Australian Council of Human Rights Agencies

Submission

Consolidation of Commonwealth Anti-Discrimination Laws

1 February 2012

CONTENTS

GLOSSARY

The following defined terms and acronyms are used throughout this submission

Australian Council of Human Rights Agencies	ACHRA
Australian Human Rights Commission	Federal Commission
A Commonwealth consolidated anti-discrimination law	Consolidated Act
Commonwealth Attorney-General's Department	AGD
Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper	Discussion Paper
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
International Labour Organization, Discrimination (Employment and Occupation) Convention, C111	ILO 111
United Nations Human Rights Committee	UNHRC
Victorian Equal Opportunity and Human Rights Commission	VEOHRC

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Introduction

The Australian Council of Human Rights Agencies (ACHRA) welcomes the opportunity to make a submission in response to the Commonwealth Attorney-General's Department (AGD) *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*; an initiative under Australia's Human Rights Framework (the Discussion Paper).[1]

ACHRA is comprised of statutory human rights and anti-discrimination commissions established at the state, territory and national levels. Over the past 30 years Commonwealth government and State and Territory governments have introduced anti-discrimination laws to help protect people from discrimination and harassment. ACHRA members have more than 30 years' experience working within the anti-discrimination and human rights jurisdiction.

The following members of ACHRA have drafted this submission:

- Anti-Discrimination Commission (Northern Territory)
- Anti-Discrimination Commission (Queensland)
- Equal Opportunity Commission (South Australia)
- Equal Opportunity Commission (Western Australia)
- Dr Helen Watchirs OAM, Human Rights Commissioner (ACT)
- Office of the Anti-Discrimination Commissioner (Tasmania)
- Victorian Equal Opportunity & Human Rights Commission

Background

AGD released the discussion paper on 22 September 2011, and called for submissions on this paper to be provided by 1 February 2012.

The discussion paper noted that the consolidation of Commonwealth anti-discrimination laws provides a valuable opportunity to consider the existing legal framework at the Commonwealth level, and to explore opportunities to improve the effectiveness of the legislation to better address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of the Australian community.

Federal anti-discrimination law is currently vested in four separate Commonwealth Acts that address different grounds and areas of discrimination.[2]

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[1] Commonwealth Attorney-General's Department (AGD) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper; an initiative under Australia's Human Rights Framework (the Discussion Paper), 22 September 2011, available at: http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc/$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc

[2] *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth). Also note: The *Australian Human Rights Commission Act 1986* (Cth) governs, among other things, the procedure for obtaining redress in discrimination matters (Part 11B), and may need to be amended depending on the recommended amendments to the powers and functions of the Federal Commission

The Discussion Paper indicated that the federal Government is committed to ensuring that any draft legislation for a Commonwealth consolidated anti-discrimination law (Consolidated Act) will not result in a reduction of existing protections against discrimination. Rather, the consolidation project seeks to reform the current legislative framework, taking into account the following goals:

1. To reduce the complexity and inconsistency in regulation to make it easier to understand rights and obligations;
2. To ensure there is no reduction of existing protections in the law;
3. To ensure there are simple, cost-effective mechanisms for resolving complaints; and
4. To clarify and enhance protections where appropriate.

ACHRA makes it submission taking into account these overarching goals.

ACHRA considers that a Consolidated Act should be drafted to achieve the following outcomes:

1 Improving fairness, effectiveness and efficiency in resolving complaints of discrimination.

ACHRA considers this outcome could be achieved by fusing the two definitions of discrimination (direct and indirect) into a unified test, introducing a detriment test into the elements of direct discrimination, and adopting a model of a shifting burden of proof, to reflect the reality that the party with greater access to available evidence have the burden proving that discrimination did/did not occur.

2 That new attributes should be protected under a Consolidated Act, in order to better reflect the nature of Australian society and culture, and emerging forms of discrimination.

3 That a focus of federal anti-discrimination law should be the identification and elimination of systemic discrimination, and be based on clear objectives that target the causes and manifestations of discrimination and take into account international human rights obligations.[3]

To this end, ACHRA considers that further important protections could be introduced and strengthened as part of the consolidation project, including by:

- the introduction of a positive duty to eliminate discrimination;
- the introduction of a special measures provision;

[3] A useful definition of systemic discrimination was provided in the former Victorian Attorney-General's justice statement: *New Directions for the Victorian Justice System* 2004 – 2014: Attorney-General's Justice Statement, May 2004, at p 57: '[systemic discrimination occurs] when processes and practices become entrenched in organisations and are viewed as neutral and acceptable, but in fact result in discrimination against various groups who are often disadvantaged in other areas of their lives.' Another useful definition is also provided by the Ontario Human Rights Commission: "systemic discrimination can be described as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons." Ontario Human Rights Commission, *Factsheet: Racism and Racial Discrimination - Systemic Discrimination*, available at: http://www.ohrc.on.ca/en/resources/factsheets/systemic;

- a general obligation to make reasonable adjustments on the basis of all protected attributes; and
- by providing enhanced powers to the Australian Human Rights Commission (Federal Commission) to enable it to respond flexibly to patterns of systemic discrimination where it occurs.

4 That the ongoing focus of anti-discrimination and human rights legislation should be the realisation of substantive equality, through the provision of a regulatory framework that enables the enforcement of equal opportunity laws, as a process of last resort where voluntary compliance does not occur.

This focus requires that the Federal Commission be provided the resourcing and legal capacity to:

- actively monitor progress and compliance (including by having a register of action plans);
- use enforcement powers where reasonable steps are not being taken to comply with equal opportunity obligations; and
- play a more active role in litigation matters, including having an own-motion advocacy power, and a broader power to intervene or act as *amicus curiae* in proceedings.

The Discussion Paper separated the 30 key questions and issues to be addressed in submissions into the following categories:

1. Meaning of discrimination
2. Protected Attributes
3. Protected areas of public life
4. Exceptions and exemptions
5. Complaints and compliance framework
6. Interaction with other laws and application to state and territory governments

ACHRA has framed this submission by providing recommendations in response to relevant questions posed in the Discussion Paper.[4]

ACHRA may provide further detailed comment in response to draft provisions as these are made available by AGD.

[4] Note: as the ACHRA submission was prepared following consultation and agreement by the State and Territory Human Rights Agencies listed above, this submission has not provided a response to all questions posed in the Discussion Paper

Summary of recommendations

Recommendation 1: that a Consolidated Act include an objects and purpose provision that sets out the equality right, Australia's recognition of its obligations under international human rights treaties, and the goal of promoting substantive equality and eliminating systemic discrimination.

Recommendation 2: that a Consolidated Act adopt a unified test for discrimination based on elements of the *Discrimination Act 1991* (ACT), the *Racial Discrimination Act 1975,* the *Anti-Discrimination Act 1996 (NT)* and the *Equal Opportunity Act 2010* (Vic).

Recommendation 3: that a Consolidated Act does not adopt the comparator test and instead uses a detriment test based on the *Discrimination Act* 1991 (ACT) and the *Equal Opportunity Act 2010* (Vic).

Recommendation 4: that in establishing 'indirect' discrimination, a Consolidated Act requires only that a condition, requirement or practice has the effect of disadvantaging a person (or people) because they have a protected attribute(s) and/or characteristics related to such attributes, without the further requirement that the person does not comply or is not able to comply.

Recommendation 5: that the proportionality test be removed from the definition of indirect discrimination, and replaced with a 'likely to cause disadvantage' test.

Recommendation 6: that, if a general limitations provision is not enacted, the 'reasonableness' element be removed from the test for indirect discrimination, and a general limitations provision (or defence to discrimination) be adopted.

Recommendation 7: that further consideration is given to replacing the current 'reasonableness' test for indirect discrimination with a 'legitimate and proportionate' test.

Recommendation 8: that a Consolidated Act clearly covers proposed discrimination for all attributes.

Recommendation 9: that there be a rebuttable presumption that makes clear that alleged direct discriminatory treatment will be considered to be discriminatory for the purposes of the definition, unless a respondent can prove otherwise.

Recommendation 10: that, if a Consolidated Act does not introduce a general limitations provision, it should provide for a shifting onus of proof from the complainant to the respondent to establish that the identified requirement, condition or practice is justified in all the circumstances.

Recommendation 11: that a Consolidated Act should include a single special measures provision, covering all protected attributes. It should include guidance on the reasonable parameters of special measures.

Recommendation 12: that a Consolidated Act should include a process for temporary authorisation (or certification) of special measures.

Recommendation 13: that a Consolidated Act include express provision for reasonable adjustments, and that this provision should apply to all attributes.

Recommendation 14: that a Consolidated Act should contain a duty to eliminate discrimination, sexual harassment, victimisation, and other forms of prohibited conduct as far as possible.

Recommendation 15: that the positive duty included in a Consolidated Act should:

- Apply to public, private and non-profit organisations
- Include a requirement to take reasonable and proportionate measures to prevent discrimination
- Allow remedial action to be taken to address discrimination where necessary

Recommendation 16: that a Consolidated Act make clear that sexual harassment and harassment on the basis of any protected attribute or attributes are unlawful in any area of public life covered by the legislation.

Recommendation 17: that a Consolidated Act should provide for regular, periodic reviews of attributes covered by the Act to ensure that emerging forms of discrimination are appropriately addressed.

Recommendation 18: that a Consolidated Act provide broad coverage of sexual orientation, sex characteristics, gender identity and gender expression as protected attributes.

Recommendation 19: that all grounds covered by the *Australian Human Rights Commission Act 1986* (Cth) (including ILO 111 discrimination grounds) are protected attributes and cover all areas of public life under a Consolidated Act.

Recommendation 20: that a Consolidated Act include 'victim or survivor of domestic/family violence' as a protected attribute.

Recommendation 22: that a Consolidated Act include 'social origin or status' as a protected attribute.

Recommendation 23: that a Consolidated Act should clarify the coverage of discrimination on the basis of more than one protected attribute so as to address intersectional discrimination.

Recommendation 24: that a Consolidated Act include a general prohibition against discrimination, comparable to that of the *Racial Discrimination Act 1975* (Cth) including a non-exhaustive list of covered areas.

Recommendation 25: that a Consolidated Act apply to all States and Territories and State and Territory instrumentalities.

Recommendation 26: that volunteers and unpaid workers are protected from discrimination, sexual harassment and other forms of prohibited conduct under a Consolidated Act.

Recommendation 27: that favourable consideration be given to the adoption of a general limitations clause in a Consolidated Act, to replace other exceptions as far as possible.

Recommendation 28: that a general limitations clause does not diminish or limit the existing protection against racial discrimination set out in the *Racial Discrimination Act 1975* (Cth).

Recommendation 29: that, if a general limitations clause is not introduced in a Consolidated Act, a separate review of the existing exception and exemption provisions be conducted: with recommendations made at the close of this review as to whether exceptions should be retained, amended or removed.

Recommendation 30: that any religious exception provision in a Consolidated Act appropriately reflect the balance between the right to hold and have a religious belief and the general prohibition against discrimination in areas of public life.

Recommendation 31: that the process for considering and granting temporary exemptions be made consistent across all grounds of discrimination, excepting those attributes covered under the *Racial Discrimination Act 1975* (Cth).

Recommendation 32: that the criteria for granting, renewing or revoking a temporary exemption be set out in a Consolidated Act, to ensure consistency and promote the objects of the Act.

Recommendation 33: that the Federal Commission be required to publish and seek submissions on exemption applications, and notify the relevant State or Territory anti-discrimination Agency of any exemption application.

Recommendation 34: that the Federal Commission should be able to review an organisation's programs and practices to assess compliance with the Consolidated Act.

Recommendation 35: that the Consolidated Act allow organisations to lodge voluntary action plans with the Federal Commission in relation to any or all protected attributes.

Recommendation 36: that a Consolidated Act enable the Federal Commission to keep a register of action plans that meet minimum standards set by the Federal Commission.

Recommendation 37: that a Consolidated Act retain inquiry powers in relation to complaints and avoids prescriptive provisions in relation to the complaint process and forms of dispute resolution, other than to clarify the applicability of confidentiality provisions to voluntary as well as compulsory conciliation conferences.

Recommendation 38: that a Consolidated Act provide that complaints on the grounds of ILO 111 discrimination and contraventions of protected human rights be treated the same as 'unlawful discrimination claims' and be justiciable.

Recommendation 39: that a Consolidated Act require courts to consider all adverse effects of discrimination when assessing damages, and indicate that a court may make orders for aggravated, exemplary and/or punitive damages in discrimination cases, where appropriate.

Recommendation 40: that a Consolidated Act provide the Federal Commission with the power to monitor local, state and federal laws and practices, and advise the Minister on compliance with human rights laws.

Recommendation 41: that a Consolidated Act empower the Federal Commission to monitor progress towards eliminating discrimination and achieving equality and periodically report to parliament.

Recommendation 42: that the Consolidated Act provide the Federal Commission with a range of enforcement mechanisms to prevent discrimination, and promote substantive equality and compliance.

Recommendation 43: a Consolidated Act should extend the formal inquiry function to enable the Federal Commission to inquire into issues concerning human rights and the promotion equality in Australia including acts and practices in relation to the private sector, states and territories.

Recommendation 44: that the Federal Commission have sufficient resources to fulfil its statutory functions.

Recommendation 45: that a Consolidated Act grant the Federal Commission the power to initiate proceedings for enforcement and promotion of a Consolidated Act on an own motion basis.

Recommendation 46: that a Consolidated Act enable the Federal Commission to commence proceedings in the Federal Court or Federal Magistrates Court on behalf of a complainant, where a complaint has not resolved and it is in the public interest to do so.

Recommendation 47: that a Consolidated Act amend the *Australian Human Rights Commission Act 1986* (Cth) to enable the Federal Commission and specialist Commissioners to appear as *amicus curiae* or intervener in court proceedings, subject to a direction that leave not be refused except in particular circumstances.

Recommendation 48: that the existing *amicus curiae* function in the *Australian Human Rights Commission Act 1986* (Cth) be expanded to include any consequent appeals of a matter.

Recommendation 49: that further consideration is given to trialling dispute resolution through a multi-agency approach to matters that fall within overlapping jurisdictions.

Recommendation 50: that a Consolidated Act does not provide a general exemption for acts done in compliance with State or Territory Laws for all protected attributes.

1. Objects of a Consolidated Act

1.1.1 Although the Discussion Paper does not specifically address the issue of the objects and purpose of a Consolidated Act, ACHRA regards the objects section as the keystone of any new anti-discrimination legislation: being of fundamental importance as a means of ensuring compliance, promoting substantive equality and recognising Australia's commitment to international human rights Conventions.

1.1.2 An objects and purpose clause would set out the key values and purposes of the jurisdiction: not just for duty holders, but for the wider Australian community. It would also clearly indicate that the Act is beneficial legislation, and that the prohibition against discrimination is to be given a broad construction.

1.1.3 ACHRA considers that a narrow, doctrinal interpretation of anti-discrimination law has generally lessened the strength of anti-discrimination legislation. Cases such as *Purvis v New South Wales*[5] and *New South Wales v Amery*[6] are examples of judicial decisions which have narrowed the scope and application of the protection of anti-discrimination legislation. ACHRA is of the view that some statutory guidance for courts should be included in the objects and purpose clause, similar to that set out in the *Equal Opportunity Act 2010* (Vic).[7]

1.1.4 ACHRA considers that an objects and purpose provision similar (although with some amendment) to that proposed by the Discrimination Law Experts' Roundtable (Experts' Roundtable) in their submission to this consultation process would be appropriate for a Consolidated Act.[8]

1.1.5 ACHRA would prefer that the international human rights Conventions to which Australia is a party are listed in a Schedule to the Act,[9] rather than in the

[5] *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92; 202 ALR 133
[6] *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196
[7] *Equal Opportunity Act 2010* (Vic), section 3
[8] Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 31 March 2011, (Experts' Roundtable, Report, March 2011) p 6, available at: http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts'_Roundtable_Report_revised_31Mar2011.pdf;
[9] The Conventions listed in the Schedule would include (as at 1 February 2012): *International Covenant on Civil and Political Rights*, (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I; UN General Assembly, *the Declaration on the Rights of the Child*, (GA Res 1386 (XIV) UNGAOR, 14th sess, UN Doc A/4354 (1959), the *Declaration on the Rights of Mentally Retarded Persons*, (GA Res 2856 (XXVI), UN GOAR, 26th

objects and purposes clause. This ensures that a Consolidated Act could remain flexible to any changes in international law that may occur, including any new Conventions being signed and ratified by Australia in the future, without requiring specific legislative amendment.

1.1.6 ACHRA also considers that any objects and purpose clause must include positive recognition of the right to equality before the law and the right to freedom from discrimination. ACHRA notes that a broad 'equality right' provision is already set out in sections 9 and 10 of the *Racial Discrimination Act 1975* (Cth).[10] ACHRA considers that the general right to equality should be more broadly framed, using the model of section 8 the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which relevantly provides that:

- Every person has the right to recognition as a person before the law;[11]
- Every person has the right to enjoy his or her human rights without discrimination;[12] and
- 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.[13]

1.1.7 ACHRA has set out a proposed objects and purposes provision below:

1. Objects of the Act

The objects of this Act are 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 at all times to:

(a) 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 to all persons, regardless of attribute. This includes a right to be free from harassment and victimisation;

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sess, UN Doc A/ 8429 (1971); *the Declaration on the Rights of Disabled Persons* (GA Res 3447 (XXX), UN GAOR, 30th sess, UN Doc A/10034 (1975) and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (1981), declared to be an international instrument relating to human rights and freedoms for the purposes of the *Australian Human Rights Commission Act 1986* (Cth) on 8 February 1993)

[10] *Racial Discrimination Act 1975* (Cth), sections 9 and 10 reflect the content of Article 26 of the ICCPR: '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 …or other status.'

[11] *Charter of Human Rights and Responsibilities Act 2006* (Vic), subsection 8(1)

[12] *Charter of Human Rights and Responsibilities Act 2006* (Vic), subsection 8(2)

[13] *Charter of Human Rights and Responsibilities Act 2006* (Vic), subsection 8(3). Note: subsection 8(4) addresses special measures. The identification and certification of special measures as measures that are not discriminatory in nature are dealt with as a separate subject in this submission, and a proposal made that a separate provision be included in a Consolidated Act to provide for special measures

(c) This Act recognises that:

- Every person has the right to recognition as a person before the law
- Every person has the right to enjoy his or her human rights without discrimination;
- 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.

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

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

(f) In the case of a finding of discrimination, a remedy may include a proactive initiative that recognises the systemic nature of discrimination;

(g) 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;

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.

Recommendation 1: that a Consolidated Act include an objects and purpose provision that sets out the equality right, Australia's recognition of its obligations under international human rights treaties, and the goal of promoting substantive equality and eliminating systemic discrimination.

2. Meaning of discrimination

2.1 What is the best way to define discrimination?

(a) Unified test

2.1.1 As noted in the Discussion Paper,[14] there has been substantial criticism of the definitions of direct and indirect discrimination that are currently used in Commonwealth anti-discrimination legislation.

The Experts' Roundtable has commented that the development in Australian law of two different categories of discrimination is an artificial distinction that has unnecessarily complicated anti-discrimination laws.[15] In its submission in response to the Discussion Paper, the Experts' Roundtable proposed that it would be preferable for a consolidated anti-discrimination Act to have a single definition of discrimination to apply to all protected attributes, across all areas of public life. ACHRA agrees that a single definition of discrimination would reduce regulatory complexity, increase consistency and promote compliance.[16]

2.1.2 In its submission to the review and consolidation of Commonwealth anti-discrimination laws,[17] the Federal Commission noted that continued legislative use of the terms direct and indirect discrimination, and 'the separation of direct and indirect discrimination into different sections within the legislation, introduces unhelpful technicality and complexity and can be misleading.'[18] The Federal Commission also noted that separate provision for direct and indirect discrimination has led to the (general) conclusion in judicial interpretation of cases that the concepts are separate, distinct and do not overlap.[19]

2.1.3 ACHRA agrees that the continued separation and distinction between direct and indirect forms of discrimination does not reflect the reality that discriminatory actions are often carried out in a way (or with intent) that

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[14] Discussion Paper, p 14 at [44] – [46]

[15] Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 31 March 2011, (Experts' Roundtable, 31 March 2011 Report) p 6, available at: http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Roundtable_Report_revised_31Mar2011.pdf;

[16] Discrimination Law Experts' Group, *Submission: consolidation of Commonwealth anti-discrimination laws*, 13 December 2011 (Experts' Roundtable, 13 December 2011 Submission), available at: http://www.equalitylaw.org.au/elrp/submissions/; also in support of this position: Law Institute of Victoria, *Submission, A National Equality Act*, February 2011, p. 7

[17] Australian Human Rights Commission, *Submission to the Attorney-General's Department, consolidation of Commonwealth Discrimination Law* (Federal Commission, Submission), 6 December 2011, available at: http://www.humanrights.gov.au/legal/submissions/2011/20111206_consolidation.html;

[18] Federal Commission, Submission, pages 8 – 9, at [23]

[19] Federal Commission, Submission, page 9 at [23]. Although note: discussion of tests by Mason CJ and Gaudron J in *Waters v Public Transport Corporation* (1992) 173 CLR 349

satisfies both legislative tests.[20] Further, ACHRA agrees that the distinction between direct and indirect discrimination promotes findings based on technicality, is complex and difficult for complainants to understand and apply, and does not readily promote the objectives of federal anti-discrimination and human rights legislation.

2.1.4 ACHRA notes that a unified test for discrimination is preferred in the Canadian jurisdiction, where the Supreme Court has abolished the distinction between direct and indirect discrimination.[21] An applicant need only establish a *prima facie* case of discrimination, namely that there is a 'link between group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact'.[22] Once this threshold has been met, the onus then shifts to the respondent to establish that the relevant act or condition was a '*bona fide* occupational requirement'. This has been interpreted to involve a proportionality based approach to be adopted in all cases of alleged discrimination.[23]

2.1.5 ACHRA recommends that a unified test of discrimination that is clearer and more consistent with the objects of anti-discrimination legislation should be developed by reference to existing provisions in State and Territory anti-discrimination and equal opportunity legislation.

2.1.6 Section 8 of the *Discrimination Act 1991* (ACT) does not distinguish between the terms 'direct' and 'indirect' discrimination, but rather fuses the two definitions and indicates that a person will discriminate against another if they:

(a) treat, or proposes to treat, the person unfavourably because of a protected attribute; or

(b) impose, or proposes to impose, a condition or requirement that is likely to have the effect of disadvantaging people with a protected attribute.

2.1.7 ACHRA considers that this method of providing a path for proving either direct and/or indirect discrimination, under an overarching definition of discrimination, provides a best practice framework for a unified definition, and should be adopted, with some amendment.[24] This is discussed further below.

2.1.8 Subsection 9(1) of the *Racial Discrimination Act 1975* (Cth) includes a broader, rights-based approach to a definition of discrimination that is not

[20] See: example in relation to discrimination on the grounds of disability that would constitute both direct and indirect discrimination under the *Disability Discrimination Act 1992* (Cth): Federal Commission, Submission, page 9, at [25]

[21] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (also known as the *Meiorin* case) [1999] 3 SCR 3; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (also known as the *Grismer* case) [1999] 3 SCR 868

[22] *McGill University Health Centre v Sydnicat des employés de l'Hopital general de Montréal* [2007] 1 SCR 161 per Abella J

[23] The *Meiorin* case [1999] 3 SCR 3, at [54]. The Supreme Court has also confirmed that the proportionality approach is not confined to employment related discrimination, but applies in all cases of alleged discrimination: the *Grismer* case [1999] 3 SCR 868, at [19]

[24] This model of indicating 'pathways' for how discrimination can occur, and incorporating the current definitions of direct and indirect discrimination into subsections, is the favoured approach of the Experts' Roundtable: 13 December 2011 Submission: p. 10

encompassed in the ACT test.[25] The wording of this test is based on the definition of discrimination set out in Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966*.[26] Mindful of the need to ensure that existing protections under law are not reduced by the consolidation of anti-discrimination law, ACHRA proposes that a broader prohibition on discrimination similar to subsection 9(1) of the *Racial Discrimination Act 1975* (Cth) be incorporated into a unified definition of discrimination. Relevant to this, the *Anti-Discrimination Act 1996* (NT) sets out a broader 'equality test' for discrimination, which identifies unlawful discrimination as 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity.'[27]

2.1.9 The unified definition needs to clearly indicate where and when the onus of proof (in relation to both direct and indirect discrimination) shifts from the complainant to the respondent. The issue of where the burden of proof should lie in terms of establishing that discrimination has occurred is discussed further below at heading 2.2.12.

(b) Intersectional discrimination

2.1.10 Intersectional discrimination recognises that a person may be subject to discrimination based on several aspects of their identity. For example, most people identify as having a race and a gender identity. Some people will have other attributes as well, some permanently, some at particular points in their lives.

2.1.11 ACHRA is of the view that intersectional discrimination (whereby individuals experience discrimination because of more than one attribute, or because of a combination of attributes) is an important issue that needs to be addressed clearly in a Consolidated Act. ACHRA therefore recommends that a unified definition of discrimination acknowledges intersectional discrimination by including a reference to 'a combination of more than one protected attributes'.[28]

2.1.12 Further discussion about intersectional discrimination, in the context of protected attributes under a Consolidated Act is at heading 3.4.

Recommendation 2: that a Consolidated Act adopt a unified test for discrimination based on elements of the *Discrimination Act 1991* (ACT), the *Racial Discrimination Act 1975,* the *Anti-Discrimination Act 1996 (NT)* and the *Equal Opportunity Act 2010* (Vic).

[25] Subsection 9(1): it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life

[26] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

[27] *Anti-Discrimination Act 1992* (NT), subsection 20(1). See also: the definition of 'ILO 111 Discrimination' in subsection 3(a) of the *Australian Human Rights Commission Act 1986* (Cth)

[28] Note: this definition of intersectional discrimination is preferred in Canada: *Canadian Human Rights Act 1985*, section 3.1 'for greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.'

(c) 'Direct discrimination' –detriment test

2.1.13 ACHRA agrees with the conclusions of the Discussion Paper that use of the comparator test in sections[29] of the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) has resulted in significant difficulties in applying the test, because of the requirement that a person in materially the same circumstances as the person alleging discrimination (the comparator) must first be identified in order to prove that there has been differential and less favourable treatment. The results of applying this test have been unpredictable, and have created significant uncertainty for complainants and human rights agencies.[30] The application of the comparator test has also proved difficult for courts and tribunals, due to the issue of how to construct the same or similar circumstances or characteristics for carrying out the comparison.[31]

2.1.14 For this reason, ACHRA recommends that the comparator test be removed from the definition of direct discrimination in a Consolidated Act, and a 'detriment test' provision be introduced. The form of detriment test should follow that of the *Discrimination Act 1991* (ACT) (set out above in our suggested definition of discrimination).[32] This is also the model recommended by the comprehensive review into the operation of the *Equal Opportunity Act 1995* undertaken by Julian Gardner in 2008[33] (the Gardner Review)[34] and adopted in section 8 of the *Equal Opportunity Act 2010* (Vic).

Recommendation 3: that a Consolidated Act does not adopt the comparator test and instead uses a detriment test based on the *Discrimination Act* 1991 (ACT) and the *Equal Opportunity Act 2010* (Vic).

[29] *Sex Discrimination Act 1984* (Cth), section 5; *Age Discrimination Act 2004* (Cth), section 14; *Disability Discrimination Act 1992* (Cth), section 5

[30] See: Bell J's discussion of recent comparator case law in *Collier v Austin Health* [2011] VSC 344

[31] See, for example: Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), p. 83: 'there are numerous instances in which courts and tribunals have struggled with the overlapping factual issues of identifying a person, either real or hypothetical, who may stand as the *comparator* and when determining the *relevant characteristics* for the purposes of contrasting the respondent's treatment of the complainant with the treatment of the comparator…The various judgements in *Purvis* illustrate that there is considerable scope, in some areas, for quite different approaches to these issues which are, essentially, questions of fact.'

[32] The 'detriment test' approach was also recommended by the NSW Law Reform Commission in its 1999 Review of the *Anti-Discrimination Act 1977* (NSW)

[33] Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report)*, June 2008 (the Gardner Review)

[34] Gardner Review: recommendation 41: 'The definition of direct discrimination should be amended…The new definition should overcome the limitations of the comparator test and reflect the aims of progressively achieving substantive equality and consistency with the Charter.' p. 86

(d) 'Indirect discrimination' – remove the requirement that a person cannot comply with a requirement, condition or practice

2.1.15 As noted in the Discussion Paper,[35] the relevant sections of the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth) definitions of indirect discrimination add a further requirement: being that the complainant must not be able to comply, or must be unable to comply, with the identified condition, requirement of practice.

2.1.16 ACHRA concurs with the Federal Commission's view that this requirement should not be applied in that part of the unified definition of discrimination which deals with indirect discrimination.[36] To do so could reduce protection in practice compared to the current provisions of the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 1992* (Cth). Inclusion of this additional element also appears to be unnecessarily confusing, overly technical, and potentially misleading.

Recommendation 4: that in establishing 'indirect' discrimination, a Consolidated Act requires only that a condition, requirement or practice has the effect of disadvantaging a person (or people) because they have a protected attribute(s) and/or characteristics related to such attributes, without the further requirement that the person does not comply or is not able to comply.

(e) 'Indirect discrimination': removal of the proportionality test

2.1.17 ACHRA notes that, in line with recommendation 42 of the Gardner Review,[37] section 9 of the former *Equal Opportunity Act 1995* (Vic) was amended in 2010 to:

- remove the proportionality test; and
- add a new criterion that complainants must demonstrate that their inability to comply with the relevant requirement, condition or practice has, or is likely to have, the effect of disadvantaging the person with the attribute.

2.1.18 As set out in the Gardner Review, these changes to the *Equal Opportunity Act 2010* (Vic), particularly the removal of the proportionality test, aligned the law in Victoria with the *Discrimination Act 1991* (ACT) the *Anti-Discrimination Act 1998* (Tas), the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth).[38]

2.1.19 ACHRA considers that removing the proportionality test would simplify the test for indirect discrimination, and allow a Consolidated Act to provide redress for circumstances of indirect discrimination, which might otherwise fail due to an inability to satisfy a complex and technical test, which has not been uniformally or consistently applied in case law.[39]

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[35] Discussion Paper, p. 13, at [38]
[36] See: Federal Commission, Submission, p. 13, at [43]
[37] Gardner Review, pp. 87 – 89
[38] *Sex Discrimination Act 1984* (Cth), subsection 5(2), *Age Discrimination Act 2004* (Cth), subsection 15(1)
[39] For example, compare: *Hurst v State of Queensland* (2006) 91 ALD 575, *Rainsford v State of Victoria* (2007) 242 ALR 128; and *Hinchcliffe v University of Sydney* 186 FLR 376

2.1.20 ACHRA recommends that the 'proportionality test' within the test for indirect discrimination be removed, and replaced with a simpler 'likely to cause disadvantage' test.

Recommendation 5: that the proportionality test be removed from the definition of indirect discrimination, and replaced with a 'likely to cause disadvantage' test.

(f) 'Reasonableness': inclusion as a separate defence to discrimination

2.1.21 An alternative to including 'reasonableness' as an element within the test of indirect discrimination is to remove this element of the test, and to introduce a separate general limitations (or defence) provision in a Consolidated Act, which would import a 'reasonableness' or 'legitimate and proportionate' test for discriminatory conduct. This approach would require a respondent to establish that a requirement, condition or practice was 'reasonable' or 'legitimate and proportionate' in all the circumstances. The *Human Rights Act 1985* (Canada) takes a similar approach to this by applying a *bona fide* occupational requirements (for employment conditions) and a *bona fide* justification test (for other conditions, requirements or practices), whereby a condition, requirement or practice that is necessary to achieve a legitimate objective, and is a proportionate means of achieving that objective, is not discrimination. The condition, requirement or practice has to be based on reasonable and objective criteria.[40]

2.1.22 One advantage of replacing the current 'reasonableness' element in the test for indirect discrimination would be a clearer separation between the elements of discrimination (as unlawful conduct) and defences to that discrimination (that make conduct lawful). This separation recognises the policy position that discrimination, as a general proposition, is unlawful conduct: without the qualifying element of 'reasonableness' in the definition making some discriminatory conduct lawful. This separation between elements of conduct and defences is usual practice in other jurisdictions such as the criminal law and defamation, and reflects the usual practice in law that the onus of proving a defence to unlawful conduct lies with the respondent. This approach would be consistent with the *Human Rights Act 1985* (Canada), which sets out definitions of discrimination in sections 5 to 14, and then defences in section 15.[41]

2.1.23 ACHRA considers that a general limitations test could substantially simplify and streamline the current permanent exceptions and exemptions in Commonwealth anti-discrimination law, and is in favour of further consideration of the type of general limitations test that a Consolidated Act should import. Further discussion of a general limitations test for discrimination (and the relevant recommendation) is found at heading 5.1 below.

Recommendation 6: that the 'reasonableness' element be removed from the test for indirect discrimination, and a general limitations provision (or defence to discrimination) be adopted.

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[40] *Human Rights Act 1985* (Canada), section 15

[41] For example: *Human Rights Act 1985* (Canada), subsection 15(1).

(g) 'Reasonableness': replacing with 'legitimate and proportionate' test

2.1.24 The Discussion Paper raised the possibility of replacing the present reference to 'reasonableness' in the test for indirect discrimination, with reference instead to whether the condition requirement or practice was for a legitimate purpose and proportional to that purpose.[42]

2.1.25 ACHRA's first preference (as set out above) is that the test for 'reasonableness' should be removed from the unified test of discrimination, and respondents should rather be required to demonstrate that conduct fell within the scope of a general limitations provision. However, should a Consolidated Act retain the element of 'reasonableness' in the definition of indirect discrimination, the question to ask is whether this element should be replaced by the term 'legitimate and proportionate'.

2.1.26 ACHRA notes that the Federal Commission recommended further consideration of this approach in its submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the effectiveness of the SDA Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality, together with provision of guidance on what would and would not be considered legitimate and proportionate.[43] Recommendation 6 of the Senate Legal and Constitutional Affairs Committee's Final Report was that the 'reasonableness' element in the definition of indirect discrimination be replaced with a 'legitimate and proportionate' element.[44] This approach is taken in the United Kingdom (in the context of a general limitations provision), and is consistent with the approach taken in other comparable jurisdictions overseas.[45]

2.1.27 ACHRA agrees with the Federal Commission that adopting a test of 'legitimate and proportionate' within the definition of indirect discrimination could require a greater degree of accountability in terms of justifying rules or requirements that would otherwise be discriminatory. ACHRA also notes that the 'reasonableness standard' is somewhat weaker than the approach required under international human rights law in terms of assessing the legitimacy and proportionality of acts or practices that limit human rights. At international law, a human rights approach requires a respondent to demonstrate that the infringement was pursuant to an aim that was legitimate under the relevant instrument, and proportionate to the achievement of that aim. This generally requires a respondent to establish that a less restrictive measure was not available in the circumstances.[46]

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[42] Discussion Paper, p. 13, at [39], [43]

[43] Federal Commission: Submission to the Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality, 1 September 2008 (Submission to the Review of the *Sex Discrimination Act 1984* (Cth)), pp. 264 – 265, available at: http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html

[44] Standing Committee on Legal and Constitutional Affairs, *Report into the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and promoting gender equality*, December 2008, p. xiii

[45] *Equality Act 2010* (UK), paragraph 19(2)(d) (UK Act); see also: Equal Opportunities Commission (UK), *Submission to the Discrimination Law Review Green Paper,* (April 2006), 36-7; Council Directive 2002/73/EU, 23 September 2002, Art 2, amending Council Directive 76/2007/EEC

[46] See: Human Rights Committee, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, U.N Doc. CPR/C/21/Rev.1/Add.13 (2004), at [6]; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the*

2.1.28 However, ACHRA notes that there are practical issues and risks associated with removing the 'reasonableness' threshold from the elements of indirect discrimination. Firstly ACHRA notes that, while the goal of a Consolidated Act is to harmonise federal anti-discrimination law and remove unnecessary duplication and complexity; introducing a new, human-rights based test for assessing the legitimacy and proportionality of conduct could also increase complexity for parties to disputes (in terms of understanding and applying a new legislative test), and create unnecessary uncertainty and technicality for courts applying this new test.

2.1.29 Further, as no State and Territory jurisdictions currently use a 'legitimate and proportionate' test for assessing justification of conduct, there is a risk that the jurisprudence arising out of a Consolidated Act would not readily apply to State discrimination complaints, thereby reducing consistency in applicable case law and creating further complexities for complainants trying to choose a jurisdiction.

2.1.30 On balance, ACHRA recommends that further consideration be given to the proposal that the term 'reasonable' be replaced with 'legitimate and proportionate' in any unified test for discrimination in a Consolidated Act, taking into account the various advantages and disadvantages with incorporating an international human-rights based framework into domestic equality legislation.

Recommendation 7: that, if a general limitations provision is not enacted, further consideration is given to replacing the current 'reasonableness' test for indirect discrimination with a 'legitimate and proportionate' test.

(h) Proposed discrimination

2.1.31 ACHRA notes that the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) expressly cover proposed discrimination, as well as discrimination that has already occurred. ACHRA concurs with the position taken by the Federal Commission that it would be in keeping with the overarching objectives of anti-discrimination legislation, and an important measure to ensure consistency in approach, to make clear that it is not necessary to wait until detriment has already occurred for action to be taken to resolve claims of discrimination on the basis of a protected attribute.

Recommendation 8: that a Consolidated Act clearly covers proposed discrimination for all attributes.

International Covenant on Civil and Political Rights, 'General Interpretative Principles relating to the Justifications of limitations', U.N. Doc. E/CN.4/1985/4, Annex (1985), at IA (11). See also the application of the proportionality test by the European Court of Human Rights in *Handyside v United Kingdom* [1976] ECHR 5, at [45] – [49]; *The Sunday Times v the United Kingdom* [1979] ECHR, 1 at [62]. Note also: the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has introduced a proportionality test in respect of any limitations on a person's human rights by a public authority: subsection 7(2)

2.2 How should the burden of proving discrimination be allocated?

(a) Direct discrimination

2.2.1 Under the current regime of anti-discrimination law, individuals claiming direct discrimination have the burden of proving causation for their less favourable treatment by the duty holder. As the Discussion Paper acknowledges, this obligation requires the complainant to prove matters relating to the state of mind of the respondent, which can be 'both difficult and unfair'.[47] As the Experts' Roundtable has noted, in the absence of any requirement for the respondent to produce evidence of the basis of their action, 'it can be extremely difficult to prove what was in the mind of the respondent. As a result, many cases of direct discrimination fail, because although less favourable treatment is proved, the court cannot be satisfied that this treatment was 'on the basis of' or 'because' of the prohibited attribute.'[48]

2.2.2 Very few, if any, comparable international jurisdictions impose the full burden of proof on the complainant in discrimination law.[49] ACHRA agrees with the recommendation of the Experts Roundtable that any definition of direct discrimination in a Consolidated Act should be consistent with that in the *Fair Work Act 2009* (Cth),[50] which provides that once a *prima facie* case has been made out that any disadvantage appears to have been on a prohibited ground under the Act (i.e.: an allegation that discriminatory conduct is the reason for disadvantage), a presumption will arise that action was taken for the discriminatory reason alleged, unless the respondent proves otherwise.[51]

2.2.3 In creating a rebuttable presumption, the onus should be on the complainant to establish three things:

(1) that they have a protected attribute or attributes;

(2) that the respondent has done something (or not done something) or is proposing to do something unfavourable to the complainant; and

(3) that they suffered, or will suffer detriment because of the past or proposed action (or inaction) of the respondent.

2.2.4 ACHRA considers that the 'rebuttable presumption' approach taken by the FWA properly requires a court or tribunal to directly address the substantive issue of the basis for an action and consider whether a justification for discrimination existed; rather than focusing first on procedural or onus of proof issues which do not deal with legal obligations. The purpose of establishing a rebuttable presumption is to encourage parties to focus on substantive issues;

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[47] Discussion Paper, p. 15, at [52]
[48] Experts' Roundtable, 13 December submission, p. 13
[49] See: list of comparable jurisdictions and models of shifting onus of proof provisions in the Discussion Paper, p. 15, at [50]
[50] FWA, section 361
[51] Experts' Roundtable, 31 March 2011 Report, p. 9. This is also the approach favoured by the Human Rights Law Centre: *Realising the Right to Equality: The Human Rights law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination* Laws, January 2012, p. 12

such as what was the basis of the action, if there was a prohibited attribute(s) and whether there is any acceptable justification for the action.

2.2.5 This approach also enables and encourages a respondent to volunteer all relevant information to the issues in the complaint. Further, this approach ensures that court hearings focus on the central issue of whether the reason for what happened is a discriminatory reason: it is hoped that this will lead to clearer and more readily applicable case law.

2.2.6 ACHRA considers that, in order for a respondent to prove that an action was taken (or not taken) for a non-discriminatory reason; they will need to provide evidence of a lawful reason for the treatment, effectively challenge the allegation that any disadvantage was suffered or will be suffered by the complainant or effectively challenge the allegation that they were responsible for, or engaged in, the conduct that resulted in the treatment. Showing that the reasons relied on by the employer were sufficient in themselves as a basis for the action would discharge the presumption, unless the credibility of the evidence is questioned. The respondent would (as a matter of course) have access to any relevant exceptions provided for in the Consolidated Act that might render conduct lawful, including a general limitations provision, if it was enacted in a Consolidated Act.

2.2.7 ACHRA considers that the aim of anti-discrimination law should be to require duty holders to provide evidence of why they took the particular action that has been challenged, so that the court or tribunal can make an assessment of whether it was on an unlawful basis. While this concept is often discussed in terms of reversing the onus of proof, a formulation more familiar in the Australian legal system is the idea of a rebuttable presumption.[52]

Recommendation 9: that there be a rebuttable presumption that makes clear that alleged direct discriminatory treatment will be considered to be discriminatory for the purposes of the definition, unless a respondent can prove otherwise.

(b) Indirect discrimination

2.2.8 ACHRA's first position is that the 'reasonableness' element of indirect discrimination be removed, and a separate general limitations (or defence) provision be introduced in a Consolidated Act. This approach would require a respondent to establish that a requirement, condition or practice was 'legitimate and proportionate' or 'reasonable' in all the circumstances, after the complainant had made a case that the respondent had unlawfully discriminated against them, applying the relevant elements of a unified test of discrimination.

2.2.9 However, should a Consolidated Act maintain the element of 'reasonableness' in the test of indirect discrimination, ACHRA considers that there should be a shifting onus of proof built into the test: that is, once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging the complainant, or people with the relevant attribute, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the

[52] See: FWA, section 361, Experts' 13 December 2011 Submission, p. 12; Experts' Roundtable, 31 March 2011 Report, pp. 8 – 9

alleged discriminator.[53] A disadvantage of this approach, compared to the approach of a separate defence to discrimination, is that it is likely to add complexity to the test of discrimination by requiring it to incorporate the shifting onus of proof within the definition of unlawful conduct.

2.2.10 ACHRA notes that the *Anti-Discrimination Act 1991* (Qld) (the Queensland Act), the *Discrimination Act* 1991 (ACT) and the *Equal Opportunity Act 2010* (Vic),[54] all similarly provide for a shifting onus of proof in relation to the respondent establishing that a requirement, condition or practice is reasonable in the circumstances.

2.2.11 This approach (a shifting onus of proof to establish reasonableness) reflects well-established common law principle that evidence should be weighed according to the capacity of the party to produce it. It is also consistent with longstanding industrial law provisions that shift the onus of proof where one party is in the better position to provide that particular evidence.[55]

2.2.12 There is support for this approach in international jurisdictions. In the United Kingdom, the respondent must be able to 'reasonably justify' a discriminatory practice.[56] The *Human Rights Act 1985* (Canada) (further discussed above) requires the respondent to establish whether or not there is a *bona fide* occupational requirement or justification in order to avoid a finding of unlawful discrimination.[57] Similarly, *Human Rights Act 1993* (New Zealand Act) specifically places the onus on the respondent to establish a 'good reason' for the discriminatory practice.[58] In the United States, the test is one of 'business necessity'.[59] The European Union has also issued Directives on the burden of proof in relation to gender discrimination and sex discrimination cases, so that where a person has shown an arguable case of discrimination, the burden of proof shifts to the respondent to show there has been no discrimination.[60] The burden does not shift in response to a mere allegation of discrimination.

2.2.13 On the basis of consistency across Australian jurisdictions, and given that there have been demonstrated difficulties in complainants establishing unreasonableness,[61] ACHRA supports applying the shifting onus requirement for indirect discrimination matters (currently set out in the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth) to all grounds of discrimination covered by a Consolidated Act.

Recommendation 10: that, if a Consolidated Act does not introduce a general limitations provision, it should provide for a shifting onus of proof from the complainant to the respondent to establish that the identified requirement, condition or practice is justified in all the circumstances.

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[53] See: subsection 15(2) of the *Age Discrimination Act 2004* (Cth) as introduced, and section 7B of the *Sex Discrimination Act* 1984 (Cth) and subsection 6(4) of the *Disability Discrimination Act* 1992 (Cth) as amended. Note: there is no comparable provision in the *Racial Discrimination Act 1975* (Cth)

[54] *Anti-Discrimination Act 1991* (Qld), section 205, *Discrimination Act 1991* (ACT), section 70, *Equal Opportunity Act 2010* (Vic), subsection 9(2)

[55] For example: Commonwealth *Workplace Relations Act 1996*, subsections 659 and 664 (repealed)

[56] *Equality Act 2006* (UK), paragraph 45(3)(d)

[57] *Human Rights Act 1985* (Canada),, paragraphs 15(1)(a), 15(1)(g) and subsection 15(2)

[58] *Human Rights Act 1993* (New Zealand), section 65

[59] *Griggs v Duke Power Company* 401 US424 (1971)

[60] EU Directives 97/80/EC and 2000/43/EC

[61] See, for example: *State of Victoria v Schou* [2004] VSCA 71

2.2.14 On the basis of the above discussion and recommendations in relation to the tests for direct and indirect discrimination, ACHRA recommends that a unified test of discrimination, on the lines of the following draft provision, be adopted in a Consolidated Act:

Definition of discrimination

(1) For the purposes of this Act, discrimination includes:

(a) any action or inaction, distinction, restriction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity on the basis of one or more protected attributes or a combination of attributes; or

(b) harassment on the basis of an attribute or more than one attribute.

(2) Without limiting the generality of subsection (1), a person discriminates against another person if:

(a) the person treats or proposes to treat the other person unfavourably on the basis of one or more attributes, or a combination of attributes; or

(b) the person imposes or proposes to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person, or a group of people on the basis of one or more attributes, or a combination of attributes.

(3) In proving whether discrimination occurred for the purpose of subsection 2(a), it is presumed that the unfavourable treatment happened, is happening, or will happen on the basis of one or more attributes, or a combination of attributes, unless the person responsible for the treatment proves otherwise.

2.3 Should a Consolidated Act include a special measures provision?

2.3.1 ACHRA supports the recognition that insistence on identical treatment for all can, in some instances, entrench discrimination (particularly systemic discrimination) and prevent achievement of substantive equality. ACHRA therefore considers that positive measures to ensure equal enjoyment of human rights should be permitted in appropriate circumstances, and be formally recognised in law. Special measures should be understood as an expression of substantive equality rather than an exception to it. Substantive equality is about recognising the need for different approaches to overcome the effects of disadvantage and to facilitate the full enjoyment of that group's rights without discrimination. Some groups that have been disadvantaged by discrimination in the past may need special assistance to address that disadvantage.

2.3.2 The *Racial Discrimination Act 1975* (Cth), the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth) already contain this recognition in varying terms in each Act.[62] General special measures provisions (that apply to all protected attributes) also exist in most State and Territory anti-discrimination Acts.[63]

2.3.3 ACHRA recommends that a Consolidated Act include a special measures provision similar in form to that in section 12 of the *Equal Opportunity Act 2010* (Vic), which clearly establishes that special measures do not fall within the scope of discriminatory behaviour prohibited by the Act.[64] Section 12 of the *Equal Opportunity Act 2010* (Vic) sets reasonable parameters for special measures, requiring them to be:

- Taken in good faith
- Reasonably likely to achieve their remedial purpose
- Proportionate means of achieving their purpose; and
- Justified because of the particular, continuing need for advancement/assistance of the group.[65]

2.3.4 These parameters could be reflected in a Consolidated Act, to give clear structure and guidance to organisations designing, or assessing, special measures.

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[62] *Age Discrimination Act 2004* (Cth), paragraph 33(c), *Disability Discrimination Act 1992* (Cth), paragraph 45(1)(a), *Racial Discrimination Act 1975* (Cth), subsection 8(1), *Sex Discrimination Act 1984* (Cth), section 7D

[63] Including: *Equal Opportunity Act 2010* (Vic), section 12, *Discrimination Act 1991* (ACT), section 27, *Anti-Discrimination Act 1996* (NT), section 57, *Anti-Discrimination Act 1998* (Tas), sections 25 and 26, *Anti-Discrimination Act 1991* (Qld), section 105

[64] This approach is also recommended by the Experts' Roundtable in its 13 December 2011 Submission, pp. 14 – 15

[65] *Equal Opportunity Act 2010* (Vic), subsection 12(3)

2.3.5 The Explanatory Memorandum to the *Equal Opportunity Act 2010* (Vic) notes that the factors in section 12 do not specifically require consultation with the group that is to be assisted or advanced by the measure in question. However, the Explanatory Memorandum notes that, in practice, evidence of some consultation with the group to be assisted or advanced is likely to be necessary, because it is not intended that special measures authorise conduct that is not wanted and not welcome by the target group.[66]

2.3.6 A Consolidated Act should also require that the measure has been the subject of consultation with the affected group, although what constitutes adequate 'consultation' should vary, depending on the nature of the measure and the make-up of the affected group. It is important that the obligation to consult does not become overly onerous for small organisations and vulnerable groups.

2.3.7 The special measures provision in section 12 of the *Equal Opportunity Act 2010* (Vic) does not permit a special measures program or service to continue after substantive equality has been achieved, unless removal of it would result in the target group again becoming disadvantaged.[67] The provision therefore recognises that special measures are a balancing measure, intended to facilitate equality, but not to preference one group over another substantive equality is achieved.

2.3.8 ACHRA also agrees with the position of the Experts' Roundtable that a Consolidation Act should include a process for temporary 'authorisation' or certification of special measures, to reassure business and other duty holders employing such measures that they are not in breach of the Act when taking an identified 'special measure'. Such a process has been informally undertaken in Victoria: in 2011, the Victorian Civil and Administrative Tribunal made orders in three cases that organisations seeking to employ Aboriginal people in specified roles were taking special measures under section 12 of the *Equal Opportunity Act 2010* (Vic), and were therefore not in breach of the law.[68]

2.3.9 A certification power could be granted to the Federal Commission as a function similar to the granting of temporary exemptions. Certification would be for a set period of time (potentially up to 5 years),[69] to ensure special measures remain subject to review over time, so that the purpose remains relevant and remedial in nature.

Recommendation 11: That a Consolidated Act should include a single special measures provision, covering all protected attributes. It should include guidance on the reasonable parameters of special measures.

Recommendation 12: That a Consolidated Act should include a process for temporary authorisation (or certification) of special measures.

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[66] Explanatory Memorandum: *Equal Opportunity Act 2010* (Vic) (Amended print), 26 March 2010, p. 15

[67] *Equal Opportunity Act 2010* (Vic), subsection 12(7)

[68] *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238, *Cummeragunja Housing & Development Aboriginal Corporation (Anti-Discrimination Exemption)* [2011] VCAT 2237, *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236

[69] This was the time limit proposed by the Federal Commission for the certification of special measures in its Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 230, at [671]

2.4 Should the duty to make reasonable adjustments be clarified? Should it apply to other attributes?

2.4.1 As noted in the Discussion Paper,[70] a duty to make reasonable adjustments is implicit in the prohibition of indirect discrimination in each of the current Commonwealth anti-discrimination Acts; however, only the *Disability Discrimination Act 1992* (Cth) sets out an explicit duty to make reasonable adjustments. ACHRA considers that, in the interests of clarity and consistency, a Consolidated Act should include express provision for reasonable adjustment and that this provision should apply to all covered attributes and to all areas of public life covered by a Consolidated Act.

2.4.2 ACHRA also agrees with the Federal Commission that the form of the current reasonable adjustment provision in the *Disability Discrimination Act 1992* (Cth) could be improved and simplified. ACHRA considers that the reasonable adjustment provisions set out in the *Equal Opportunity Act 2010* (Vic) provide a good approach, and could be the basis of provisions in a Consolidated Act, where the provisions should apply to all protected attributes and to all areas of public life covered by a Consolidated Act. An example of a 'reasonable adjustments' provision can be found in section 20 of the *Equal Opportunity Act 2010* (Vic), which, in respect of the duty held by employers, relevantly provides:

> "Employer must make reasonable adjustments for person offered employment or employee with a disability
>
> (1) This section applies to a person with a disability who—
>
> (a) is offered employment or is an employee; and
>
> (b) requires adjustments in order to perform the genuine and reasonable requirements of the employment.
>
> (2) The employer must make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.
>
> (3) In determining whether an adjustment is reasonable, all relevant facts and circumstances must be considered, including—
>
> (a) the person's or employee's circumstances, including the nature of his or her disability; and
>
> (b) the nature of the employee's role or the role that is being offered; and
>
> (c) the nature of the adjustment required to accommodate the person's or employee's disability; and
>
> (d) the financial circumstances of the employer; and
>
> (e) the size and nature of the workplace and the employer's business; and

[70] Discussion Paper, p. 17 at [58]

(f) the effect on the workplace and the employer's business of making the adjustment 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 the adjustment; and

(h) the consequences for the person or employee of not making the adjustment; and

(i) any relevant action plan made under Part 3 of the *Disability Discrimination Act 1992* of the Commonwealth; and

(j) if the employer is a public sector body within the meaning of section 38 of the *Disability Act 2006* (Vic), any relevant Disability Action Plan made under that section."

2.4.3 ACHRA also notes the recommendation that a Consolidated Act introduce a positive duty (applicable to all duty holders under the Act) to eliminate discrimination and harassment, as far as reasonably possible. The operation of this duty should make duty holders more aware of the need to make reasonable adjustments and accommodations for people with protected attributes, in all areas of public life covered by a Consolidated Act, where it is necessary to do so.

2.4.4 Extending the obligation to make reasonable adjustments to all protected attributes is also in keeping with the goal of eliminating systemic discrimination and promoting substantive equality.

Recommendation 13: that a Consolidated Act include express provision for reasonable adjustments, and that this provision should apply to all attributes.

2.5 Should organisations have a positive duty to eliminate discrimination and harassment?

2.5.1 Australia has a positive duty to provide effective protection from discrimination in accordance with international human rights law.[71] As noted by the United Nations Human Rights Committee (UNHRC), statutes prohibiting discrimination are often insufficient to guarantee true equality, particularly for groups traditionally subject to discrimination.[72]

2.5.2 One way for Australia to better eradicate discriminatory practices is to impose a positive duty on the public and private sectors to eliminate discrimination as far as possible. A positive duty would serve to clarify existing obligations not-to-discriminate, and encourage duty holders take a proactive approach to compliance. Because a positive duty is a preventative rather than remedial approach, it goes a long way to relieving the individual burden presently placed on complainants to identify and address human rights issues under the current anti-discrimination laws.

2.5.3 Commonwealth anti-discrimination laws currently rely on individual complainants to identify and challenge discriminatory conduct. This model has limited the potential to prevent discrimination because it relies on individuals who have experienced discrimination to facilitate compliance by lodging a complaint, and fails to address the systemic causes of discrimination.

2.5.4 Positive duty provisions are consistent with emerging international practice, [73] and have the advantage of providing a clearer, simpler mechanism to ensure that public and private bodies examine their policies and practices and provide training, and promote proactive compliance. Larger organisations may need to demonstrate a more sophisticated approach to compliance than a small business.

2.5.5 Australia currently lags behind comparable jurisdictions in implementing positive duty provisions into anti-discrimination laws.[74] At the federal level, there are few examples of positive duties in anti-discrimination legislation. The *Disability Standards for Education 2005*, for example, impose an obligation on education providers to make reasonable adjustments to accommodate the needs of students with a disability. Following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the *Disability Discrimination Act 1992* (Cth) was amended to make explicit the positive duty

[71] ICCPR, Article 20

[72] Human Rights Committee, *General Comment 18, Non-Discrimination*, [10]. See also Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, p. 11

[73] Experts' Roundtable, 13 December 2011 submission, p. 24. See also: *Northern Ireland Act 1998* (UK), section 75 and Schedule 9; *Fair Employment and Treatment (NI) Order 1998*; *Employment Equity Act 1998* (Sth Afr); *Promotion of equality and Prevention of Unfair Dismissal Act 2000* (Sth Afr), section 5; *Executive Order 11246 of Sept 24, 1965 – Equal employment opportunity* (US)

[74] Experts' Roundtable, 13 December 2011 submission, p. 24. See also, *Northern Ireland Act 1998* (UK), section 75 and Schedule 9; *Fair Employment and Treatment (NI) Order 1998*; *Employment Equity Act 1998* (Sth Afr); *Promotion of equality and Prevention of Unfair Dismissal Act 2000* (Sth Afr), section 5; *Executive Order 11246 of Sept 24, 1965 – Equal employment opportunity* (US)

to make reasonable adjustments for a person with a disability.[75] These amendments provide a cause of action for a failure to make reasonable adjustments. However what is described as a positive duty in this context is still limited in the sense that it is not a proactive obligation on service providers or government agencies to ensure that existing structural features that may disadvantage people with a disability are removed or altered.[76]

2.5.6 The *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth) do not contain positive duties to promote equality and eliminate discrimination, but do provide a defence of reasonable preventative action where they can demonstrate that they have taken reasonable precautions to prevent unlawful behaviour from occurring.[77]

2.5.7 Victoria is currently the only Australian state to have introduced a positive duty to promote equality and prevent discrimination. Under the *Equal Opportunity Act 2010* (Vic), all organisations covered by the law – including government, business, employers and service providers – have a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.[78]

(a) Who should the positive duty apply to?

2.5.8 Substantive equality cannot be achieved without a collective commitment to preventing and eliminating discrimination across all sectors – both public and private. Without application to both sectors – as is the case with the positive duty under the *Equal Opportunity Act 2010* (Vic) – a positive duty would miss the opportunity to precipitate widespread cultural change.

2.5.9 The obligation not to discriminate and to make reasonable adjustments under federal anti-discrimination laws has existed for a significant period of time. [79] Accordingly, all duty holders should have a firm grasp of their obligations and how to meet them. ACHRA is of the view that reframing existing obligations not to discriminate as a positive duty to prevent discrimination serves only to clarify existing obligations.

2.5.10 The framework for compliance with a positive duty already exists for many public and private sector bodies, which take positive measures to promote equality, either as best practice or to avoid being held vicariously liable for discrimination or harassment. Many employers for example have systems in place which are designed to satisfy the reasonable precautions defence available under the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth). As part of standard risk management and good business practice, many employers provide training about policies on equality in the workplace. In many cases,

[75] See: Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), p. 8, at [35]
[76] See: Federal Commission,, '*Improved rights protection for people with a disability*' (2009) available at: http://www.hreoc.gov.au/legal/publications/improved_dda2009.html;
[77] *Age Discrimination Act 2004* (Cth), subsection 57(4); *Disability Discrimination Act 1992* (Cth), subsection 123(4); *Racial Discrimination Act 1975* subsection 18A(2); *Sex Discrimination Act 1984* (Cth), subsection 106(2)
[78] *Equal Opportunity Act 2010* (Vic), section 15
[79] *Racial Discrimination Act 1975* , *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth)

compliance with a positive duty would involve reviewing policies and practices for potential discrimination and harassment, and considering how existing frameworks could be improved and strengthened to promote diversity and inclusion, and making appropriate changes.

2.5.11 A positive duty under a Consolidated Act would also sit alongside existing positive duties under the *Fair Work Act 2009* (Cth) and occupational health and safety legislation, which are conceptually well understood and accepted by employers. Just as occupational health and safety laws require employers to take appropriate steps to improve their systems, policies and practices to ensure workplaces are safe and injuries are prevented, so a positive duty under a Consolidated Act would require appropriate steps to prevent problems before they occur, such as making sure premises and services are accessible to people with a range of disabilities.

2.5.12 In the absence of a positive duty applying to the private sector, ACHRA supports the Experts' Roundtable suggestion regarding the use of other tools (such as equality targets as part of government procurement practices) to increase the reach of the duty.[80]

(b) How should the duty be implemented?

2.5.13 There are various ways to implement a positive duty, including guidelines, education, action plans and monitoring progress.

2.5.14 ACHRA views the implementation and enforcement of a positive duty as underpinned by two important approaches: self-regulation in relation to entities required to comply with the duty, and facilitation in relation to the Federal Commission's role as regulator. The self-regulatory strategy allows a solution to be tailored to each entity's circumstances and does not require a one size fits all approach, which would fail address systemic discrimination given its multiple and complex permutations. This approach should be complemented by the Federal Commission playing a facilitative role through the provision of education and compliance guidance.

(c) How should the duty be enforced?

2.5.15 To effectively address systemic discrimination, a breach of the positive duty should give rise to an independent cause of action that can be brought by an individual complainant, group, representative body, or the Federal Commission. This is not dissimilar to the options available under section 32 of the *Disability Discrimination Act 1992* (Cth) for breach of a disability standard.

2.5.16 ACHRA sees the Federal Commission's primary role in relation to the positive duty as an educator and facilitator, to work cooperatively with entities to assist them to achieve compliance with the duty, with strategic enforcement where necessary and appropriate. In this way ACHRA expects that the positive duty would provide greater impetus for compliance beyond the risk of individual complaints.

2.5.17 ACHRA supports the use of enforcement mechanisms by the Federal Commission as a last resort after attempts to encourage entities to comply

[80] Experts' Roundtable, 13 December 2011 submission, p. 25

with the duty and achieve cultural change have been unsuccessful. It recognises however, that enforcement mechanisms importantly provide the ultimate legal sanction to ensure that compliance with the duty is viewed as necessary and desirable.

2.5.18 Additional compliance tools are discussed under heading 6.1 below.

Recommendation 14: that a Consolidated Act should contain a duty to eliminate discrimination, sexual harassment, victimisation, and other forms of prohibited conduct as far as possible.

Recommendation 15: that the positive duty included in a Consolidated Act should:

- **Apply to public, private and non-profit organisations**
- **Include a requirement to take reasonable and proportionate measures to prevent discrimination**
- **Allow remedial action to be taken to address discrimination where necessary**

2.6 Should the prohibition against harassment cover all attributes?

2.6.1 The current provisions expressly dealing with 'harassment' in Commonwealth anti-discrimination legislation are inconsistent and confusing in their extent.[81] The relevant provisions in the *Sex Discrimination Act 1984* (Cth) deal only with unwelcome conduct of a sexual nature.[82] Harassment which does not have an overtly sexual element, but which occurs because of a person's sex or gender is left to be dealt with by the more general non-discrimination provisions in the *Sex Discrimination Act 1984* (Cth). Further, while the review of the *Sex Discrimination Act 1984* (Cth) resulted in the extension of the express provisions on sexual harassment to most of the circumstances covered by the general discrimination provisions, some anomalies remain.[83]

2.6.2 ACHRA considers that coverage of 'attribute-based harassment' in a Consolidated Act should be clearly expressed by including a reference to 'harassment' in the definition of discrimination, and an inclusive definition of harassment in the interpretation section of the Act. This inclusive definition should make clear that unlawful harassment can include behaviour which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute,[84] and that harassment can occur on a 'one-off' basis, rather than requiring a pattern of conduct before actions constitute unlawful harassment.

2.6.3 ACHRA has included a reference to 'attribute based harassment' in the proposed definition of discrimination, set out at heading 2.2.14 above.

Recommendation 16: that a Consolidated Act make clear that sexual harassment, and harassment on the basis of any protected attribute or attributes are unlawful in any area of public life covered by the legislation.

[81] Discussion Paper, p. 18, at [67]
[82] *Sex Discrimination Act 1984* (Cth), section 28A
[83] Federal Commission submission, p. 20 at [74] – [75]
[84] An example of an inclusive definition of harassment is found in the *Anti-Discrimination Act 1998* (Tas), subsection 17(1), which provides: "a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed." See also: *Equality Act 2010* (UK), section 26, which relevantly provides that: "A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating Bs dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

3. Protected attributes

3.1 Introduction

3.1.1 A Consolidated Act should prohibit discrimination on the basis of a 'protected attribute' which is defined in a separate exhaustive list. Parliament can then make alterations to this list over time without the necessity of a major restructure of the legislation. The States and Territories have benefitted from this approach which allows discrimination law to keep step with societal attitudes and be responsive to the experiences of people in the community.

3.1.2 A protected attribute should be defined to include a past, future or presumed attribute,[85] and imputations and characteristics of an attribute.[86]

3.1.3 A Consolidated Act should also extend protection against discrimination to persons who are associated with a person who has a protected attribute.

3.2 Periodic review of protected attributes

3.2.1 ACHRA supports a flexible and responsive approach to protection from emerging forms of discrimination. One way to identify and provide effective protection from emerging forms of discrimination would be to require regular, periodic review of the attributes protected under the Consolidated Act. This would ensure that protection from emerging forms of discrimination is appropriately considered, debated and (where appropriate) addressed in legislation.[87]

3.2.2 ACHRA supports regular, periodic review of the attributes covered by the Consolidated Act ensure that it continues to reflect developments in international human rights law, and provide effective protection from emerging forms of discrimination.

Recommendation 17: that a Consolidated Act should provide for regular, periodic review of attributes covered by the Act to ensure that emerging forms of discrimination are appropriately addressed.

[85] See: section 4 of the *Disability Discrimination Act 1992* (Cth)
[86] As reflected in s 5(1)(b) and (c) of the *Sex Discrimination Act 1984* (Cth)
[87] ACHRA notes that some submissions to the Consolidation Project have called for protection of 'other status' to harmonise the Consolidated Act with articles 2(1) and 26 of the ICESCR, and reflect international jurisprudence from the United Nations Human Rights Committee. ACHRA considers that protection of 'other status' may have the perceived effect of lessening the significance of entrenched discrimination on the basis of attributes such as race, sex and disability, and creating uncertainty due to its imprecision. It has therefore recommended statutory, periodic review of attributes to ensure that emerging forms of discrimination can be identified and addressed.

3.3 How should sexual orientation and gender identity be defined?

3.3.1 The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity provide that 'states shall adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.[88] ACHRA notes the commitment of the Government to achieving this.

3.3.2 Extensive background on this issue and the need for further protection in federal law in this area is set out in the Federal Commission's consultation report *Addressing sexual orientation and sex and/or gender identity discrimination*, 2011,[89] and its submission to the Senate *Inquiry into the Effectiveness of the Sex Discrimination Act 1984* (Cth).[90]

3.3.3 ACHRA recommends broad coverage of sexual orientation, sex characteristics, gender identity and gender expression under a Consolidated Act.

3.3.4 Any definition federally should ensure that it fully encompasses the experience of discrimination and harassment people who are intersex, androgynous and other individuals who do not fit within the sex binary approach, i.e. the definition should not be about choosing to identify as either male or female. Further, it should provide specific protection for individuals who may identify or be perceived as having a 'fluid gender', such as those individuals undergoing sex changes and those who do not identify as having a single fixed gender.

3.3.5 The definition should be broad enough to cover gender expression: how people express their gender through behaviour, appearance, mannerisms, voice, style of dress and other forms of communication.

Recommendation 18: that a Consolidated Act provide broad coverage of sexual orientation, sex characteristics, gender identity and gender expression as protected attributes.

3.4 Is the current coverage of protected attributes appropriate?

3.4.1 The grounds currently covered in federal anti-discrimination law are race, sex (including pregnancy, marital status and family responsibilities), disability and age. To the extent that the Constitution allows (and noting the broad scope of Australia's international obligations under provisions of the ICCPR and the ICESCR, the following additional areas should be included to ensure

[88] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: http://www.unhcr.org/refworld/docid/48244e602.html;
[89] Available at: http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/index.html;
[90] Available at: http://www.hreoc.gov.au/legal/submissions/2008/20080901_SDA.html#9_3;

consistency across the federal legislative framework and that Australia is best meeting its international commitments to the right to equality:

- all other grounds currently covered in the AHRC Act: religion, political opinion, social origin, medical record, criminal record, marital status, trade union activity.[91]

Recommendation 19: that all grounds covered by the *Australian Human Rights Commission Act 1986* (Cth) (including ILO 111 discrimination grounds) are protected attributes and cover all areas of public life under a Consolidated Act.

3.4.2 In addition, ACHRA recommends that two attributes be more clearly covered in the legislation to the extent permissible under the Constitution. Domestic violence disproportionately affects women and discrimination in this area is often a form of sex or disability discrimination. Homelessness also disproportionally affects people with other attributes already covered in anti-discrimination law. ACHRA is of the view that both of these areas could be more clearly covered and be simpler for people to understand their rights and responsibilities if they were protected as specific attributes.

3.5 Domestic and family violence

3.5.1 ACHRA notes that the Government has also committed to changing anti-discrimination legislation and the *Fair Work Act 2009* (Cth) so that they provide 'appropriate protection to victims of domestic violence in the workplace'.[92]

3.5.2 The health and economic costs of failing to properly address the immediate and long-term consequences of domestic and family violence—consequences that often manifest in the workplace, including related to discrimination—are of critical social importance.

3.5.3 Victims and survivors of domestic or family violence can face a number of challenges in the workplace. One such challenge is discrimination which, when experienced, can compound the harm of the original acts of violence.

3.5.4 Victims and survivors of domestic and family violence can experience similar vulnerabilities and require similar types of adjustments in the workplace as other workers who are considered 'vulnerable' such as persons with disabilities and family responsibilities. Although discrimination takes many forms, research suggests that it is common for victims and survivors of domestic and family violence to:

- be denied leave or flexible work arrangements to attend to violence-related matters, such as attending court or moving into a shelter;

- have their employment terminated for violence-related reasons, including a drop in performance or attendance occasioned by domestic or family

[91] *Australian Human Rights Commission Act 1986* (Cth), section 3 (definition of ILO discrimination)
[92] Australian Labor Party, 46th National Conference, Amendment 448A. See: http://www.google.com.au/search?q=alp+national+conference+2011+all+the+motions+&rls=com.microsoft:en-au&ie=UTF-8&oe=UTF-8&startIndex=&startPage=1;

violence, and

- be transferred or demoted for reasons related to violence.

3.5.5 Victims and survivors of family violence may also be denied access to housing where it is known that they are in a violent situation, or they may be evicted from housing because of the abusive and threatening behaviour of their partner.

3.5.6 Smith and Orchiston have found that the current protections under the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) do not provide adequate protection against the various kinds of discrimination experienced by victims of domestic violence.[93]

3.5.7 Victims and survivors of domestic and family violence need to be supported in the workplace, in their endeavours to find safe and suitable housing, and in all other areas of their lives. This would be supported by clearer protection in anti-discrimination law.

3.5.8 A number of other countries have enacted legislation to combat adverse treatment on the basis of being a victim/survivor of domestic violence: Spain, the Philippines, and several states in the United States of America. For example, New York amended its anti-discrimination legislation to include 'victim of domestic violence' as an attribute. The legislation also imposes an onus on the employer to make 'reasonable accommodations' for victims/survivors of domestic violence.[94]

Recommendation 20: that a Consolidated Act include 'victim or survivor of domestic/family violence' as a protected attribute.

3.6 Homelessness/ social origin or status

3.6.1 ACHRA considers that a Consolidated Act should prohibit discrimination on the basis of 'social origin or status' and 'homelessness'. For clarity, ACHRA has used the term 'social origin or status' to mean a person's status as homeless, unemployed, or as a recipient of welfare or social security payments,[95] and 'homelessness' to mean primary, secondary and tertiary homelessness.[96] The inclusion of both of these attributes would ensure that

[93] Belinda Smith, Tashina Orchiston, 'Domestic Violence Victims at Work: The Role of Anti-discrimination Law' (Working Paper 9 December 2011, available at: http://sydney.edu.au/law/about/staff/BelindaSmith/index.shtml;

[94] *New York State Executive Law*, Human Rights Law, Article 15, section 296

[95] See also P Lynch and B Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

[96] 'Primary homelessness' refers to people without conventional accommodation, such as those living on the streets, squatting in derelict buildings, or using improvised dwellings for shelter. 'Secondary homelessness' is a term used to describe people who move frequently from one form of temporary shelter to another. Secondary homelessness applies to people using emergency accommodation, youth refuges or women's refuges, people residing temporarily with relatives or with friends (because they have no accommodation of their own), and people using boarding houses on an occasional or intermittent basis. 'Tertiary homelessness' refers to people who live in boarding houses on a longer-term basis, operationally defined as 13 weeks or more. People in boarding houses are considered homeless because their accommodation falls below widely accepted community standards.

coverage of a Consolidated Act is slightly broader than the protection from discrimination on the grounds of 'social origin' provided under Article 1 of the ILO: thereby providing a necessary level of protection for people who experience discrimination on the basis of social security or welfare assistance (including recipients of public housing), unemployment, homelessness and/or poverty.[97]

3.6.2 The Gardner Review supported amendments to the *Equal Opportunity Act 2010* (Vic) to include homelessness as a protected attribute in an effort to eliminate systemic discrimination against homeless people.[98] The Gardner Review also recognised that discrimination can be a cause and consequence of homelessness, as well as further entrench homelessness.[99] For example, discrimination can prevent homeless people from securing accommodation and accessing services, and thereby compound disadvantage. The potential anxiety, depression and lack of control triggered by discrimination can also further marginalise people.

3.6.3 In ACHRA's collective experience, discrimination is a common experience for homeless people based on unfair and inaccurate assumptions about homeless persons' lifestyle, character and ability to pay for goods and services. According to a survey conducted in 2006 by the Homeless Persons Legal Clinic of 180 homeless people in Victoria, there were a number of reasons identified by participants for their experiences of discrimination.[100] They reported that they were discriminated against because of factors such as their appearance, their source of income (e.g. Centrelink benefits), association with or assistance by a welfare agency and/or being unable to meet certain requirements, such as having a fixed address.

3.6.4 The inclusion of the umbrella concept of 'social origin or status' or as a prohibited ground of discrimination was strongly supported in submissions to Victoria's Equal Opportunity Review. According to the Victorian Council of Social Services (VCOSS), this is the 'single most effective measure that can be taken in the current review to address causes and effects of disadvantage'.[101]

3.6.5 Protection from discrimination on the grounds of 'homelessness' and social origin or status' would reflect emerging international practice, and help to address the pervasive discrimination and stigmatisation of people who are in receipt of social security or welfare assistance, unemployed, homeless or poor.

Recommendation 21: that a Consolidated Act include homelessness as a protected attribute.

Recommendation 22: that a Consolidated Act include 'social origin or status' as a protected attribute.

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[97] Proponents of this approach are also concerned about discrimination based on geographical area, colloquially known as 'postcode discrimination'

[98] Gardner Review, Recommendation 46, p. 10

[99] Gardner Review, p. 97 at [5.97]

[100] Public Interest Law Clearing House, *Homelessness and Discrimination*, [1.6] p. 4 – 5; See: PILCH Homeless Persons' Legal Clinic 2007, *Discrimination on the grounds of homelessness or social status: Report to the Department of Justice*, PILCH, Melbourne, cited in the Gardner Review, p. 26 at [1.28]

[101] VCOSS, *Submission to the Equal Opportunity Review Discussion Paper*, January 2008, p. 10

3.7 How should the consolidation bill protect against intersectional discrimination?

3.7.1 The current segregation of attributes under Commonwealth anti-discrimination law has led to disputes about whether people have to show the discrimination was because of one particular attribute. It has also meant that some complainants feel they have to choose a particular 'path' of discriminatory conduct: which requires them to name and label discrimination as being because of their race, but not because of their gender or disability. In reality, people are subject to discrimination as a whole person and this can be on the basis of multiple protected attributes. For example, large numbers of immigrant women are forced to work in exploitative work arrangements. These women experience discrimination because of their sex and their race.

3.7.2 A discussion of including intersectional discrimination in a unified definition of discrimination is set out at 1.2.10 above.

3.7.3 ACHRA notes that the Federal Commission handles complaints flexibly so that a complaint made alleging discrimination on the basis of more than one attribute or on the basis of a combination of attributes is routinely handled as a single complaint rather than a series of complaints on separate grounds.

3.7.4 A Consolidated Act could more clearly reflect this situation by demonstrating clear coverage of discrimination on the basis of one or more protected attributes.

Recommendation 23: that a Consolidated Act should clarify the coverage of discrimination on the basis of more than one protected attribute so as to address intersectional discrimination.

4. Protected areas of public life

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

4.1.1 A number of areas of public life covered by existing legislation are not the subject of specific questions in the Discussion Paper: including education; provision of goods, services and facilities; accommodation; transactions in interests in land; and administration of Commonwealth laws and programs. Mindful of the Government's commitment to prevent lessening of existing rights and coverage under anti-discrimination law, ACHRA assumes that a Consolidated Act would maintain these areas of coverage and apply them to all protected attributes.

4.1.2 ACHRA considers it is important that the areas of public life covered by a Consolidated Act be simplified and made consistent. ACHRA notes that, currently, the application provisions of the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth) are particularly complex and inconsistent with one another.

4.1.3 ACHRA therefore recommends that a Consolidated Act have a general prohibition against discrimination in all areas of public life, similar to that set out in section 9 of the Racial Discrimination Act 1975 (Cth). Section 9 of the *Racial Discrimination Act 1975* (Cth) prohibits discrimination in the 'political, economic, social, cultural or any other field of public life' consistent with Australia's human rights obligations.

4.1.4 Whilst ACHRA supports a broad prohibition of discrimination in all areas of public life, it also considers that the definition areas of public life should contain a non-exhaustive list of areas of public life to provide guidance on the Consolidated Act's coverage, and clarity about the 'public/private life' divide.

4.1.5 Without limiting the coverage of Consolidated Act, ACHRA considers that areas of public life should be broadly defined as 'political, economic, social, cultural or any other field of public life', should take into account definitions of public life in State and Territory anti-discrimination laws, and should include:

- Accommodation
- Clubs
- Education
- Disposal of land
- Access to premises

- Employment and employment-related areas
- Goods and Services (including facilities, and services relating to entertainment, refreshment and recreation)
- Local, State and Federal laws, programs and functions
- Statutory powers, services and functions
- Superannuation
- Sport.

4.1.6 For the avoidance of doubt, areas identified in the inclusive list should be broad enough to cover all policing activities (i.e. not simply services that are provided to the public), prisons and other closed environments, local government, statutory enforcement powers, licensing, and government functions, programs and services provided by private bodies.

4.1.7 Consistent with the objects and purpose of the Consolidated Act to prevent discrimination and harassment and promote substantive equality, 'areas of public life' should be interpreted broadly to give full effect to Australia's international human rights obligations and prevent duty holders contracting out of the Consolidated Act.

Recommendation 24: that a Consolidated Act include a general prohibition against discrimination, comparable to that of the *Racial Discrimination Act 1975* (Cth) including a non-exhaustive list of covered areas.

4.2 Should the consolidation bill apply to State and Territory Governments and instrumentalities?

4.2.1 ACHRA recommends that section 13 of the *Sex Discrimination Act 1984* (Cth), which relevantly provides that protection against discrimination does not extend to employment by State and Territory Governments and instrumentalities, not be re-enacted in a Consolidated Act, and that it be made clear that the Act applies to State and Territory Governments and their instrumentalities.

4.2.2 ACHRA notes that the effect of subsections 13(1) and 13(2) of the *Sex Discrimination Act 1984* (Cth) is that the prohibitions against discrimination in employment and sexual harassment do not bind the States or State instrumentalities (or their employees). ACHRA notes that the definition of State under the *Sex Discrimination Act 1984* (Cth) includes the ACT and NT,[102] and that the scope of 'instrumentality of a State' is potentially very broad.[103] As the Federal Commission has previously noted,[104] the ability of

[102] *Sex Discrimination Act 1984* (Cth),, subsection 4(1)
[103] See: Federal Commission,, Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 114, at [304]; Federal Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), at [5.42] – [5.44], available at: http://www.humanrights.gov.au/sex_discrimination/publication/pregnancy/report.html;

an aggrieved person to pursue a claim against a State instrumentality in a State or Territory jurisdiction is not sufficient protection against discrimination in many cases. For instance:

- Most State tribunals are no-cost jurisdictions, which can be a strong disincentive for applicants likely to incur significant legal costs in pursuing a meritorious claim.

- Some State tribunals are subject to a jurisdictional limit, which limits the amount of compensation able to be awarded to a successful complainant.[105]

4.2.3 ACHRA also notes that the *Sex Discrimination Act 1984* (Cth) is anomalous from the other Commonwealth anti-discrimination Acts, which all bind the Crown in right of the States.[106]

Recommendation 25: that a Consolidated Act apply to all States and Territories and State and Territory instrumentalities.

4.3 How should the consolidation bill protect voluntary workers?

4.3.1 ACHRA recognises that volunteers make a significant contribution to Australian society, across a wide range of areas and services: across the public and private spheres.

4.3.2 The existing Commonwealth laws prohibiting discrimination and harassment in the area of employment do not extend to volunteers. However, most Australian State jurisdictions provide some protection to volunteer, trainee or unpaid workers. For example, in Queensland, the definition of 'work' includes: student work experience; vocational industry placement; voluntary or unpaid work; paid or unpaid work by a person with an impairment in a sheltered workshop; work under a guidance, apprenticeship or occupational training or retraining program.[107] The *Anti-Discrimination Act 1996* (NT) covers work in a sheltered workshop and vocational training programs.[108] The *Equal Opportunity Act 1984* (SA) and the *Discrimination Act 1991* (ACT) cover unpaid work.[109] The *Anti-Discrimination Act 1998* (Tas) covers employment or occupation in any capacity, with or without remuneration.[110]

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[104] Federal Commission, Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 114, at [305]

[105] For example: *Anti-Discrimination Act 1977* (NSW),, paragraph 108(2)(a), which sets a cap on damages of $100,000; *Equal Opportunity Act 1984* (WA), paragraph 127(b)(i), which sets a cap on damages at $40,000

[106] *Disability Discrimination Act 1992* (Cth), section 14, *Racial Discrimination Act 1975* , section 6, *Age Discrimination Act 2004* (Cth), section 13

[107] *Anti-Discrimination Act 1991* (Qld), schedule, dictionary

[108] *Anti-Discrimination Act 1996* (NT), section 4

[109] *Discrimination Act 1991* (ACT) section 4, *Equal Opportunity Act 1984* (SA), section 5

[110] *Anti-Discrimination Act 1998* (Tas), section 3

4.3.3 In Victoria, recommendation 51 of the Gardner Review was that volunteer workers be given the same protection against discrimination as employees.[111] The definitions of 'employee' and 'employment' in the *Equal Opportunity Act 2010* (Vic) were subsequently changed to include work on an unpaid or voluntary basis, but this definition was only extended to the prohibition against sexual harassment in Part 6 of the Act.[112] Western Australia and New South Wales do not protect volunteers and other unpaid workers from discrimination.[113]

4.3.4 ACHRA is of the view that amending the definition of 'employee' in a Consolidated Act to include unpaid and volunteer workers is a necessity for realising substantive equality for Australia's workforce. It will also enhance the recognition and respect afforded to the volunteer workforce, and value their contribution through the protection of their right to equality. ACHRA concurs with the opinion of the Experts' Roundtable that there is no sufficient policy reason for excluding volunteers from protection from discrimination and harassment.[114] ACHRA notes that extending the definition of employee to include unpaid and volunteer workers will necessarily mean repealing the specific volunteer bodies' exemptions in the *Sex Discrimination Act 1984* (Cth) [115] and the *Age Discrimination Act 2004* (Cth).[116]

4.3.5 ACHRA notes that there has been a concern that extending the protections of anti-discrimination law to volunteer workforces can impose an unreasonable burden on small not-for-profit associations or clubs. However, ACHRA accepts the reasoning set out in the Gardner Review on this point, namely that:

> In some cases, an employer may need to make adjustments to accommodate a volunteer that are reasonable in the circumstances. Some volunteers only work a few hours a month. This could mean that compliance with the Act to accommodate such a volunteer may become unnecessarily burdensome. These concerns are addressed by the requirement to make reasonable adjustments and in the application of the test for indirect discrimination. In other words, what may be reasonable and require action in respect of a paid employee may well not be reasonable [or necessary] in respect of a volunteer.[117]

Recommendation 26: that volunteers and unpaid workers are protected from discrimination, sexual harassment and other forms of prohibited conduct under a Consolidated Act.

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[111] Gardner Review, p. 106 at [5.150]
[112] *Equal Opportunity Act 2010* (Vic), section 4
[113] In a recent review of the *Equal Opportunity Act* 1984 (WA), it was recommended that the legislation be amended to provide protection to volunteers: Equal Opportunity Commission 2007, *Review of the Equal Opportunity Act 1984 (WA) Final Report, Perth*, p 42. Similarly, a 1999 review of the Anti-Discrimination Act 1977 (NSW) recommended the inclusion of work done by volunteers, trainees or unpaid workers within the definition of work: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Report No.* 92, 1999, Sydney
[114] Experts' Roundtable, 31 March 2011 submission, p. 16
[115] *Sex Discrimination Act 1984* (Cth), section 39
[116] *Age Discrimination Act 2004* (Cth), section 36
[117] Gardner Review, page 106, at [5.149]

5. Exceptions and exemptions

5.1 Should the consolidation bill adopt a general limitations clause?

5.1.1 As noted in the Discussion Paper, the exceptions and exemptions (and the various ways in which they apply to conduct) provided under Commonwealth anti-discrimination legislation are inconsistent and potentially confusing for complainants and duty holders.[118] There is also concern that, while permanent exceptions in equal opportunity law provide a degree of certainty, they also carry the risk of excluding too much or too little depending on the circumstances: and this can undermine the protection and promotion of substantive equality.

5.1.2 The Discussion Paper proposed that an alternative method to the current range of permanent exceptions would be to introduce a general limitations clause to a Consolidated Act that could apply to all attributes in all areas of public life if certain elements were satisfied.

5.1.3 Various models for a general limitations clause have been suggested, including the *bona fide* occupational requirement test in the *Human Rights Act 1985* (Canada),[119] and an approach that examines the legitimacy of particular conduct in all the circumstances, based on the *Equality Act 2010* (UK).[120] This second approach requires that the alleged discriminatory conduct is a proportionate means of achieving a legitimate end or purpose. A provision framed around the UK model (incorporated into the definition of discrimination) is the approach favoured by the Experts' Roundtable for a Commonwealth general limitations clause.[121]

5.1.4 ACHRA considers that there is substantial merit in simplifying and limiting the scope of some of the existing exceptions and exemptions (noting the inconsistent use of the two terms across the Commonwealth Acts) in a Consolidated Act: and that this can be achieved by introducing a general defence to discrimination in the form of a general limitations test, that replaces (as far as possible) specific exceptions and exemptions.

5.1.5 One advantage of introducing a general defence of justification to a Consolidated Act is that all relevant circumstances can be considered in determining whether discrimination is unlawful or not, which allows for a fairer balancing of the rights and interests of duty holders and rights holders under the Act.

5.1.6 However, ACHRA agrees with the Federal Commission that there is a need to ensure that replacement of specific exceptions by adoption of a general

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[118] Discussion Paper, p. 37, at [143]

[119] *Human Rights Act 1985* (Canada), section 15. This test is discussed in the Discussion Paper at p. 37, at [145]

[120] For example: UK Act, subsection 13(2): 'if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.'

[121] Experts' Roundtable, 13 December 2011 submission, p. 9

limitations clause does not result in excessive uncertainty and complexity,[122] or unreasonably weaken the general prohibition against discrimination. To this end, courts would need to undertake careful consideration of what is 'justified' and 'proportionate' conduct, within the overarching objects of equal opportunity legislation, when applying a general limitations test.

5.1.7 ACHRA notes that the Senate Report following the Review of the *Sex Discrimination Act 1984* (Cth) recommended consideration of replacement of a number of permanent exceptions in that Act with a general limitations clause.[123] Further, in its submission to the Review of the *Sex Discrimination Act 1984* (Cth) review, the Federal Commission also recommended that the introduction of a general limitations test, permitting differential treatment strictly in accordance with human rights principles, be given favourable consideration. The Federal Commission noted that a general limitations clause would need to be 'narrowly crafted' to ensure that the right to equality is limited strictly in accordance with guiding human rights principles, and that the definition of unlawful discrimination may need to be amended to lower the threshold of conduct that initially engaged/limited the right to equality.[124] ACHRA agrees with this analysis.

5.1.8 ACHRA does not have a final view on the specific form of a general limitations provision for inclusion in a Consolidated Act, but agrees with the Federal Commission[125] that any such clause must be carefully drafted to ensure:

- that such a clause would not result in any diminution of rights in the area of racial discrimination;
- it can be made sufficiently clear that what is legitimate and proportionate should be assessed having regard to, and consistently with, the objects and purpose of the legislation;[126]
- that clear and specific criteria about the scope and application of the general limitations provision is set out in a Consolidated Act, to guide duty holders and complainants in applying the provision to conduct; and
- that appropriate guidance is provided, either in a Consolidated Act or in formal guidelines published by the Federal Commission, about the interaction between the general limitations clause and relevant State and Territory law, including the application of permanent exception provisions.

5.1.9 ACHRA recommends that favourable consideration be given to the adoption of a general limitations test in a Consolidated Act. ACHRA is hopeful that the submissions and discussions provided as part of this consultation process will further develop this issue.

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[122] Federal Commission, Submission, p. 34 at [147]
[123] Standing Committee on Legal and Constitutional Affairs, Report, p. xvii (Recommendation 35)
[124] Federal Commission, Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 163 at [465]
[125] See: Federal Commission, submission, pp. 34 – 34, at [148]
[126] To this end, ACHRA has proposed that a Consolidated Act have a clear objects and purpose provision (discussed at 1.1) which would guide the application of a general limitations test

Recommendation 27: that favourable consideration be given to the adoption of a general limitations clause in a Consolidated Act, to replace other exceptions as far as possible.

Recommendation 28: that a general limitations clause does not diminish or limit the existing protection against racial discrimination set out in the *Racial Discrimination Act 1975* (Cth).

5.1.10 In the event that the Commonwealth does not prefer the introduction of a general limitations clause to a Consolidated Act, ACHRA considers that it will be necessary to undertake a separate review of all existing permanent exceptions and exemptions in federal anti-discrimination legislation, and scrutinise them for scope, application and consistency with human rights obligations and the objects and purpose of equal opportunity law. Recommendations could then be made in relation to each exception, and whether it should be retained, amended or repealed in a Consolidated Act.

5.1.11 ACHRA considers a separate review of the permanent exceptions would be necessary given the complexity and uncertainty of the existing exceptions, the inconsistent application of varying exceptions across different Acts, and the varying community views on the necessity, scope and purpose of permanent exceptions. An inquiry of this scope should not be subsumed into the broader Consolidation Project, but rather should be the focus of a separate review.

5.1.12 ACHRA notes that a wholesale review of the exceptions in the Victorian Act was undertaken by the Victorian Scrutiny of Acts and Regulations Committee in 2009, and that the Committee subsequently recommended in its final Report that the Victorian Act should require the exceptions and exemptions be reviewed at least every 10 years, to determine whether they should be retained, amended or repealed.[127] This review was conducted separately to the Gardner Review into the Victorian Act.

5.1.13 ACHRA also notes the Federal Commission's recommendation to the Review of the *Sex Discrimination Act 1984* that all permanent exemptions in the *Sex Discrimination Act 1984* should be made subject to a three year sunset clause in their current form, and then progressively reviewed to see whether they should be retained, narrowed or removed.[128]

5.1.14 ACHRA considers that an appropriate body for undertaking this further inquiry into the exception provisions would be the (future) Parliamentary Joint Committee on Human Rights, which has the following functions under the *Human Rights (Parliamentary Scrutiny) Bill 2010* (Cth):

- examining Bills for Acts and legislative instruments for compatibility with human rights;
- examining Acts for compatibility with human rights; and

[127] Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995, Final Report,* November 2009, pp. 7 – 9

[128] Federal Commission, Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 163, at [463] – [464]

- inquiring into any matter relating to human rights which is referred to it by the Attorney-General and to report on these matters to both Houses of Parliament.[129]

Recommendation 29: that, if a general limitations clause is not introduced in a Consolidated Act, a separate review of the existing exception and exemption provisions be conducted: with recommendations made at the close of this review as to whether exceptions should be retained, amended or removed.

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

5.2.1 As a first position, ACHRA notes its recommendation that favourable consideration be given to a general limitations clause that substantially replaces the permanent exceptions across federal anti-discrimination legislation. With this in mind, ACHRA recommends that the religious exemptions that currently apply in the *Sex Discrimination Act 1985* (Cth)[130] and the *Age Discrimination Act 2004* (Cth)[131] be removed, and favourable consideration given to adopting a general limitations provision in a Consolidated Act. This approach arguably provides a more effective and balanced mechanism for religious institutions to defend their conduct on the basis that it is justified and proportionate, enabling impugned conduct to be tested with due regard to the organisation's purpose and legitimate objectives.

5.2.2 However, ACHRA notes the statement in the Discussion Paper that the Government is not proposing to remove the current religious exception provisions, apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity.[132] ACHRA expresses its disappointment at this decision, and notes its recommendation 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 and to provide improved protection against discrimination. The following recommendations are therefore made on the proviso that permanent religious exception provision(s) are re-enacted in a Consolidated Act.

5.2.3 ACHRA also notes the goals of the Consolidation project, and presumes that the Government does not intend to extend the application of any religious exceptions in a Consolidated Act to those attributes protected by the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 2004* (Cth).[133] ACHRA therefore makes the following recommendations only on the basis of the religious exemption provisions in the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth).

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[129] *Human Rights (Parliamentary Scrutiny) Bill 2010* (first reading draft): section 7
[130] *Sex Discrimination Act 1984* (Cth), subsection 37(d)
[131] *Age Discrimination Act 2004* (Cth), section 35
[132] Discussion Paper, p. 40, at [161]
[133] Note: the *Racial Discrimination Act 1975* and the *Disability Discrimination Act* 1992 (Cth) do not have equivalent religious exception/exemption provisions

5.2.4 While ACHRA acknowledges that actions taken to conform with religious doctrines are important and respect the right to freedom of religion, these considerations must be balanced against competing rights in the context of the authorising legislation. ACHRA considers that, without amendment, the religious exemptions currently included in the *Sex Discrimination Act 1984* (Cth)[134] and the *Age Discrimination Act 2004* (Cth)[135] constitute an unreasonable limitation on competing human rights (notably the equality right protected by anti-discrimination legislation, but also rights of privacy, freedom of expression and association).

5.2.5 Religious organisations are large-scale employers of Australian workers in a range of fields, including: recreational services, primary, secondary and tertiary education, social services and the health sector. ACHRA considers that, as a general proposition, religious organisations should have a degree of accountability that reflects their level of participation in areas of public life that are subject to equal opportunity law. ACHRA also considers that religious exceptions need to be framed in a manner that appropriately recognises the religious/secular divide and appropriately balances the competing rights of freedom of thought, religion and belief with the right to equality.

5.2.6 ACHRA considers that a better balance between religious freedom and the right to equality could be achieved by amending the current exemptions to ensure that 'core' religious activities are generally exempt from the operation of a Consolidated Act, while engagement of religious organisations in sectors of public life (such as employment) are subject to a more limited level of exception.

5.2.7 Such a divide would mean that religious organisations would still be able to lawfully discriminate on the basis of certain attributes in relation to their core activities such as the ordination or appointment of priests, ministers or members of a religious order, but would be limited in terms of discriminating on the basis of certain attributes where they are providing public services or facilities.

5.2.8 This separation between between 'core' and 'external' activities of religious bodies reflects the international law position that distinction between the right of freedom of thought, conscience, religion and belief[136] and the freedom to manifest this belief in public life entails differential treatment of these elements of the right in Article 18 of the ICCPR.[137] As a general rule, the freedom to hold a belief is broader in scope than the freedom to manifest that belief, and the freedom to manifest a belief may be reasonably limited.[138]

5.2.9 ACHRA also draws from the recommendation by the Experts' Roundtable[139] that the religious exception in relation to employment should not be available to a religious institution or organisation that is carrying out functions contracted by government, or where it is accessing public funds in order to do

[134] See: footnote 128 (above)
[135] See: footnote 129 (above)
[136] ICCPR, Articles 18(1), 18(2)
[137] General Comment No. 22, Article 2: *The right to freedom of thought, conscience and religion* (Art. 18), 30/07/1993 (GC 22)
[138] ICCPR, Article 18(3); see also: *C v United Kingdom* App. No. 10358/83, 37 ECHR Dec & Rep 142 at 147.
[139] Experts' Roundtable, 13 December 2011 submission, pp. 16 – 17

so. ACHRA is of the view that this limitation should be made clear in the exception provisions to enable religious organisations to clearly understand their obligations and the scope of the exception.

5.2.10 ACHRA proposes that an appropriate balance between the human rights engaged in the religious exception provisions could be struck by drafting a religious exception provision in the following terms:

1. Religious bodies: core religious activities

Nothing in (*insert relevant division and part*), done on the basis of a person's sex, marital status or sexual orientation, applies to:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order;

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or

(d) other core religious activities of a body established for religious purposes, being an act or practice that is necessary to conform with the doctrines, tenets or beliefs of that religion.

2. Employment by a religious body

Nothing in (*insert relevant division and part*) applies to:

Any distinction, exclusion or preference on the basis of a person's sex, marital status, or sexual orientation that is done in connection with employment as a member of staff of an institution that conforms with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith that is necessary to avoid injury to the religious susceptibilities of adherents of that religion or creed.[140]

3. The exception in subsection 2 does not apply to any distinction, exclusion or preference that is connected with employment by an institution that conforms with the doctrines, tenets, beliefs or teachings of a particular religion or creed, where:

(b) The institution is carrying out functions contracted by government in relation to the employment; or where

(c) The institution is accessing public funds to fund the employment.

5.2.11 ACHRA also draws from the recommendation by the Experts' Roundtable that religious organisations that want to rely on the exceptions should be required to identify the content, scope and basis of their claim in a way that informs

[140] This wording draws on the exception set out in the definition of discrimination in *International Labour Organization (ILO), Discrimination (Employment and Occupation) Convention, C111* (ILO 111), 25 June 1958, C111, available at: http://www.unhcr.org/refworld/docid/3ddb680f4.html; that is reflected in section 3 of the *Australian Human Rights Commission Act 1986* (Cth), with some limited amendment

people who might be affected of the proposed discriminatory conduct. This would mean that any organisation that seeks to rely on the amended exception (either subsection 1 or 2) must:

- provide a written statement of the doctrine or susceptibility involved, and
- document the basis of the claim of its religious character; and
- (In the case of subsection 2, where the discrimination relates to employment) make a case that the discrimination on the basis of the doctrine is a genuine occupational requirement for employment.

5.2.12 Such an approach would limit the need to have these questions determined by a secular court, although argument should still be heard about the breadth and basis of any claims made.[141] Ideally the statement should be available to be provided to any individual, such as an employee, student or service recipient, who may be affected by the religious doctrine.

5.2.13 In the event of a discrimination complaint being made to the Federal Commission, this statement should be provided to a complainant at a first step of dispute resolution, rather than as a final response provided at a conciliation conference or to a court if the complaint does not resolve.

5.2.14 Statements should be in writing and be authorised at an appropriate level of authority within the religious organisation.

5.2.15 The requirement of making a statement supporting reliance on the religious exception provision could be set out in guidelines issued by the Federal Commission; and in the event of a complaint, the Federal Court or Federal Magistrates Court could have reference to these guidelines to assist in determining whether the exception provision applies.

Recommendation 30: that any religious exception provision in a Consolidated Act appropriately reflect the balance between the right to hold and have a religious belief and the general prohibition against discrimination in areas of public life.

[141] Recent cases demonstrate the difficulty in determining the religious doctrine that is relied on to prove the application of the exceptions: *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, subsequently dismissed by the NSW ADT: *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293), and *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* [2010] VCAT 1613, currently on appeal to the Victorian Court of Appeal

5.3 Should temporary exemptions continue to be available?

5.3.1 The *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) provide for the Federal Commission to grant temporary exemptions from the unlawful discrimination provisions.[142] The legislation does not specify any criteria or procedures for consideration of exemption applications, although the Federal Commission has issued guidelines for the consideration of exemption applications under each Act, which indicate that exemption applications should be considered in the context of the objects of the relevant Act.[143] Exemptions may be granted up to a five year period and may be subject to any conditions that the Federal Commission thinks fit. Decisions to grant or refuse an exemption are reviewable by the Administrative Appeals Tribunal (AAT).

5.3.2 ACHRA considers that, in exceptional or (preferably) transitional situations, temporary exemptions can sometimes be required to make anti-discrimination legislation practical and workable, by protecting individuals or organisations from complaints of unlawful discrimination for a set period.

5.3.3 ACHRA considers that, when dealing with temporary exemptions, the overarching objects and purposes of anti-discrimination law should be a primary consideration, and the terms of the exemption should be as narrow and limited as possible (in terms of coverage), be for the shortest possible period of time, and be directly proportionate to the need for the exemption.

5.3.4 ACHRA proposes that the best way of achieving these outcomes would be for a Consolidated Act to set criteria for the application of the exemption power; that indicates that:

- exemptions should not be inconsistent with the objects and purposes of the Act;
- exemptions should encourage and exhort compliance with the law wherever possible (including by requiring timetables for compliance); and

[142] *Sex Discrimination Act 1984* (Cth), section 44, *Disability Discrimination Act 1992* (Cth), section 55, *Age Discrimination Act 2004* (Cth), section 44. There is no express exemption power in the *Racial Discrimination Act 1975*

[143] See: *Temporary exemptions under the Age Discrimination Act, Commission Guidelines*, 2010, available at: http://www.humanrights.gov.au/legal/exemptions/ada_exemption/ada_exemp_info_appl.html; *Temporary exemptions under the Disability Discrimination Act, Commission Guidelines*, 2010, available at: http://www.humanrights.gov.au/disability_rights/exemptions/Exemption_guidelines/Exemption_guidelines.html; *Temporary exemptions under the Sex Discrimination Act, Commission Guidelines*, 2009, available at: http://www.humanrights.gov.au/legal/exemptions/sda_exemption/sda_exemption_guidelines.html;

- the decision-maker should take into account relevant human rights when making a decision. Section 90 of the *Equal Opportunity Act 2010* (Vic) provides one example of a 'guiding' provision for granting exemptions.[144]

5.3.5 ACHRA considers that, wherever possible, exemptions should be granted on the condition that the applicant is taking active steps towards compliance with its obligations under Act, or that the circumstances that exist to warrant the exemption are temporary in nature and will be changed to ensure compliance in the future. This requirement is in keeping with the Federal Commission's current policy on temporary exemptions: in that the Federal Commission has not ordinarily been prepared to grant exemptions simply to enable discrimination to continue unchecked. The Federal Commission has indicated that its practice in this regard has been based on the general administrative law proposition that powers conferred by a statute are required to be exercised consistently with the objects of that statute and that any different result requires legislative or regulatory action rather than administrative action.[145]

5.3.6 In this regard, the Federal Commission has indicated that the temporary exemption power under the *Disability Discrimination Act 1992* (Cth) has performed a significant role in promoting compliance, by providing timetables for compliance with the law, and providing a mechanism for approving technical (and other) approaches to compliance.[146]

5.3.7 ACHRA recommends that the process for considering and granting temporary exemptions be made consistent across all grounds of discrimination, excepting for those attributes covered by the *Racial Discrimination Act* 1975 (Cth): race, colour, descent or national or ethnic origin, which are not subject to exemptions.[147] In this regard, ACHRA notes that there is currently no facility for granting temporary exemptions in relation to racial attributes under the *Racial Discrimination Act 1975* (Cth), because of the absolute nature of the protection against racial discrimination provided by CERD. ACHRA considers that ensuring that the protection against racial discrimination is not diminished by the introduction of a Consolidated Act (and any provisions within that Act) accords with the overarching goals of the Consolidation project.

5.3.8 ACHRA recommends that a Consolidated Act should continue to vest the power to grant temporary exemptions with the Federal Commission, as this reflects the degree of expertise and experience that the Federal Commission brings to the equal opportunity and human rights jurisdiction.

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[144] Section 90 of the *Equal Opportunity Act 2010* (Vic) relevantly provides that, when deciding whether to grant or revoke an exemption application, VCAT must consider whether the proposed exemption is unnecessary (for example, because the measure is a special measure and therefore not discrimination), and whether the proposed action is a reasonable limitation on the right to equality set out in the Charter.

[145] Federal Commission, Submission, p. 50, at [222]

[146] Federal Commission, Submission, p. 47, at [207]

[147] This definition of 'race' imports the definition of the term in the *Racial Discrimination Act 1975* (Cth), sections 9 and 10

5.3.9 ACHRA also recommends that the general process for considering exemption applications advocated by the Experts' Roundtable be adopted,[148] with some minor amendments. These processes are as follows:

- The Federal Commission should be required to:
  - publicly advertise each application for an exemption, calling for comment and submissions;
  - Notify the relevant State or Territory anti-discrimination agency of all exemption applications;
  - consider the exemption in accordance with the criteria set out in the Consolidated Act (set out above at 5.3.4);
  - grant an exemption only on a temporary basis for a defined period;
  - where appropriate, 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; and
  - maintain a public register of applications made and exemptions granted and refused.[149]

Recommendation 31: that the process for considering and granting temporary exemptions be made consistent across all grounds of discrimination, excepting those attributes covered under the *Racial Discrimination Act 1975* (Cth).

Recommendation 32: that the criteria for granting, renewing or revoking a temporary exemption be set out in a Consolidated Act, to ensure consistency and promote the objects of the Act.

Recommendation 33: that the Federal Commission be required to publish and seek submissions on exemption applications, and notify the relevant State or Territory anti-discrimination Agency of any exemption application.

[148] Experts' Roundtable, 13 December 2011 submission, pp. 17 – 18; see also: Experts' Roundtable, 31 March 2011 report, p. 13

[149] Note: the ACT jurisdiction has a similar notification and registration requirement which could be generally adopted in a Consolidated Act. Section 109 of the *Discrimination Act 1991* (ACT) relevantly provides that an exemption is a notifiable instrument and must be formally notified and listed on the ACT Legislation Register, in accordance with section 19 of the *Legislation Act 2001*(ACT).

6. Complaints and compliance framework

6.1 Are there other mechanisms that would provide certainty and guidance to duty holders to assist them to comply with their legal obligations?

(a) Practice guidelines

6.1.1 All Commonwealth anti-discrimination Acts include a function for developing and publishing guidelines, however the extent to which this function has been exercised has varied significantly.[150]

6.1.2 Guidelines under the anti-discrimination Acts do not have any defined legal status. As noted in the Federal Commission's submission, this can create uncertainty for organisations regarding the effect and benefit of acting in compliance with the Federal Commission's guidelines, and lead to perceived injustice if litigation fails to take account of action undertaken in reliance on guidelines issued by the Federal Commission.[151]

6.1.3 ACHRA supports the view of the Experts' Roundtable that it is a constructive practice to supplement anti-discrimination legislation with supporting documents to provide explanation and guidance on how to comply with anti-discrimination obligations.[152] We note however that while the existing function to develop guidelines plays an important educative role, this could be enhanced by enabling the Commission to issue guidelines with greater standing, where they are intended to be more prescriptive and provide greater certainty about conduct that would be compliant.

6.1.4 ACHRA acknowledges that courts and tribunals can already consider guidelines. However, an express power to develop guidelines with limited standing provides a degree of cogency and authority that general publications (irrespective of how they are described) may not.

6.1.5 The introduction of Practice Guidelines under the *Equal Opportunity Act 2010* (Vic) provides one option for providing clearer guidance on how to comply with anti-discrimination obligations.[153] Under this model, the VEOHRC may develop practice guidelines in consultation with relevant stakeholders. Practice guidelines are given standing by making them relevant to matters for consideration by the courts and tribunals. Developed in this way, ACHRA considers that a power to develop practice guidelines (or standards similar to those under the *Disability Discrimination Act 1992*

[150] Federal Commission, Submission, p. 37. The Federal Commission also has a general power to prepare and publish guidelines under the *Australian Human Rights Commission Act 1986* (Cth), paragraph 11(1)(n)
[151] Federal Commission, Submission, p. 37
[152] Experts' Roundtable, 13 December 2011 submission, p. 22
[153] *Equal Opportunity Act 2010* (Vic), section 148

(Cth)) would enhance the Federal Commission's advocacy role and its effectiveness in promoting compliance.

6.1.6 ACHRA acknowledges that the creation of practice guidelines with limited standing may lead to confusion about the status of Standards under the *Disability Discrimination Act 1992* (Cth) and that a general power to develop Standards may be preferable to ensure consistency.

6.1.7 Like the Expert Panel, ACHRA considers that existing Disability Standards should be preserved regardless of whether practice guidelines are introduced as these Standards provide a level of discrimination protection from which the proposed consolidated Act should not detract.[154]

(b) Standards

6.1.8 One alternative to a power to create practice guidelines of limited standing under the consolidated Act is to expand the Federal Commission's power to set Standards, similar to those under the *Disability Discrimination Act 1992* (Cth). Disability Standards have to fall within the scope of the *Disability Discrimination Act 1992* (Cth) but can elaborate upon obligations that exist and set benchmarks for equality.

6.1.9 Because Standards can have the effect of limiting rights by setting minimum standards for compliance, they must be developed through a rigorous consultation process with relevant stakeholders, including the public and industry bodies. Extensive consultations with stakeholders and other State human rights agencies will be critical to ensure their legitimacy and consistency.

6.1.10 Standards do not need a separate enforcement regime.[155] In the context of disability discrimination, non-compliance with a standard is an unlawful act under the *Disability Discrimination Act 1992* (Cth) in the same way that non-compliance with one of the existing anti-discrimination provisions is an unlawful act.

6.1.11 A broader power to set standards would enable the Federal Commission to set more definite benchmarks for equality than is provided for by existing legislation. Further, their regulatory nature assures greater compliance.

6.1.12 ACHRA welcomes further discussion about the most appropriate way for the Federal Commission to set benchmarks and provide greater clarity on compliance with the Act beyond the existing power to develop general guidelines.

[154] Experts' Roundtable, 13 December 2011 submission, p. 22

[155] See: Human Rights and Equal Opportunity Commission, *Frequently Asked Questions: Disability Standards*, available at: http://www.hreoc.gov.au/disability_rights/faq/stanfaq/stanfaq.html;

(c) Reviews

6.1.13 ACHRA recommends that the Federal Commission be empowered to review an organisation's programs and practices to assess compliance with the consolidated Act. This would enable the Federal Commission to engage directly with organisations on systemic discrimination and compliance with human rights instruments.

6.1.14 Similar powers were recently introduced in Victoria. Under the *Equal Opportunity Act 2010* (Vic), VEOHRC may, on request, review an organisation's programs and practices to determine their compliance with the Act.[156] Advice provided in the course of conducting a review does not give rise to any liability, and is intended to facilitate compliance rather than provide a rubber stamp of approval.

6.1.15 ACHRA considers that this function is consistent with the Federal Commission's responsibility to facilitate compliance with the Act, and provides a useful way of engaging with duty holders on potential discrimination.

Recommendation 34: that the Federal Commission should be able to review an organisation's programs and practices to assess compliance with the Consolidated Act.

(d) Action plans

6.1.16 ACHRA considers that the consolidated Act should provide a framework for the development, use and promotion of action plans for all attributes. Whilst the *Disability Discrimination Act* 1992 (Cth) specifically provides for the development and use of action plans, the *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth) and *Age Discrimination Act 2004* (Cth) do not.

6.1.17 Action plans provide a way for organisations to develop and specify the practical steps that it will take to comply with equal opportunity laws and achieve cultural change. The promotion of action plans on a public register enables organisations to market their commitment to equality and improve their policies and practices.

6.1.18 Cognisant of the Government's commitment not to place unnecessary regulatory burden on the public or private sectors, ACHRA recommends that the preparation of action plans should be voluntary. This approach would allow organisations to register their plans with the Federal Commission as a statement of their commitment to equality and improve their policies and practices.

6.1.19 Like the *Disability Discrimination Act 1992* (Cth), the consolidated Act should contain a requirement that an organisation's action plan is taken into consideration in the event of a complaint being made against it. This would provide a risk management incentive to organisations to develop action plans and take proactive steps to meet their positive duty. ACHRA notes that under a revised model, organisations should be able to continue

[156] *Equal Opportunity Act 2010* (Vic), section 151

lodging Disability Action Plans in the same way so as not to undermine the existing framework for addressing disability discrimination.

6.1.20 Subject to appropriate resourcing, the Federal Commission could play a role in working with organisations on request to develop an effective plan and provide a publicly available register of plans that meet a minimum set of criteria.

Recommendation 35: that the Consolidated Act allow organisations to lodge voluntary action plans with the Federal Commission in relation to any or all protected attributes.

Recommendation 36: That a Consolidated Act enable the Federal Commission to keep a register of action plans that meet minimum standards set by the Federal Commission.

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

6.2.1 ACHRA considers that the Federal Commission's function of handling discrimination complaints is an important part of a compliance framework, and a valuable means of enabling access to justice in the anti-discrimination jurisdiction. Provision for conciliation and other alternative dispute resolution in response to complaints allows resolution of compliance issues more quickly, at far less cost and with greater flexibility of processes and outcomes compared to reliance on recourse to the courts alone. Complaint processes provide an effective means for achieving remedies for past acts of discrimination and also for implementing agreed measures to eliminate and prevent discrimination into the future. The complaints process also works as a conduit for information about systemic patterns of discrimination that might otherwise escape regulatory detection.

6.2.2 ACHRA considers that there is no need for significant legislative changes to the current complaint inquiry and conciliation provisions. ACHRA considers that the alternative dispute resolution process allows appropriate flexibility in responding to a range different issues and circumstances, and has the capacity to provide for flexible solutions to discrimination issues.

6.2.3 ACHRA also considers that there is no need to remove the Federal Commission's current complaint inquiry function. As the Federal Commission has noted in its submission,[157] in many cases, some level of inquiry into a complaint is of significant value in enabling fairness of process and assisting parties to make informed decisions about participation in conciliation and the appropriate terms on which a complaint could be resolved.

[157] Federal Commission, Submission, p. 57 at [255]

6.2.4 Further, ACHRA considers that it would not be appropriate to limit or lessen the confidentiality of conciliation proceedings.[158] Confidentiality in a dispute resolution system is a fundamental aspect of ensuring confidence in the process and encouraging participation.

6.2.5 However, ACHRA notes that the *Australian Human Rights Commission Act 1986* (Cth) does not specifically impose similar confidentiality requirements on parties to a conciliation. ACHRA notes that the Federal Commission has suggested[159] that consideration be giving to clarifying the confidentially requirements on all participants in conciliation by including a provision in a Consolidated Act similar to section 117 of the *Equal Opportunity Act 2010* (Vic).[160]

6.2.6 ACHRA also notes that directions (in relation to confidentiality) regarding the conciliation processes are currently contained in section 46PK of the *Australian Human Rights Commission Act 1986* (Cth) which only applies expressly to compulsory conciliation. ACHRA agrees with the Federal Commission that a Consolidated Act make clear that these directions apply to both voluntary and compulsory conciliation processes.[161]

6.2.7 ACHRA is not in favour of a Consolidated Act providing a direct access to court option for complainants. ACHRA echoes the Federal Commission's concerns that this allowance would result in a disproportionate increase in the workload of the court,[162] as well as potentially disadvantaging those unrepresented complainants who would otherwise benefit from the flexible and informal nature of the Federal Commission dispute resolution process. Those complainants who chose direct access would also be likely to engage legal representation at a much earlier stage of the process than would otherwise be necessary. ACHRA considers that the administrative inquiry and conciliation process (at the Federal Commission) provides an important opportunity for complainants, who are often unrepresented, to obtain information about the law as it applies to the issues they are raising and reflect on the possible merit of their complaint before commencing often lengthy and costly litigation.

6.2.8 ACHRA also recommends that complaints to the Federal Commission on the basis of ILO 111 discrimination set out in section 3 of the *Australian Human Rights Commission Act 1986* (Cth)[163] be treated in the same way as

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[158] *Australian Human Rights Commission Act 1986* (Cth), sections 46PK (compulsory conciliation conferences to be held in private) and 46PS (the President must not include information about anything said or dine in the course of conciliation proceedings in any report that is provided to the court regarding a complaint)

[159] Federal Commission, Submission, p. 57 at [256]

[160] *Equal Opportunity Act 2010* (Vic), subsection 117(1): 'Evidence of anything said or done in the course of dispute resolution is inadmissible in proceedings before the Tribunal or any other legal proceeding relating to the subject matter of the dispute.'

[161] See: Federal Commission, Submission, p. 57 at [258]

[162] Federal Commission, Submission, p. 58 at [261]

[163] *Australian Human Rights Commission Act 1986* (Cth), section 3:

'(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

complaints of 'unlawful discrimination' under the AHRC Act, and be justiciable: rather than unsuccessful inquiries (following conciliation) merely being reported to the Commonwealth Attorney-General.[164]

6.2.9 ACHRA also recommends that complaints alleging that an act or practice done by or on behalf of the Commonwealth is inconsistent with, or contrary to, any human right (protected by international conventions),[165] also be justiciable. At present, where an inquiry is not settled by conciliation, and where the Federal Commission is of the opinion that an act or practice is inconsistent with or contrary to a human right, the only avenue for progressing this matter is for the Federal Commission to report to the Commonwealth Attorney-General.[166] While the Federal Commission currently has the power to make recommendations in the event that it finds a breach of human rights, including for the payment of compensation, these recommendations are not enforceable.[167]

Recommendation 37: that a Consolidated Act retain inquiry powers in relation to complaints and avoids prescriptive provisions in relation to the complaint process and forms of dispute resolution, other than to clarify the applicability of confidentiality provisions to voluntary as well as compulsory conciliation conferences.

Recommendation 38: that a Consolidated Act provide that complaints on the grounds of ILO 111 discrimination and contraventions of protected human rights be treated the same as 'unlawful discrimination claims' and be justiciable.

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

(a) Remedies

6.3.1 ACHRA agrees with the recommendation of the Experts' Roundtable that a Consolidated Act require courts to consider all adverse effects on a successful complainant, including future effects of discrimination, in assessing compensation for discrimination, rather than limiting any accounting to monetary compensation.[168] Another option for strengthening

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(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;'

[164] *Australian Human Rights Commission Act 1986* (Cth), paragraph 31(b)(ii)

[165] *Australian Human Rights Commission Act 1986* (Cth), subsections 11(1)(f), 20(1); 'human right' is defined in section 3 of the *Australian Human Rights Commission Act 1986* (Cth) as any right recognised in the ICCPR, declared by the Declarations or recognised or declared by any relevant international instrument. At present, the protection extends to any rights provided for in the ICCPR, and in the following Covenants: *the Convention on the Rights of the Child*, the *Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons* and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

[166] *Australian Human Rights Commission Act 1986* (Cth), subparagraph 11(1)(f)(ii)

[167] *Australian Human Rights Commission Act 1986* (Cth), paragraph 29(2)(c)

[168] Experts' Roundtable, 13 December 2011 submission, p. 23; see also: *Hall v Sheiban* (1989) 20 FCR 217

remedies could be enabling courts to make orders awarding aggravated, exemplary and/or punitive damages, where appropriate. ACHRA considers that these measures would go some way to addressing the fact that discrimination complainants have traditionally been poorly compensated.

6.3.2 The Federal Magistrates Court and Federal Court have the power to make any orders they think fit in discrimination matters.[169] However, ACHRA considers that minor amendments could be made to AHRC Act to encourage courts to make more proactive and creative orders that better address the effects of systemic discrimination and promote substantive equality. For example, an order could require a respondent to develop, implement and/or review a program or action plan aimed at addressing unlawful discrimination.[170] Further, an order could require that AHRC oversee any positive compliance strategies that a respondent is ordered to undertake.

Recommendation 39: that a Consolidated Act require courts to consider all adverse effects of discrimination when assessing damages, and indicate that a court may make orders for aggravated, exemplary and/or punitive damages in discrimination cases, where appropriate.

(b) Costs

6.3.3 There are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Magistrates Court and Federal Court. Rather, the courts have a general discretion to order costs under the provisions of the *Federal Court Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth).[171]

6.3.4 Some of the factors that have been identified in federal discrimination cases as being relevant to the discretion to order costs include:[172]

- where there is a public interest element to the complaint;[173]
- where the applicant is unrepresented and not in a position to assess the risk of litigation;[174]
- that the successful party should not lose the benefit of their victory because of the burden of their own legal costs;[175]
- that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage;[176] and

[169] *Australian Human Rights Commission Act 1986* (Cth), subsection 46PO(4)
[170] Similar amendments (to the *Australian Human Rights Commission Act 1986* (Cth)) are also recommended by the Experts' Roundtable: Submission dated 13 December 2011, p. 24
[171] *Federal Court Act 1976* (Cth), section 43; *Federal Magistrates Act 1999* (Cth), section 79
[172] See: Federal Commission, *Federal Discrimination Law*, Chapter 8, Costs Awards, 8.3.3, available at: http://www.hreoc.gov.au/legal/FDL/fed_discrimination_law_05/fdl2005chap08.html;
[173] *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; *Ferneley v The Boxing Authority of New South Wales* (2001) 115 FCR 306
[174] *Xiros v Fortis Life Assurance Ltd*;
[175] *Shiels v James* [2000] FMCA 2; *Travers v New South Wales* (2001) 163 FLR 99; *McKenzie v Department of Urban Services* (2001) 163 FLR 133

- that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged.[177]

6.3.5 ACHRA notes the research carried out by Beth Gaze and Rosemary Hunter, which suggests that the practice in the federal courts that 'costs follow the event' can be a serious disincentive for complainants who fear a possible adverse costs order, and can result in claims not being pursued, or abandoned.[178]

6.3.6 ACHRA notes, however that there are some risks associated with moving from the current federal model to a State 'no-costs system' at the federal level. For example, one disadvantage of moving to a 'no-costs system' would be to reduce the adequacy of compensation to successful complainants. In a jurisdiction where amounts of compensation awarded are traditionally very low,[179] this could also be a disincentive for complainants bringing an action to court in the federal system.

6.3.7 Further, while some State tribunals do have the general discretion not to award costs in anti-discrimination matters, this does not necessarily equate to a 'no-costs' jurisdiction, but rather a general presumption that parties each bear their own costs.[180] State tribunals have previously made substantial costs orders against complainants in anti-discrimination matters.[181] In one recent VCAT decision, VCAT ordered that an unrepresented complainant pay the respondents' total party/party costs for five full days of hearing, assessed on County Court Scale D.[182] In that matter, Deputy President Coghlan commented that: 'the discretion to award costs is broad. Each case is different and must be considered on its own merits.'[183]

6.3.8 One option for amending the current discretion to award costs in the federal jurisdiction might be to introduce a set of criteria in a Consolidated Act, which provides guidance as to the circumstances that should be met when a court makes an order for costs. These criteria could set clear limits on the circumstances in which such an order may be made, provide a list of relevant factors to consider when assessing costs (including the relative strengths of the claims of the parties and the impact of making a costs order

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[176] *Low v Australian Tax Office* [2000] FMCA 6; *Saddi v Active Employment* [2001] FMCA 73; *Hinchliffe v University of Sydney (No 2)* [2004] FMCA 640

[177] *Horman v Distribution Group Limited* [2001] FMCA 52, affirmed on appeal: *Horman v Distribution Group Limited* [2002] FCA 219; *McBride v Victoria* [2003] FMCA 313; *Tate v Rafin* [2000] FCA 1582

[178] Beth Gaze and Rosemary Hunter, *Enforcing human rights in Australia: an evaluation of the new regime*, Themis Press, 2010

[179] See: Experts' Roundtable, 13 December 2011 submission, p. 22;

[180] For example: subsection 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) provides that, as a general rule, parties pay their own costs. However, subsection 109(2) provides that VCAT may depart from this general rule and order that a party pay all or some of the opposing party's costs in a matter. Subsection 109(3) provides the conditions on which VCAT may make a costs order

[181] See for example: *Rae v Commissioner of Police, New South Wales Police Force (No 3)* [2010] NSWADT 254; *Finch v The Heat Group Pty Ltd* (Unreported, Victorian Civil and Administrative Tribunal, Harbison VP, 31 January 2011)

[182] *Singh v RMIT University and Ors* (Anti-Discrimination) [2011] VCAT 1890

[183] *Singh v RMIT University and Ors*, per DP Coghlan, at [7]. This appears in conflict with previous statements of VCAT on the issue of costs, including: *Tanglemayer v FAI Workers Compensation* (Vic) Pty. Ltd (Anti-Discrimination List, No. M84 of 1998, 16 December 1998

on the remedies awarded if a claim was successful), and include a presumption that costs orders be capped at a certain scale, except in particular circumstances. One example of such limiting criteria is the former costs provision in section 213 of the *Anti-Discrimination Act 1991* (Qld).[184]

6.3.9 Some criteria that could be included in such a costs provision includes:

1. In deciding whether to order a party to pay costs, the Court must have regard to the following:

    a. The objects and purposes of a Consolidate Act, and whether those objects and purposes would be compromised or defeated in ordering the party to pay coststhe relative strengths of the claims made by each of the parties;

    b. whether a party reasonably believed there had been a contravention of a Consolidated Act;

    c. the fairness of a costs order having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding, including, for example, by-

        (A) failing to comply with an order or direction of the Court without reasonable excuse; or

        (D) attempting to deceive another party or the tribunal; or

        (E) vexatiously conducting the proceeding;

    d. the nature and complexity of the proceeding;

    e. whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

    f. whether the complaint raised matters in the public interest;

    g. whether the complaint identified conduct that allegedly constituted systemic discrimination; and

    h. the impact of making a costs order on any remedies awarded if a claim was successful.

6.3.10 ACHRA also considers that problems experienced by complainants in the federal anti-discrimination jurisdiction could be addressed, in some way, by publicly promoting the dispute resolution functions of the Federal Commission as a no-cost means of resolving complaints, and by enabling the Federal Commission to act as an advocate for complainants in court

[184] This provision was repealed as a result of the jurisdiction of the Anti-Discrimination Tribunal moving to the Queensland Civil and Administrative Tribunal (QCAT), and the costs jurisdiction moving to a no-costs jurisdiction. Discrimination complaints in Queensland are now dealt with under the generic costs provisions of QCAT, with the starting point being each party bears own costs with power for the tribunal to award costs it if considers it is in the interests of justice to do so. Matters that the Tribunal may take into consideration in deciding whether to award costs are consistent with the former subparagraphs 213(3)(b)(i), (iii), (v) and (vi) of the *Anti-Discrimination Act 1991* (Qld) (which include: the relative strengths of the parties' claims, whether a party has unreasonably disadvantaged the other by reason of delay, failing to comply with an order, adjournment or acting vexatiously, the nature and complexity of the matter and any other relevant considerations), as well as the financial circumstances of the parties and failing to attend mediation or hearing without reasonable excuse.

proceedings, where the complainant has consented to this course of action, and where the subject-matter of dispute deals with an issue of public interest.

6.4 Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime?

(a) Monitoring legislation and advising government of compliance

6.4.1 ACHRA considers that existing mechanisms for reviewing legislation and assessing draft legislation are inadequate, and that enhanced powers are necessary to monitor legislation, enquire into human rights issues that exist at a local, state and federal level, and report on compliance with human rights laws.[185]

6.4.2 The Australian government has international human rights obligations to which it must comply. The Federal Commission plays an important role in monitoring legislation and reporting on Australia's compliance with international human rights obligations. Notwithstanding the overarching role that it is required to play, the Federal Commission's existing powers to examine laws for consistency with human rights[186] and report on laws that should be made or action that should be taken on human rights matters[187] are limited to federal enactments and practices engaged in by or on behalf of the Commonwealth.[188] ACHRA considers that this limitation undermines the Federal Commission's ability to effectively monitor and address human rights issues that arise in a local and state government context, and that the power should be expanded to include any issue covered by the consolidated Act. Accordingly, ACHRA recommends amending the definition of 'enactment' to include monitoring state and local laws.

6.4.3 Discrimination against international students in the context of access to primary and secondary education and travel concessions are pertinent examples of systemic issues which have not been effectively addressed at a state or federal level under the current regime.

6.4.4 An overarching power to monitor local, state and federal laws and practices, and report on compliance with international human rights obligations would facilitate a holistic approach to addressing similar barriers to equality and human rights issues that arise at a local, state and federal level.

6.4.5 This function should be complemented by an enhanced power to monitor progress towards eliminating discrimination in respect of the protected attributes and periodically report to Parliament, similar to the function exercised by the Aboriginal and Torres Strait Islander Social Justice Commissioner. At present there is no institutional arrangement in place for

[185] *Australian Human Rights Commission Act 1986* (Cth), section 11
[186] *Australian Human Rights Commission Act 1986* (Cth), subsection 11(1)(e)
[187] *Australian Human Rights Commission Act 1986* (Cth), paragraphs 11(1)(j) - (k)
[188] *Australian Human Rights Commission Act 1986* (Cth), section 3 (definition of 'enactment' and 'practice')

an agency independent of government to report to Parliament and the Australian public, providing a considered evidence-based assessment of progress against an integrated set of equality indicators and to benchmark progress against those indicators over time.

6.4.6 ACHRA considers that this function would provide greater rigour in assessing whether existing legislation and programs are succeeding in eliminating discrimination, and demonstrate the Australian Government's commitment to independent monitoring and assessment of progress towards equality.

Recommendation 40: that a Consolidated Act provide the Federal Commission with the power to monitor local, state and federal laws and practices, and advise the Minister on compliance with human rights laws.

Recommendation 41: that a Consolidated Act empower the Federal Commission to monitor progress towards eliminating discrimination and achieving equality and periodically report to parliament.

(b) Own motion investigations

6.4.7 Under the AHRC Act and current anti-discrimination laws, neither the Federal Commission nor its Commissioners have the power to take compliance action for an alleged breach of the legislation. Enforcement of each Act is dependent upon an individual or their representative lodging a complaint.

6.4.8 ACHRC considers that ability of the Federal Commission to effectively eliminate discrimination would be enhanced by providing the Federal Commission with the power to commence an investigation regarding an alleged breach of the Act, without requiring an individual to lodge a complaint. A broad power to initiate investigations either on its own motion or following a request would give the Federal Commission a statutory basis to enquire into systemic issues and provide greater leverage to engage with individuals and organisations reluctant to comply with the Act and meet their positive duty.

6.4.9 This power would be similar to that held by the VEOHRC and the Commission for Equality and Human Rights in the United Kingdom, which may investigate potential contraventions of anti-discrimination law.[189] Similarly, the New Zealand Human Rights Commission may inquire into any matter including any law, practice or procedure (governmental or non-governmental) where it thinks human rights might be, or have been, infringed.[190] The Canadian Human Rights Commission also has the ability to initiate a complaint if it has reasonable grounds for believing a discriminatory practice has occurred.[191]

6.4.10 ACHRA's preferred investigation model is consistent with the recommendations made in the Gardner Review.[192] Under the preferred model, a Commissioner may identify a potential breach of the relevant

[189] See: *Equal Opportunity Act 2010* (Vic), section 127 and *Equality Act 2010* (UK), paragraph 20(1)(a)
[190] *Human Rights Act 1993* (NZ), subsection 5(2)(h)
[191] *Canadian Human Rights Act 1985* (Canada), c H-6, subsection 40(3)
[192] Gardner Review, p. 134 at [6.166]

legislation either through an inquiry, or upon notification from third parties. The Commissioner would then have the power to:

- investigate the allegations
- compel attendance and the production of information
- carry out negotiations
- enter into settlement arrangements
- agree upon enforceable undertakings, and
- issue compliance notices.[193]

6.4.11 This model is consistent with the existing powers of WorkCover under the *Occupational Health and Safety Act* 2004 (Vic) and the Fair Work Ombudsman under the *Fair Work Act 2009* (Cth) and would enable the Commissioner to resolve a matter informally or take more formal compliance action where appropriate. A Compliance Notice would place the body on formal notice that the Federal Commission is of the view that their conduct is unlawful under the Act and that steps need to be taken to comply.

6.4.12 If a complaint cannot be satisfactorily resolved through the use of these new powers of the Commissioner, a Commissioner could refer the matter to the Federal Commission as a whole. The Federal Commission could then decide whether to commence legal action in the Federal Court or Federal Magistrates Court, and have the power to do so.

6.4.13 The ACHRC supports the Federal Commission's recommendation that the decision to commence legal action should be a collegiate decision in order to enable the Federal Commission to appropriately balance the potential costs implications of legal action with the duties of the Federal Commission under the AHRC Act.[194] This would ensure that legal action would be exercised only as a last resort but would still provide an important additional enforcement mechanism for addressing serious or wide-spread non-compliance with the relevant Act.

6.4.14 ACHRA also supports the Federal Commission's recommendation that commencement of an action by the Federal Commission should not affect the remedies which are available for an individual who is alleging a breach of a Consolidated Act.[195] Like the former Victorian model, the power to initiate an investigation should be reserved for matters that raise a serious issue and indicates a possible contravention of the Act or systemic discrimination, rather than for individual breaches of the Act.[196]

6.4.15 Since the purpose of both investigations and inquiries is to identify and eliminate systemic discrimination, the same range of enforcement options should be available to the Federal Commission, whether it is conducting an investigation or inquiry.

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[193] This model was reflected in the *Equal Opportunity Act 2010* (Vic) (no. 16) as at 27 April 2010, prior to the Victorian Parliament passing the *Equal Opportunity (Amendment) Bill 2011* (Vic)

[194] Federal Commission, Submission to the Review of the *Sex Discrimination Act 1984* (Cth), p. 226, at [657]

[195] Federal Commission, Submission to Review of the *Sex Discrimination Act 1984* (Cth), p. 227 at [658]

[196] *Equal Opportunity Act 2010* (Vic) (no. 16) as at 20 April 2010

Recommendation 42: that the Consolidated Act provide the Federal Commission with a range of enforcement mechanisms to prevent discrimination, and promote substantive equality and compliance.

(c) Formal inquiries

6.4.16 The *Sex Discrimination Act 1984* and AHRC Act are the only Acts which provide the Federal Commission with the statutory power to undertake formal inquiries or to carry out 'inquiry-like' functions. Inquiry powers include the ability to undertake detailed research and analysis to eliminate discrimination and promote gender equality,[197] and conduct formal inquiries into 'acts or practices' in Australia which may be contrary to human rights.[198] These functions have been used to raise public awareness of the nature and extent of discrimination and gender inequality in Australia, and to develop recommendations for reform.

6.4.17 The ACHRC considers that existing inquiry functions and compliance powers should be strengthened to better enable the Federal Commission to inquire into and address a broader range of human rights issues.

6.4.18 Inquiry functions under paragraph 11(1)(f) of the AHRC Act are limited to Commonwealth laws or actions done by the Commonwealth or its Territories, and does not extend to employers, or other bodies which may be acting in breach of anti-discrimination legislation or failing to take reasonable steps to progress substantive equality.[199]

6.4.19 ACHRA considers that the consolidated Act and the AHRC Act should be amended to provide for a broad formal inquiry function, but which applies generally to issues relevant to eliminating discrimination and promoting equality, and human rights generally. The benefits of this amendment would be that the Federal Commission would be able to investigate a wide range of equality issues which do not directly involve an 'act' or 'practice' by the Commonwealth government or its territories, or which are confined related to employment.[200] For example, the Federal Commission could undertake a formal inquiry into a specific accommodation service if it identified that systemic gender inequality appeared to be extensive. The Federal Commission has a similar inquiry function in subsection 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) to conduct inquiries into discrimination in employment, including systemic discrimination, which applies also to acts or practices within a state, or under state laws.

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[197] *Australian Human Rights Commission Act 1986* (Cth), paragraph 11(1)(h)

[198] *Australian Human Rights Commission Act 1986* (Cth), paragraph 11(1)(f). Note that this function may be exercised when requested by the Minister, when a written complaint is received, or by own motion power of the Federal Commission: see: *Australian Human Rights Commission Act 1986* (Cth), section 20

[199] ACHRA notes that the Federal Commission has a similar inquiry function in s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) to conduct inquiries into discrimination in employment, including systemic discrimination, which applies also to acts or practices within a state, or under state laws

[200] The inquiry function under paragraph 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) is limited to Commonwealth laws or actions done by the Commonwealth or its Territories (*Australian Human Rights Commission Act 1986* (Cth), section 3), and does not extend to employers, or other bodies which may be acting in breach of the *Sex Discrimination Act 1984* (Cth) or failing to take reasonable steps to progress substantive gender equality

6.4.20 The creation of a broad formal inquiry function for breaches of the consolidated Act or international legal obligations would support Recommendation 67 of the Gardner Review regarding the powers and functions of VEOHRC.

6.4.21 The existing inquiry functions under the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986* (Cth) are important in efforts to bring about cultural changes and action through education and awareness-raising. The Federal Commission's inquiries have been influential in fostering public debate and public action, for example, in the area of paid maternity leave, the right to request flexible work arrangements, and amendments to the *Sex Discrimination Act 1984* (Cth) to increase legal protection from discrimination, for example, in the areas of potential pregnancy, family responsibilities and breastfeeding. However, the current inquiry functions are limited, due to the confined nature of the formal inquiry functions under the *Australian Human Rights Commission Act 1986* (Cth).

6.4.22 The consolidated Act should include new powers for the Federal Commission to allow it to effectively investigate and enforce its findings on issues such as systemic discrimination.

6.4.23 Compared with regulators in other jurisdictions, the Federal Commission has limited powers to undertake a range of enforcement actions under Commonwealth anti-discrimination laws.[201]

6.4.24 The Federal Commission's power to compel the production of information and attendance of people with penalties applying for non-compliance is limited to inquiries commenced under paragraph 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth),[202] and does not extend to inquiries conducted under the *Sex Discrimination Act 1984* (Cth).

6.4.25 ACHRC considers that a range of enforcement mechanisms should be available to the Federal Commission when conducting inquiries and investigations. The spectrum of compliance powers are briefly discussed in paragraph 6.8.10 above.

Recommendation 43: a Consolidated Act should extend the formal inquiry function to enable the Federal Commission to inquire into issues concerning human rights and the promotion equality in Australia including acts and practices in relation to the private sector, states and territories.

(d) Resourcing

6.4.26 The ability of the Federal Commission to fulfil its existing statutory functions is often constrained by a lack of funding. It does not have the capacity to undertake new functions in addition to existing ones. If the Federal Commission is provided with new functions under a Consolidated Act to address systemic discrimination and promote substantive equality, the Federal Government must ensure that it is provided with sufficient

[201] Regulators in areas such as consumer and competition law, and occupational health and safety have powers to undertake a range of enforcement actions, such as issue compliance notices, enter into enforceable undertakings and initiate court proceedings

[202] *Australian Human Rights Commission Act 1986* (Cth), sections 21–26

additional resources to enable it to effectively carry out these new functions, as well as existing functions.

6.4.27 Additional resources should also be made available for the Federal Commission to undertake *ad hoc* functions at the request of a Minister, such as when the Attorney-General instructs the Federal Commission to conduct a public inquiry into a human rights issue.

Recommendation 44: that the Federal Commission have sufficient resources to fulfil its statutory functions.

(e) Advocacy functions for the Federal Commission

6.4.28 ACHRA recommends that the *Australian Human Rights Commission Act 1986* (Cth) be amended to create a power for the Federal Commission to initiate proceedings for enforcement and promotion of a Consolidated Act in the Federal Court or Federal Magistrates Court, without requiring an individual complaint to first be lodged with the Federal Commission.

6.4.29 ACHRA notes that a similar approach was previously recommended by the Federal Commission in its submission to the Review of the *Sex Discrimination Act 1984* (Cth), in the context of proposing that the provisions under the AHRC Act relating to standing to bring claims be widened to include standing for public interest-based organisations, including the Federal Commission.[203]

6.4.30 ACHRA notes the Australian Law Reform Commission's long-held view that there are sound public policy rationales for allowing organisations with a legitimate interest in a subject-matter to commence discrimination proceedings, particularly where the claim involves a systemic problem affecting a wide class of persons.[204] Enabling the Federal Commission to initiate proceedings would also provide an effective means of addressing systemic discrimination entrenched in policies, legislation and procedures.

6.4.31 Further, ACHRA recommends that the *Australian Human Rights Commission Act 1986* (Cth) be amended so that, where a complaint cannot be satisfactorily resolved, the President is able to then refer the matter to the Federal Commission as a whole (with the complainant's consent). The Federal Commission could then decide whether to commence legal action, on behalf of the complainant and as advised by the complainant, in the Federal Court or Federal Magistrates Court.[205]

6.4.32 The expectation of creating this advocacy function would be that the Federal Commission would only take on an advocacy role in cases which:

- deal with a key issue of public interest (to be separately defined, potentially in guidelines issued by the Federal Commission);

[203] Federal Commission, Submission to Review of the *Sex Discrimination Act 1984* (Cth), pp. 208 – 209

[204] Australian Law Reform Commission (ALRC), *Beyond the Door-Keeper: Standing to sue for public remedies*, *Report No 87*, (1996), recommendation 2; ALRC, *Standing in Public Interest Litigation, Report No 27* (1985)

[205] This reflects the recommendations made by the Federal Commission in its Submission to the Review of the *Sex Discrimination Act 1984* (Cth), pp. 226 – 227

- cases where serious systemic discrimination has been identified; and/or

- cases in which the Federal Commission considers resolution of a legal issue is necessary to promote and advance the objectives of a Consolidated Act.

Recommendation 45: that a Consolidated Act grant the Federal Commission the power to initiate proceedings for enforcement and promotion of a Consolidated Act on an own motion basis.

Recommendation 46: that a Consolidated Act enable the Federal Commission to commence proceedings in the Federal Court or Federal Magistrates Court on behalf of a complainant, where a complaint has not resolved and it is in the public interest to do so.

(f) *Amicus curiae* and intervention powers

6.4.33 Under the *Australian Human Rights Commission Act 1986* (Cth),[206] the specialist commissioners have the specific function of assisting the Federal Court and Federal Magistrates Court as *amicus curiae*,[207] with leave of the court. The *Australian Human Rights Commission Act 1986* (Cth) relevantly provides guidance as to the types of proceedings in which this function should be exercised,[208] which has been supplemented by additional, publicly available guidelines prepared by the Federal Commission.[209] As with the *amicus curiae* function, the intervention function must also be exercised with leave of the court. The Federal Commission has also prepared publicly available guidelines for the exercise of its intervention function.[210]

6.4.34 In addition to the *amicus curiae* function, a wider function is conferred on the Federal Commission[211] and each of the Commonwealth anti-discrimination Acts[212] to intervene in proceedings that raise human rights and/or discrimination issues.[213] This power is therefore very wide and enables the Federal Commission to intervene in any court or tribunal involving human rights issues, including issues related relevant international instruments. The Federal Commission has previously indicated that its major constraint on the use of this function is resourcing and capacity.[214]

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[206] *Australian Human Rights Commission Act 1986* (Cth), subsection 46PV(3)(e)
[207] *Australian Human Rights Commission Act 1986* (Cth), subsection 46PV(1)
[208] The types of proceedings are described in paragraphs 46PV(1)(a)-(c) of the *Australian Human Rights Commission Act 1986* (Cth)
[209] Federal Commission: *Guidelines for the exercise of the amicus curiae function under the Australian Human Rights Commission Act*, 18 September 2009, available at: http://www.humanrights.gov.au/legal/submissions_court/amicus/amicus_guidelines.html
[210] Available at: http://www.humanrights.gov.au/legal/submissions_court/intervention/interventions_in_court_proc.html
[211] *Australian Human Rights Commission Act 1986* (Cth), section 11(1)(o)
[212] *Sex Discrimination Act 1984* (Cth), paragraph 48(1)(gb); *Disability Discrimination Act 1992* (Cth), section 67; *Racial Discrimination Act 1975* , section 20; *Age Discrimination Act 2004* (Cth), section 53
[213] For example: under s 48(1)(gb) of the *Sex Discrimination Act 1984* (Cth), the Federal Commission has the function of intervening in 'proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment.'
[214] Federal Commission, Submission to Review of the *Sex Discrimination Act 1984* (Cth), p. 232

The exercise of either the *amicus curiae* or intervention function by the Federal Commission is subject to the granting of leave by the court.

6.4.35 ACHRA recommends that the Federal Commission and the other special-purpose Commissioners be granted the function of appearing as *amicus curiae* or as intervener in court proceedings, subject to a direction by the Court that leave not be refused except in particular circumstances.

6.4.36 ACHRA also recommends that the existing *amicus curiae* function be expanded to include any consequent appeals. At present, the function does not extend to appeals from initial proceedings in the Federal Magistrates Court or Federal Court to the Full Federal Court or High Court. The Federal Commission has previously reported that this adds unnecessary costs and administrative burden as the Federal Commission must bring a separate application to act as intervener when a matter goes on appeal.

Recommendation 47: that a Consolidated Act amend the *Australian Human Rights Commission Act 1986* (Cth) to enable the Federal Commission and the specialist Commissioners to appear as *amicus curiae* or intervener in court proceedings, subject to a direction that leave not be refused except in particular circumstances.

Recommendation 48: that the existing *amicus curiae* function in the *Australian Human Rights Commission Act 1986* (Cth) be expanded to include any consequent appeals of a matter.

7. Interaction with other laws and application to state and territory governments

7.1 Should a Consolidated Act make improvements to mechanisms for managing interactions with the Fair Work Act?

7.1.1 ACHRA acknowledges that the jurisdictional overlap between the federal anti-discrimination acts, workers compensation, occupational health and safety and *Fair Work Act 2009* (Cth) has lead to inefficiencies in resolving interrelated matters. Internationally, human rights agencies have introduced inter-agency dispute resolution processes as a way of addressing and streamlining the degree of overlap between competing jurisdictions.

7.1.2 For example, the New Zealand Human Rights Commission recently trialled co-mediation with the Department of Labour as a way of improving the previously siloed approach to disputes within human rights and employment jurisdictions under the *Human Rights Act 1993* (New Zealand) and *Employment Relations Act 2000* (New Zealand) respectively.

7.1.3 This development constitutes an innovative and holistic approach to dispute resolution in complex employment and human rights issues which warrants further consideration in light of the impending review of the *Fair Work Act 2009* (Cth).[215]

Recommendation 49: that further consideration is given to trialling dispute resolution through a multi-agency approach to matters that fall within overlapping jurisdictions.

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

7.2.1 The *Disability Discrimination Act 1992* (Cth) currently allows regulations to be made exempting acts done in direct compliance with specified State and Territory laws.[216] The *Age Discrimination Act 2004* (Cth) has a broader exemption provision; that exempts acts done in direct compliance with all State and Territory laws, except for those specified in regulations.[217] ACHRA

[215] Cara Takitumu, Presentation at the National Conciliators, Legal Officers and Educators Conference 2011 (Adelaide), available at: http://www.eoc.sa.gov.au/eo-resources/events/other-events/national-conciliators-legal-officers-and-educators-conference/natio;
[216] *Disability Discrimination Act 1992* (Cth), subsection 47(2)
[217] *Age Discrimination Act 2004* (Cth), subsection 39(4)

notes that similar general exemptions are not found in the *Sex Discrimination Act 1984* (Cth) or the *Racial Discrimination Act 1975*.

7.2.2 ACHRA considers that there should be no general exception in a Consolidated Act that allows discrimination on the basis of compliance with State and Territory laws, on the basis of any protected attribute. Rather, any complaint of discrimination should be assessed on a case by case basis, potentially with reference to a general limitations provision to assess the justification and proportionality of the conduct.

Recommendation 50: that a Consolidated Act provide no general exemption for acts done in direct compliance with State or Territory Laws for all protected attributes.

7.3 Should the consolidation bill apply to State and Territory Governments and instrumentalities?

7.3.1 This question is substantially addressed above under heading 4.2.1.