HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Mr Greg Manning
Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department

Via email
antidiscrimination@ag.gov.au

Dear Mr Manning

Thank you for the opportunity to respond to the "Consolidation of Commonwealth Anti-Discrimination Laws" Discussion Paper. Please find attached my submission.

I support the move towards greater consistency between the discrimination laws of Australia's various jurisdictions. It would benefit both complainants and respondents for the law in this area to be streamlined, clear and consistent. However, it is important that the end result of consolidation is that discrimination law is strengthened, and that existing protections in State and Territory laws are not diminished. Discrimination law must also at least keep step with, if not be ahead of, community attitudes and the experiences of minorities to remain relevant and effective. This project represents a rare opportunity to examine best practice, both in Australia and internationally, and to enact laws accordingly.

As you know, I have already made some contribution to this consultation through my membership of the first Discrimination Law Experts' Group (but whose final submission was lodged in December 2011) and as a member of the Australian Council of Human Rights Agencies. I do not seek to duplicate the detailed recommendations submitted by those bodies, but draw on my experience in handling discrimination complaints and considering policy issues as ACT Human Rights and Discrimination Commissioner since 2004. I am also currently a member of the ACT Law Reform Advisory Council. Therefore, the submission concentrates on details of the ACT experience that may assist you in considering some aspects of our legislation.

Please contact me if you would like to discuss this submission in further detail.

Yours sincerely

Dr Helen Watchirs OAM
Human Rights and Discrimination Commissioner
February 2012

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?

In my view, the most effective definition of discrimination would include a unified test incorporating the elements of direct and indirect discrimination. These elements should not be mutually exclusive.[1]

The current distinction between direct and indirect discrimination is conceptually difficult for many people to understand. An appropriately drafted unified definition would make lodging, responding to and assessing discrimination complaints easier for all parties concerned. The benefit of this suggested reform is increased public understanding of the law and better conditions for improved compliance.

Accordingly, I endorse the recommendations to this effect in submissions made to this consultation by the Discrimination Law Experts Group,[2] Australian Council of Human Rights Agencies (ACHRA),[3] and the Australian Human Rights Commission (AHRC).[4]

When originally enacted, the ACT *Discrimination Act 1991* was progressive in the context of existing Australian discrimination law, both for its lack of comparator requirement and the broader range of grounds covered. Since 1991, laws in other jurisdictions have progressed significantly, but ACT law reform in this area has been patchy. Nonetheless, the Discrimination Act remains notable for its continued lack of comparator, which other jurisdictions are gradually implementing.

Identification of an appropriate comparator can be a complex, unreliable and unnecessary step in considering potentially discriminatory behaviour. In my experience, the absence of the comparator makes the discrimination complaint process more streamlined and effective. The complaints we receive are simpler to assess, and the reasons for our assessment may be more readily explained to the parties involved, because the lack of comparator avoids the need to identify the theoretical relevant group of people that the complainant is to be compared with in regards to how s/he has been treated.

On the basis of my experience in a jurisdiction that operates without a comparator test, I recommend that it be removed from Commonwealth discrimination law in favour of a simpler test based on detriment and causation. I note similar recommendations in submissions from the Discrimination Law Experts' Group,[5] ACHRA,[6] and the AHRC,[7] and I endorse those recommendations.

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[1] In *Edgley v Federal Capital Press of Australia* [2001] FCA 379, Beaumont ACJ took a 'mutually exclusive or distributive construction' of elements of direct and indirect discrimination in s.8 of the *Discrimination Act 1991*.

[2] Discrimination Law Experts' Group submission, (13 December 2011), p8.

[3] ACHRA submission (1 February 2012), recommendation 2, p17.

[4] AHRC submission (6 December 2011), recommendation 7, p10.

[5] Discrimination Law Experts' Group, p11.

[6] ACHRA, recommendation 3, p16

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

In the ACT, the Discrimination Act currently requires that complainants to show that respondents treated them unfavourably because they possess an attribute that is protected under that Act.[8] In my experience, proving direct discrimination can be difficult for complainants, who are far less likely to have access to evidence that supports a causative link, or the resources to explicitly discover or argue its existence. These complainants bear an unreasonable burden in establishing the reasons for the unfavourable treatment they have experienced.

I support a harmonisation of the discrimination law with the *Fair Work Act 2009* (Cth), and the adoption of a rebuttable presumption in discrimination law of a burden on the respondent, as recommended by the Discrimination Law Experts' Group, ACHRA and the Human Rights Law Centre.[9]

I note that the Discrimination Law Experts' Group report recommends that, in an instance where there are multiple reasons for an action, the presumption may be rebutted when a respondent proves *'a non-discriminatory motive unrelated to an attribute that is sufficient by itself to justify the action or decision... unless the credibility of the evidence is challenged'*.[10] In my view, it is important to preserve the principle that any unlawfully discriminatory basis for an action can result in liability. The ACT Discrimination Act provides that, where there are two or more reasons for doing an act, it is sufficient for a successful complaint that one of the reasons (even if it is not the dominant reason) is based on unlawful discrimination.[11] It may be that, even if a respondent can demonstrate an unrelated and non-discriminatory motive for an act, another reason for the act may be based on unlawful discrimination. The introduction of a rebuttable presumption approach must still allow the complainant to submit that this is the case.

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 ACT Discrimination Act contains a single 'special measures' provision covering all protected attributes.[12] I have found this provision can be applied across all attributes in a simple and effective manner and accordingly I would recommend that such a provision be included in a consolidated Commonwealth Act.

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[7] AHRC, recommendation 8, p11.

[8] *Discrimination Act 1991* (ACT), s8.

[9] HRLC submission (January 2012), recommendation 6, page 12.

[10] Discrimination Law Experts' Group, p13.

[11] *Discrimination Act 1991* (ACT),s.4A(2).

[12] *Discrimination Act 1991* (ACT),s.27.

The 'special measures' provision in the ACT is placed as one of the general exceptions to the Act,[13] contained in Part 4, and states that it is not unlawful to do an act that meets the requirements of the section. I note that the Discrimination Law Experts' Group submission underlined the importance of a special measures provision clearly stating that special measures do not constitute discrimination, as opposed to being an excepted form of discrimination.[14] I agree with this approach.

I also support the Discrimination Law Experts' Group recommendation about establishing a process for the temporary advance authorisation of special measures. In the ACT, we do not have a process for providing such authorisation. Currently, almost all of the parties who contact the Commission regarding the need for an exemption under s.109 of the Discrimination Act are in fact seeking to engage in activities that constitute special measures, and they are advised that seeking an exemption is not an appropriate course of action. However, there is no mechanism in the Act that may be used to provide certainty for these parties seeking to operate under the special measures provision. This would be a useful development, although adequate resourcing would be required to ensure such a function could be discharged appropriately. I envisage that many more potential respondents would apply for such an authorisation. In addition, it must be clear that it is not necessary to have obtained advance authorisation for a course of action to qualify as a special measures.

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

I endorse the recommendations made by the Discrimination Law Experts' Group,[15] ACHRA,[16] and the AHRC,[17] that for consistency and clarity, an express provision for reasonable adjustments should be included and that it should apply to all protected attributes.

The ACT Discrimination Act currently does not explicitly include an obligation to make reasonable adjustment for any protected attribute. It has been accepted by ACT Courts and Tribunals that unlawful discrimination will occur where a person does not make 'reasonable adjustment' for a person with a disability in public life. The duty has been inferred from other provisions of the Act.[18]

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[13] Section 27.

[14] Discrimination Law Experts' Group, p14.

[15] Discrimination Law Experts' Group, p11.

[16] ACHRA, recommendation 13, p30.

[17] AHRC, recommendation 16, p19.

[18] The ACT Discrimination Tribunal noted in *Lewin v ACT Health & Community Care Service* [2002] ACTDT 2 (5 February 2002), "Subsection 4[A](2), however, extends the operation of the Act to a refusal or failure to do an act. The Act can impose an obligation upon a service provider to provide services in a special manner to avoid the commission of unlawful conduct…. The Act imposed, in my opinion, an obligation on the respondent to take steps to ensure that the detrimental effect which the complainant's attribute had upon her capacity to have access to those services, was avoided".

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

In my experience a system attempting to prevent and respond to discriminatory behaviour is weakened by relying on individuals to initiate and substantiate complaints about particular sets of circumstances over a significant period of time. In many situations where there is often an inherent power imbalance, exacerbated by unequal access to legal, financial and other resources.

The ACT discrimination complaints process, with its emphasis on early conciliation and resolution where possible, can work well and achieve positive outcomes. However, in some cases it can be too great a burden on the individual involved, particularly where resolution cannot be achieved through conciliation due to a lack of good faith on the part of respondents. In the event that conciliation is not successful, it is difficult for individuals to pursue cases in the ACT Civil and Administrative Tribunal without legal representation, and Community Legal Centres and other providers of free legal assistance are often unable to meet the demand for assistance in this area.

In this context, the next step we can take to more effectively address discrimination is to impose a 'positive duty' on organisations to ensure that discrimination, particularly hidden or systemic discrimination, does not occur. A positive duty would shift the responsibility to implement discrimination law to duty-bearers, thereby reducing the burden on specific individuals to complain. A significant advantage of this approach is that it would more actively encourage consistent non-discriminatory behaviour by potential respondents.

In 2008, the ACT Human Rights Commission released the research paper '*Mainstreaming Equality in the ACT',*[19] which advocated adding a statutory positive duty to prevent discrimination and promote equality as a more effective mechanism to achieve systemic change. It highlighted the various jurisdictions that have already adopted such positive duties to eliminate discrimination. Notably, the United Kingdom has introduced positive duties on public bodies to actively promote equality and eliminate discrimination in the areas of race, disability and gender. The UK *Equality Act 2010* includes detailed legislative guidance on how to ensure that the duty is met, for example, through auditing practices which identify specific barriers.

In a 2003 survey, the International Labour Organisation observed a common global trend in anti-discrimination laws of shifting from a general prohibition on employment discrimination to a positive duty to prevent discrimination and promote equality. The following quote relates only to the area of employment, for example the gender pay gap:

> *A growing number of countries have moved away from a legal approach exclusively based on the imposition of the negative duty not to discriminate to a broader one encompassing a positive duty to prevent discrimination and promote equality. While an anti-discrimination legal model based on prohibiting discriminatory practices has proven successful in eliminating the most blatant forms of discrimination, such as*

[19]Prepared by Gabrielle Szabo, available at http://www.hrc.act.gov.au/res/mainstreaming%20equality.pdf

> *direct pay discrimination, it has encountered less success with the more subtle forms, such as occupational segregation. Moreover, its effectiveness in eliminating discrimination is heavily dependent on litigation and this prevents it from reaching those workers who are the most disadvantaged and vulnerable to discrimination. These workers tend not to make use of the law to have redress because of ignorance or fear of retaliation.*[20]

At a minimum, I advocate that a specific positive duty be applied to all public sector bodies as soon as possible, and then be progressively apply to all private and non-profit organisations.

I support the reasoning for, and formulation of, a positive duty to eliminate discrimination, sexual harassment, victimisation, and other forms of prohibited conduct as far as possible, that is outlined in the ACHRA submission.[21]

In order to be effective, the AHRC should be empowered to investigate compliance and systemic discrimination issues. The ACT Human Rights Commission has similar powers under s.48 of the *Human Rights Commission Act 2005* (ACT), but as is discussed further below, these require significant resources to be exercised effectively, and such resources have not been forthcoming to date.

I note that already in the ACT, all public sector and some community sector organisations have 'public authority' obligations under s.40B the *Human Rights Act 2004* (ACT) to give consideration to human rights when making decisions, and act in compliance with human rights. This includes the explicit right to equality under s.8 of that Act. However, that right does not have obligations set out. A detailed and specific equality duty under Commonwealth anti-discrimination law would constitute a clearer expression of a positive duty not to discriminate.

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

As noted in the Discussion Paper, case law indicates that harassment based on a protected attribute will be unlawful. For the sake of clarity, I recommend that the proposed consolidated Commonwealth Act should explicitly extend the prohibition on harassment to include all protected attributes in all specified areas of public life where unlawful discrimination is prohibited.

Related to this issue is the current Commonwealth protection for vilification. Under Commonwealth laws, only the RDA prohibits vilification. In contrast, under the ACT Discrimination Act, vilification is unlawful on the grounds of race, sexuality, gender identity and HIV/AIDS status. Enquiries to our office suggest vilification is occurring in the community in relation to other attributes, particularly disability and religion, but there is

[20] International Labour Organisation, *Time for Equality at Work, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, Geneva, 2003, at ¶182.

[21] ACHRA, recommendations 14 and 15, page 34.

insufficient protection for victims under either ACT or Commonwealth law. My experience also indicates that the existing construction of the Commonwealth race hatred law is preferable to the current ACT vilification law, which is narrower in scope.

In 2006 as a result of a requirement under the ACT Government's *Facing up to Racism Strategy 2004-08*, the former ACT Human Rights Office published an 'Issues Paper on Racial and Religious Vilification in the ACT'.[22] This paper criticised the existing vilification law, including the difficulties of proving incitement, and it recommended adopting the 'racially offensive behaviour' provisions in the *Racial Hatred Act 1995* (Cth). This would include removing the requirement to 'incite', and instead only require that the alleged act was likely to offend, insult, humiliate or intimidate another person, or group of people.

In the case of *Emlyn-Jones and Federal Capital Press [Intervener: Human Rights Commissioner]*,[23] the former ACT Discrimination Tribunal considered whether the conduct complained about, which occurred on the Canberra Times 'blog' website, constituted vilification on the basis of sexuality. The decision ultimately turned on the defence of public interest in respect of the alleged vilification. However, the Tribunal did question whether under ACT law the person bringing the action needed to be personally vilified to have standing. In my view, the appropriate test for vilification should only require that the person was a member of the group, not individually vilified.

A consolidated Commonwealth Act is an opportunity to achieve national consistency, avoiding the complexity and inconsistency of the current patchwork approach to vilification. A single definition of vilification with respect to all attributes will avoid the difficulties of meeting different 'harm thresholds' for a complaint, and a clearly expressed defence will enable respondents to understand and comply with their obligations. Accordingly, I recommend that a consolidated Commonwealth Act prohibit vilification on the basis of any of the attributes protected by that Act.

I also note that the Commonwealth laws currently include no criminal sanctions for vilification. In contrast, the ACT Discrimination Act includes an offence of serious vilification, involving acts or threats of violence.[24] This is a useful provision, not least because it brings vilification law to the attention of the police. However, none of the cases I have referred to ACT Policing have been successfully investigated and prosecuted. I note Australia's reservation to Article 4(a) of CERD stated that legislation specifically implementing the terms of article 4 (a) would be introduced 'at the first suitable moment'. A consolidated Act is an opportunity to meet that commitment and there is an educative value in the community being able to access both sets of provisions in the one Act. The Commonwealth Criminal Code might also be a suitable location for such an offence. I note that the WA *Criminal Code 1913* criminalises racist harassment and incitement to racial hatred.

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[22] Available at http://www.hrc.act.gov.au/res/Review%20of%20racial%20vilification%20final.pdf

[23] [2009] ACTDT 2 (31 July 2009)

[24] *Discrimination Act 1991*(ACT), s.67

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

The ACT Discrimination Act prohibits discrimination with respect to sex, sexuality and gender identity under s.7(1)(a)-(c). The Act does not define 'sex', although the Dictionary to the Act includes definitions of the terms 'man' and 'woman'. It says that 'sexuality' means 'heterosexuality, homosexuality (including lesbianism) or bisexuality'. The Act defines the relative new attribute 'gender identity' as 'identification on a genuine basis by a person of one sex as a member of the other sex' and 'identification on a genuine basis by a person of an indeterminate sex as a member of a particular sex'.[25]

As stated above, I am a member of the ACT Law Reform Advisory Council (LRAC). In 2011, LRAC conducted an Inquiry into the Legal Recognition of Transgender and Intersex people in the ACT with particular regard to the potential implications for legal recognition of transgender and intersex people for public functions or documentation under Territory and Commonwealth law, and their recognition interstate. This review considered my previous advice (dated 16 March 2010) under the ACT Human Rights Act that recognition of gender diversity in the ACT *Births, Deaths and Marriages Registration Act 1997* was inequitable, undermines dignity, and imposes unjustifiable limitations on the human rights protected under the Human Rights Act.

LRAC received submissions from people in the ACT community who do not see themselves as fitting into the categories of 'transsexual', 'transgender' or 'intersex'. There are also people in the community who do not identify as heterosexual, homosexual or bisexual. Gender, gender identity and sexuality as descriptors have become more complex and, reliance on a binary notion of gender is, from the affected community's perspective, outdated and unhelpful.

Based on the matters considered by LRAC, I recommend that a Consolidated Commonwealth Act take the approach of protecting against discrimination on the grounds of both identity and presentation. That is, it would be unlawful to discriminate against someone because:

1) they identify as intersex, as a sex other than their registered sex, as having no identified sex, or because the record of their sex has been altered; or
2) their physical presentation (including manner of speech and dress) is not consistent with their recorded birth sex, or with the conventional physical presentation of a person of a particular sex.

I suggest further consultation with the relevant communities on the most appropriate language to be used in drafting this provision.

[25] This term replaced the previous 'transsexuality' in 2010.

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

The ACT Discrimination Act covers discrimination against a person based on association with a person identified by reference to any attribute protected by the Act. The mechanism for this is that 'association' is simply included in the list of protected attributes outlined in section 7 of the Act. This is a clear and consistent approach that has worked well in the ACT and I recommend that it be replicated at the Commonwealth level.

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

I support the approach, similar to that taken in the ACT Discrimination Act, of including a prohibition against discrimination on the ground of a 'protected attribute'. The 'protected attributes' would then be defined in a separate exhaustive list, to which additions can be made from time to time. I support ACHRA's recommendation that regular, periodic review of attributes should be undertaken to ensure that emerging forms of discrimination are appropriately addressed.[26]

For the sake of consistency, and to ensure that the new legislation attempts to cover all groups who have been identified as being at risk of discrimination, a consolidated Commonwealth Act should include all of the attributes currently protected in Commonwealth and State and Territory anti-discrimination laws (as far as is possible under the Constitution), and in the Fair Work Act. The broad range of grounds protected from adverse action (including discrimination) in s.351 of the Fair Work Act derive from Australia's international treaty obligations, and it makes sense to operate in the same scope in the discrimination legislative regime.

The term 'protected attribute' should be defined to include a past, future or presumed attribute,[27] and characteristics of an attribute.[28]

As the Discussion Paper notes, extending the number of attributes protected at the Commonwealth level to at least match that provided in the States and Territory would not likely place a large burden on the private sector, which must already in some manner address these obligations. Having all attributes located in a single Commonwealth Act would assist duty-holders to comply with their existing obligations because the actual breadth of their obligations would be explicit.

In addition, I agree with the proposals made variously by ACHRA, the AHRC, the Discrimination Law Experts' Group for the consideration of the following attributes in these or similar terms: 'social origin or status', 'homelessness',[29] and 'cognitive diversity'. I also

[26] ACHRA, recommendation 17, page 34

[27] Based on s.4 of the DDA

[28] s.5(1)(b) and (c) of the SDA

[29] I have had anecdotal reports from a local community legal service, Street Law, of unfair treatment experienced by people who are homeless in the ACT, but without the relevant protected attribute in our legislation we are unable to take complaints.

propose that consideration be given to the New Zealand scheme in the *Human Rights Act 1993* covering recipients of welfare and other social or compensation. I also support the suggestion that the impact of domestic violence be captured as a protected attribute. I agree with the wording proposed by the Equality Rights Alliance, 'survivor of domestic or family violence'.[30]

Inclusion of these protected attributes would ensure service providers and other agencies have clear guidance on their duty not to discriminate.

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

A consolidated Act provides the opportunity to make the concept of intersectional discrimination more prominent. This could be achieved by adding a provision that specifies that discrimination on the ground of one or more protected attributes, or a combination of protected attributes, is unlawful. Use of a more simple term such as 'combination' would assist in recognition of the special nature of intersectional discrimination matters.

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

I support extending the right to equality to all attributes protected in a consolidated Commonwealth law. The possible effect on special legal regimes for people with disabilities, such as guardianship and mental health legislation, should be managed with appropriate legislative safeguards that take into account the human rights of the individuals involved.

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

I support a provision that would enable a consolidated Act to apply broadly to all areas of public life. In the ACT, the Discrimination Act specifies the areas of public life that fall within the scope of the Act and defines the scope within which unfavourable treatment is unlawful. In my view, this approach has some limitations, and it is preferable to frame the legislation in such a way that ensures that any area of public life is covered. I support the approach outlined in ACHRA's submission,[31] where a broad prohibition of discrimination in all areas of public life is accompanied by a non-exhaustive list of areas, providing guidance on which areas fall within the public arena. A good example of an area that has been problematic in some jurisdictions is places of detention or correctional facilities.

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

The ACT Discrimination Act currently covers unpaid workers in the prohibition on sexual harassment and unlawful discrimination in employment. The Dictionary to the Act defines

[30] Equality Rights Alliance submission (19 December 2011), recommendation 9, page 13.

[31] ACHRA, recommendation 24, page 43.

'employment' to include *'work as an unpaid worker'.* An *'unpaid worker'* is defined as a person who performs work for an employer with no remuneration.

I believe it is important to ensure all participants in the workplace are protected and I support ACHRA's recommendation that a consolidated Act protect both volunteers and unpaid workers from discrimination, sexual harassment and other forms of prohibited conduct.[32]

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

The ACT Discrimination Act currently provides an exception for domestic workers,[33] whereby it is not unlawful for an employer or principal contractor to discriminate against someone if their duties involve doing domestic duties on the premises where the employer or principal contractor live. This exception applies to all attributes, but only in relation to the application process in relation to employees, and for contract workers, in not allowing the contract worker to work or continue to work.

It is unclear why the ACT Act protects employees and contract workers differently, and this in an issue I will be seeking to have addressed through the 2012 LRAC Review of the ACT Discrimination Act. If a consolidated Commonwealth Act were to introduce a general limitations clause, then this may not be an issue. If a stand alone exception is to be considered for this category, I suggest that any consolidated Commonwealth Act treat exceptions of this kind in a narrow way, with a clearly articulated principle. I note the Discussion Paper refers to situations where the spouse of the person is also employed by the same employer.

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

The concepts of voluntary bodies and clubs are treated separately in the ACT Discrimination Act. Clubs are distinguished from other groups by a requirement that they must hold a liquor licence in order to be classified as a club. It is unlawful under s.22 for a club to discriminate against a person by failing to accept their application for membership or in the terms or conditions on which they admit that person. Similarly, a club must not discriminate in the terms or conditions of membership; fail to accept a member for a particular class of membership; deny member access to benefits; deprive them of terms of membership; or subject them to any other detriment.

In contrast, the term voluntary body is used for the purposes of exceptions. A voluntary body is defined as an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit. However, it does not include a club; or a body established by a law of the Territory, the Commonwealth, a State or another Territory; or an association that provides grants, loans, credit or finance

[32] ACHRA, recommendation 26, page 45.

[33] *Discrimination Act 1991* (ACT), s24.

to its members. Voluntary bodies have exceptions in the provision of accommodation, admission of members and the provision of benefits, facilities or services to members. However discrimination in employment by voluntary bodies is unlawful and not excluded.

This dichotomy may be useful, as it recognises the degree to which the entity in question is operating in 'public life'.

Exceptions for each of these entities are likely to flow from their definition. However, in my experience of the ACT jurisdiction, care must be taken in the extent of these exceptions. For example, in the ACT many community organisations, because they come under the definition of voluntary bodies, can lawfully discriminate against people on all of the grounds set out currently in the Act in regards to admission of people as members of the body, and in the provision of benefits, facilities or services.[34] Any definition of an entity for the purposes of a new Commonwealth Act should take into account what exceptions will flow from such a definition. The number of members may be one (but not conclusive) factor considered in the extent of protection covered and the exceptions granted, in order to reduce regulatory burdens for small organisations.

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

I recommend that a Commonwealth consolidated Act provide protection against discrimination in all partnerships. Under s.14 of the ACT Discrimination Act, it is unlawful for partnerships to discriminate against a person in deciding who should be invited to be a partner, or in the terms of such an invitation. Similarly, it is unlawful for partners to discriminate against another partner in denying access to a benefit, expelling them or subjecting them to any other detriment. Sexual harassment in partnerships is also unlawful. There is no distinction made for the size of the partnership.

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

In relation to sporting clubs, sport as an activity is covered under the term 'goods services or facilities' in the ACT Discrimination Act. I note that sport is covered as a separate area of public life for the sake of simplicity in other jurisdictions, such as Victoria, and I would suggest that the consolidated Commonwealth Act take this approach. I will also be recommending this in the ACT LRAC Review.

The ACT Discrimination Act currently provides exceptions for sex where in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. An exception is provided for people with a disability where the person has a disability and the activity requires physical or intellectual attributes that the person does not possess; or in cases where the sporting activity is for those with a specific disability. These exceptions do

[34] See for example *Jones and the Scout Association of Australia, Australian Capital Territory Branch Incorporated & Ors* [2007] ACTDT 1

not apply in relation to coaching, administration or umpiring. I see merit in these exceptions.

I note the gender identity exception in Victoria. In the ACT, the Law Reform Advisory Council is considering recommended reforms to the ACT Discrimination Act to protect against discrimination on the grounds of both identity and presentation. In my view it should be unlawful to discriminate against someone because:

1) they identify as intersex, as a sex other than their registered sex, as having no sex, or because the record of their sex has been altered; or
2) their physical presentation (including manner of speech and dress) is not consistent with their recorded birth sex or with the conventional physical presentation of a person of a particular sex.

Practical considerations about how this exception would apply require community consultation, for example, it is unclear what impact an exception for gender identity would have on those who choose not to be one of the binary genders. Such persons could be excluded lawfully (and unfairly) from competitive sport. It may be that sporting associations or clubs are required to go through a reasonable process, in consultation with the person, for determining in which gender competition they will compete. There would be less difficulty with unisex sports.

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

Section 23 of the ACT Discrimination Act takes a similar approach to that used in Victoria and Queensland. It is unlawful for a person to discriminate against another by requesting or requiring information in connection with, or for the purpose of performing, an act that is unlawful.

This provision is not subject to any specific exceptions, however the general exceptions applicable to Part 3 of the Act would apply, including in relation to decisions made under the ACT *Adoption Act 1993,* special measures intended to achieve equality, insurance decisions based on actuarial data, superannuation, and acts done in compliance with statute. In recent times, exemptions under the ACT Discrimination Act have also been granted to defence companies Raytheon and BAE to make discriminatory requests.

I support the approach of a general provision making discriminatory questions unlawful, subject to a range of limited exceptions, such as those explored in the Discussion Paper including in order to make reasonable adjustments.

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

Section 121A of the ACT Discrimination Act allows liability to flow to the person (on whose behalf the act has been undertaken by their representative) only if it 'was within the scope of the person's actual or apparent authority'. This is an area where I would like to see the

ACT Discrimination Act take a clearer position and more consistent with the existing Commonwealth laws.

I support the proposal in the Discussion Paper to adopt a common test in the Commonwealth consolidation Act requiring employers and corporations to take 'all reasonable steps' to discourage their employees and agents from engaging in unlawful conduct to discharge their vicarious liability.

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

I note the confusing reference in the current Commonwealth Acts to the terms 'exception' and 'exemption', often when the same concept is being intended. The approach in the ACT Discrimination Act is to use the term 'exception' for defences to individual allegations of unlawful conduct, and 'exemption' for time-based or temporary permissive authorisation for otherwise unlawful conduct by an organisation. I recommend a similar legislative drafting approach to terminology at the Commonwealth level.

The current approach to exceptions in anti-discrimination laws across the country is inconsistent and confusing. The differences in approach and terminology across Australia in this area are counterproductive and, in my view, could benefit from a more simplified and streamlined approach.

More importantly, I am not confident that the exceptions which currently exist are appropriate. I am also concerned that any mechanisms that allow a departure from the prohibition on unlawful discrimination are both carefully limited and thoroughly justified. For example, the ACT Discrimination Act contains a range of exceptions that are often dependent on a particular protected attribute. Some, like the statutory authority defence in s.30, were intended to be short-term, but are still in existence after twenty years.

Accordingly, I agree with ACHRA's recommendation that favourable consideration be given to the introduction of a general limitations clause.[35] As noted in ACHRA's submission, a correctly (and narrowly) drafted provision, supported by sufficient guidance materials, is essential to the success of this approach.

Aside from the issue of the introduction of a general limitations clause, it is essential that any remaining stand alone exceptions are reviewed regularly and rigorously to determine whether they should be retained, amended or repealed.

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

I believe this would be dealt with by the above new general limitations clause.

[35] ACHRA, recommendations 27 and 28, p46.

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

These exceptions may well be encompassed in the application of the general limitations model proposed in the answer to question 20. In situations where a general limitations clause is insufficient to allow otherwise unlawful conduct, there is a fundamental question whether such special exceptions should exist.

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?

I endorse the recommended process outlined by the Discrimination Law Experts' Group for the consideration of temporary exemption applications by the AHRC.[36] An important concept is that any temporary exemption granted should include conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation.

Currently, under s.109 of the ACT *Discrimination Act*, I have the power to grant exemptions and obligations to publicises them as Notifiable Instruments. My decision about whether or not to grant an exemption may be appealed to the ACT Civil and Administrative Tribunal. I would welcome greater guidance in the Act about how I exercise this discretion, including in relation in relation to the desired extent for consultation with stakeholders or the community, which of course would have an impact on resources.

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?

Preventing and addressing discrimination and harassment is a significant task, and employers and service providers are often advised that it is important to utilise a range of different measures to do so. The same is true for the mechanisms that should be employed to provide certainty and guidance to duty holders to assist them to comply with anti-discrimination obligations. In my view, the four mechanism outlined in the Discussion Paper all have merit.

I note that codes of practice are often used in the Occupational Health and Safety jurisdiction in Australia, and are often part of a 'pyramid of enforcement' developed by regulatory experts Professor John Braithwaite and Professor Ian Ayres[37]. This pyramid reflects the cascading regulatory obligations.

> *'...the legal status of the documents within the pyramid increases as we move higher up. At the level of the Act, they are more likely to be written in terms of general overarching duties. As we move through the pyramid, the regulations and the Code,*

[36] Discrimination Law Experts' Group, p18.

[37] I. Ayres and J. Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, (Oxford University Press, 1992).

provide further detail to supplement parts of the Act. The guidance material, which is designed to explain certain parts of the Act and regulations, is not legally binding.'[38]

A similar pyramid of enforcement could work well in regulating discrimination, utilising both the co-regulation model discussed in the Discussion Paper, and extending the existing scheme for disability standards to other protected attributes. However, any change in legislation must be accompanied by increased resources and clear lines of responsibilities about which agency will develop relevant legislative instruments and guidance material.

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

In my experience, the ACT's free and impartial complaint handling facility for resolving discrimination complaints, primarily focussed on conciliation, provides an accessible, affordable and timely complaint resolution service for the parties. I therefore support the emphasis on an AHRC complaints-based process as the main avenue for resolution of discrimination complaints.

However, conciliation is usually unsuitable for parties where there is a significant imbalance in power and/or resources. In some cases, a preferred option for parties to a complaint may be to have the matter determined by a Court or Tribunal early in the process. Accordingly, I support the inclusion of an option for complainants to bypass the Commission complaint process, and have direct access to a court, such as in the Victorian *Equal Opportunity Act 2010*.

The ACT *Human Rights Commission Act 2005* provides for agreements reached through conciliation of discrimination complaints at the ACT Human Rights Commission to be registered at the ACT Civil and Administrative Tribunal.[39] These agreements are then enforceable as if they were orders of that Tribunal, which substantially assists with compliance in individual cases. I find that this provides a free and more accessible enforcement option for parties and gives conciliated outcomes the force of a Tribunal ruling, without the expense and time of a formal hearing process. Accordingly, I recommend that the consolidated Commonwealth Act make provision for the registration of conciliated agreements in a court of Commonwealth jurisdiction if this is constitutionally valid.

However, one practical issue I have found as Commissioner is how to deal with breaches of ACAT conciliated agreements. At times, a party to an agreement may report a breach and on other occasions, my office may become aware of a breach prior to the complainant becoming aware. In such situations, the course of action taken is generally to refer the parties to the Tribunal to seek enforcement of the agreement.

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[38] Comcare, A Practical Guide to the OHS Regulatory Framework, http://www.comcare.gov.au/safety_and_prevention/managing_OHS/ohs_regulatory_framework/a_practical_guide_to_the_ohs_regulatory_framework

[39] *Human Rights Commission Act 2005*, s62(4).

If agreements were to be registered at the Commonwealth level, I see merit in specifying a role for the AHRC to assist in encouraging compliance with registered agreements. For example, there could be a power to issue compliance notices, with civil penalties and the possibility of damages for breach of a notice, this would allow for an active approach to ensuring compliance. This would harmonise discrimination law with existing regulatory regimes, such as occupational health and safety and Fair Work Australia.

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

I endorse the Discrimination Law Expert Group's comments about the barriers to complainants posed by unequal access to financial and legal resources, the significant risk of being ordered to pay respondent costs and an inability to pay their own legal costs. Accordingly I support their recommendation that a consolidated Act make provision for free, expert legal representation for complainants wishing to take matters to the Federal Court.[40]

I note that, at a Stakeholder Forum organised by the Attorney-General's Department in Canberra in November 2011, several community participants voiced their preference to utilise the ACT rather than the Commonwealth discrimination scheme because of the costs issues involved in bring matters before the Federal courts should resolution of the complaint through the AHRC not be achieved. The ACT Civil and Administrative Tribunal is intended to operate informally, with applicants regularly representing themselves, and costs generally not being awarded.[41]

In any comparison with legal claims that give rise to compensation for wrongful conduct, anti-discrimination complainants have been very poorly compensated. This is particularly so in the ACT, where the only successful sexual harassment claim through the former Discrimination Tribunal took 13 years to complete, and awarded only $1000 damages for a serious case of physical sexual harassment, with credible and contemporaneous workplace witnesses.[42]

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?

Under the ACT *Human Rights Commission Act 2005,* I have the power to begin own-motion complaints. This is a useful power, particularly where I become aware of a serious breach of the Act through a complainant who wishes to remain anonymous or who cannot proceed with a formal complaint; or where there may be a number of concerns raised in the

[40] Discrimination Law Experts' Group, p27.

[41] Section 48 of the *AC Civil and Administrative Tribunal Act 2008* states that 'the parties to an application must bear their own costs unless this Act otherwise provides or the tribunal otherwise orders.' Generally these orders are only made under s.49 for filling fees, or where an order has been contravened or where there has been unreasonable delay or obstruction.

[42] *Paterson v Clarke* [ACTDT] 3, (3 August 2009)

community about a particular industry. Section 48 allows the ACT Commission to consider, on its own initiative, an act or service that appears to reveal a systemic problem or that is in the public interest to consider. In such cases the Commission effectively becomes the complainant, but has to conduct the consideration of the complaint in the same way that it would if an individual had lodged the complaint.

However, in the ACT there is currently no recourse to ACAT for own initiative considerations. Instead, the ACT Human Rights Commission is able to issue recommendations as a compliance measure in this process, and ultimately name and shame entities who offer no response to such recommendations as non-complying entities. This power has not to date been used by the Commission.

In reality, due to resource issues, I am rarely able to undertake any action under the own initiative power. Also, if this naming and shaming power was properly resourced, it would be a very useful tool in addressing systemic discrimination.[43]

Accordingly, I recommend that consolidated Commonwealth legislation should enable Commission-initiated complaints. The AHRC should be able to identify and investigate areas of concern, and to 'name and shame' those who breach anti-discrimination laws in appropriate cases, for example serious or serial non-complaint respondents. The powers should of course be supported by appropriate resourcing.

A consolidated Act should also give courts explicit power to give consideration to issues related to, but beyond the immediate resolution of the matter between the parties. This could include a power to publish recommendations for a systemic response (for example changes to the practices or policies of an organisation, sector, industry or government, as is the case in coronial proceedings). To support this power, the AHRC should be given the power and resources to monitor and report on compliance with such recommendations.

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?

I do not have direct experience of the interaction between AHRC and FWA on these issues and so do not offer any comments on this issue.

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

I welcome the clarification in the Discussion Paper that the consolidated Commonwealth Act will not seek to cover the field and that the existing State and Territory discrimination regimes will remain in place. I believe given the clear gaps in coverage at the Commonwealth level, particularly in relation to the number of protected attributes, make

[43] The Serbian Commissioner for the Protection of Equality has a 'naming and shaming' power, which has been exercised seven times to date, under art.40 of the *Law on the Prohibition of Discrimination* (http://minoritycentre.org/sites/default/files/The%20Law%20on%20the%20Prohibition%20of%20Discrimination%20ENG_0.pdf) .

this the most rationale option. As noted above, the statutory compliance exceptions in the ACT Discrimination Act were intended to be temporary. As the Discussion Paper notes, a blanket defence of this kind 'is less likely to encourage rigour in policy processes'. I therefore prefer a model under which specific exemptions are provided for acts done in direct compliance with specified legislation, as is the case currently under the ADA, DDA and SDA. This is the model I recommended for legislation in the ACT also.

However, I also recognise that such a system may work well when only one jurisdiction is being considered, but could in practice be unwieldy when laws of all states and territories would have to be considered. Therefore, it may be simpler for a consolidated Act to have a general exception for acts done in compliance with State and Territory laws.

I endorse the comments of the AHRC that consideration be given to ensuring that a statutory bar for complaints to the AHRC is not inadvertently activated for 'out of jurisdiction' complaints made to State and Territory bodies. This can be a confusing part of the current national discrimination system, and an emphasis on ensuring that complainants are not left without a remedy because they have submitted an 'out of jurisdiction' complaint to a State or Territory body is important.

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

I support the consolidation bill applying to all State and Territory Governments and instrumentalities to ensure a universal level of coverage across Australia. Such a system would enable staff of State and Territory anti-discrimination bodies have an option to complain about their workplace to an independent body.