401. The Law Council will consider the issue of improvements to mechanisms for managing the interactions between Commonwealth anti-discrimination laws and the FWA further and hopes to be in a position to provide further comment on the issues prior to or on the release of exposure draft legislation.

State and Territory laws including anti-discrimination laws

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

The Law Council's Policy Statement

402. In its Policy Statement, the Law Council suggested that the process of consolidation should also be accompanied by renewed moves to harmonise anti-discrimination laws across Australia, a process already commenced by the then Standing Committee of Attorneys General (now the Standing Committee on Law and Justice).

[94] See note 30

403. The Discussion Paper notes that Commonwealth anti-discrimination laws currently include provisions to clarify that they are not intended to exclude or limit the operation of State or Territory anti-discrimination laws capable of operating concurrently with them. A similar provision is likely to be included in a consolidated Act.

404. The Discussion Paper also notes that the Commonwealth anti-discrimination laws also include provisions to ensure that where a person has made a complaint or initiated proceedings under a State or Territory anti-discrimination law, that person is not entitled to do so under a Commonwealth anti-discrimination law. There are corresponding provisions in State and Territory anti-discrimination laws and the FWA.

405. The Discussion Paper also observes that there have been a number of cases where State laws have been found to be inconsistent with Commonwealth anti-discrimination laws and that there are different provisions in the ADA, DDA, RDA and SDA for exceptions for acts done in compliance with State or Territory laws.

406. The Law Council has received specific views from some of its constituent bodies in relation to the interactions between Commonwealth and State and Territory laws. These views are set out below.

The Law Institute of Victoria

407. As discussed above, the LIV agrees that harmonisation of State and Territory anti-discrimination laws would assist in addressing inconsistencies in the interactions between Commonwealth, State and Territory laws.

The Law Society of South Australia

408. The LSSA also agrees that Commonwealth, state and territory anti-discrimination laws should be harmonised. Furthermore, there should be some mechanism early in proceedings for complainants to be able to switch from Commonwealth to State or Territory legislation or vice versa, for example at or immediately after the conciliation process, if it has become apparent that they have brought a complaint under legislation which is not optimum or appropriate in relation to the facts of their matter.

The Queensland Law Society

409. The QLS wishes to highlight that Queensland is the only State or Territory which considers 17 year olds to be adults in the criminal justice system. This is in contravention of the *Convention of the Rights of the Child*, an international treaty which Australia has ratified. The QLS and many other stakeholders have repeatedly called for the Queensland government to reform this law.

410. The QLS notes that the *Child Protection Act 1999* (Qld) deems 17 year olds to be children in child protection matters. This results in inconsistency between the

criminal justice and child protection systems which has been described as "discriminatory and illogical".[95]

411. The Anti-Discrimination Commission of Queensland released a report in 2006, "Women in Prison", which details the discriminatory effects of placing 17 year old female prisoners with older offenders.[96] The Anti-Discrimination Commission of Queensland recommended that the law be reformed so that all young people under 18 are considered children for criminal law purposes. Despite this recommendation from Queensland's anti-discrimination watchdog, there has been no change.

412. This situation highlights the need for further consideration of exceptions applying to acts done in direct compliance with State or Territory laws.

The Law Society of Western Australia

413. The LSWA considers that the current provisions for exceptions for acts done in compliance with State or Territory laws are appropriate.

Recommendation

414. The Law Council recommends that Commonwealth, State and Territory anti-discrimination laws should be harmonised.

Further Consideration

415. The Law Council will consider the issue of amendments to the provisions governing interactions with other Commonwealth, State and Territory laws further and hopes to be in a position to provide further comments prior to or at the release of exposure draft legislation.

The Crown in right of the States

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

The Law Council's submission to the SDA review

416. In its submission to the SDA review the Law Council recommended that the provisions in the SDA which exempt State and Territory Government instrumentalities from the prohibition against discrimination in the area of employment and in relation to harassment should be repealed.

417. The Discussion Paper notes that the ADA, DDA and RDA apply to the Crown in the right of the States and Territories without exception but that the SDA only applies to the Crown in the right of the State and Territories in some areas of public life and has limited application in relation to harassment.

[95] See Spooner, P: ' Let's be adult about being juvenile' at http://www.dci-au.org/html/juvenile.html
[96] See http://www.adcq.qld.gov.au/Project-WIP/WIPreport_contents.htm

418. The LSSA and the LSWA specifically agree that a consolidated Act should apply generally to State and Territory Governments and instrumentalities.

Recommendation

419. The Law Council recommends that a consolidated Act should apply to State and Territory Governments and instrumentalities.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President

- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.