

Consolidation of Commonwealth Discrimination law

Australian Human Rights Commission Submission to the
Attorney-General's Department

6 December 2011

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Attorney-General's Department in its review of Commonwealth discrimination laws.¹

2 Summary

2. As indicated by the Attorney General and the Minister for Finance and Deregulation in announcing this process, the review of Commonwealth discrimination law offers important opportunities to ensure that discrimination law contributes as effectively as possible, as well as efficiently, to the objectives of the achievement of equality in Australian society and the removal of discriminatory barriers to participation and opportunity.
3. The Commission agrees with the assessment in the Discussion Paper that discrimination law can be made easier to understand, comply with, and where necessary to enforce, through:
 - greater simplicity and more consistency – across grounds of discrimination and between Commonwealth discrimination law, industrial law, and State and Territory anti-discrimination and equal opportunity laws. In particular, the Commission supports consideration of streamlining of tests for discrimination and of the range of exemptions provided, and review of inconsistent limitations in coverage; and
 - consideration of measures for improved access to justice for people and organisations seeking to assert rights, and for increased certainty for people and organisations seeking to comply with their responsibilities – noting that these should be designed to complement and enhance the effective functioning of existing mechanisms rather than displacing these.
4. The Commission has not sought to duplicate here the level of detailed legal analysis and referencing provided in some of its publicly available materials. Extensive background material for this submission is provided by the Commission's online resource [Federal Discrimination Law](#) which is intended to provide a comprehensive overview of case law decided under Commonwealth discrimination law.
5. The Commission's 2008 [submission](#) to the Senate Legal and Constitutional Affairs Committee Inquiry on the effectiveness of the SDA discussed many of the issues raised in the Discussion Paper in some detail. The Commission considers that this earlier submission continues to provide important points for consideration in the context now provided by a broader review of Commonwealth discrimination law. It should be noted, however, that the

Commission as presently constituted has not revisited in detail this or other earlier submissions of the Commission.

6. The Commission notes that its views as presented in the current submission may develop further throughout this process, including in response to submissions from individuals and organisations. The Commission will consider making further submissions during this review.
7. The Commission looks forward to the opportunity to provide more detailed comment in response to draft provisions as these become available. Initial comments are provided below by reference to the areas identified in the Discussion Paper, following some comments on overall approach.

3 Overall approach to the review

8. The Commission welcomes the release by the Attorney-General's Department of a Discussion Paper to facilitate community consultation in the review of Commonwealth discrimination laws.
9. Previous reviews (notably the [review of the SDA](#) by the Senate Legal and Constitutional Affairs Committee, as well as the [Productivity Commission review of the DDA](#)) have indicated clearly that, notwithstanding a range of indicators of success in the administration of Commonwealth discrimination laws (in resolution of complaints and in other activity)², discrimination remains prevalent, and that (among other measures) improvements are required both in the substance of discrimination laws and in associated mechanisms for achieving the objective of the law in promoting equality.
10. This objective is expressly stated in the SDA, DDA and ADA, and is clearly implicit in the RDA by reference to the *Convention on the Elimination of All Forms of Racial Discrimination*. The Commission's SDA Review submission emphasised a need for the SDA to be interpreted in a manner which is consistent with and promotes the objectives of the *Convention on the Elimination of All Forms of Discrimination Against Women*. It would be similarly appropriate for a consolidated Commonwealth equality law to be clearly linked in its objectives and interpretation to Australia's international obligations on equality.³

Recommendation 1: The Commission recommends that a consolidated law state objectives of promoting the achievement of equality and the elimination of discrimination, and indicate clearly that it is intended to be interpreted in accordance with Australia's international obligations on human rights.

11. The Commission notes that successive Australian governments have recognised that in addition to the human rights imperatives for the

achievement of the objectives of eliminating discrimination and promoting awareness, acceptance and achievement of equality, there are significant economic and social imperatives.

12. The incoming government briefs provided by the Departments of [Treasury](#) and of [Finance and Deregulation](#) following the 2010 election stressed issues of equity and participation as a means of enhancing economic performance and potential in the context of an ageing population. In [launching the 2010 Intergenerational Report](#), the Treasurer emphasized the importance of the RDA and the SDA among an earlier generation of economic reforms. In keeping with similar recognition during the term of the previous Coalition government, the objects clause of the ADA makes the connection expressly between promotion of equality and economic challenges⁴.
13. A discussion of the economic and social benefits of anti-discrimination law and its implementation in Australia is available in the Productivity Commission review of the DDA, in particular Chapter 6⁵. While noting the difficulty of quantifying costs and benefits for legislation of this kind, the Productivity Commission concluded that overall the economic and social benefits of compliance with the DDA were likely to be very large, and likely to substantially exceed costs of compliance (with economic benefits estimated as exceeding \$1 billion per annum in 2004 dollars).
14. Substantial benefits are equally likely to flow from elimination of discrimination on other grounds.
15. In 2009 [independent estimates](#)⁶ indicated that closing the gender participation gap in employment would increase Australian GDP by 21%. While it is not claimed that the whole difference in participation rates is explained by discrimination, or that discrimination law alone is capable of closing this gap, substantial productivity and participation gains appear likely to be available through improved equity measures, including through reduction in sexual harassment and violence against women. The Commission considers that any regulatory impacts and resourcing issues arising in the context of measures for improved effectiveness of discrimination law should be assessed having regard to the potential for large scale economic and social benefits through such measures.
16. The Commission notes in this context that consideration will be needed of resourcing and operational implications for the Commission:
 - in administering any new compliance mechanisms
 - in dealing with increased workload in administering existing mechanisms, in particular including complaint handling – both in dealing with grounds of unlawful discrimination not currently available under Commonwealth

discrimination law and in likely increased numbers of complaints under current grounds induced by more readily usable legislation

- in transitional processes including information and education on new legislation.

Recommendation 2: The Commission recommends that any regulatory impacts and resourcing issues arising in the context of measures for improved effectiveness of discrimination law be assessed having regard to the potential for large scale economic and social benefits through such measures.

17. The Commission notes and welcomes the commitment by the Government that there should be no reduction in the level of protection currently provided. The Commission regards this commitment as an essential benchmark against which draft legislation should be measured during its development and against which it will be measured when it becomes available.

18. In the context of a review seeking to remove inconsistencies and promote simplicity, the Commission considers that this commitment clearly implies that beneficial and best practice features of legislation which are currently applicable to one ground of discrimination should not only be maintained, but as far as possible applied to other grounds of discrimination.

Recommendation 3: The Commission recommends that beneficial and best practice features of legislation currently applicable to one ground of discrimination be maintained and as far as possible applied to all covered grounds of discrimination.

19. The Commission submits that, similarly, it is appropriate to pursue consistency between Commonwealth discrimination law and the non-discrimination provisions of the *Fair Work Act*, and between Commonwealth discrimination law and areas of best practice in State and Territory anti-discrimination and equal opportunity laws, where this would enhance, or not diminish, the protection provided by Commonwealth discrimination law. The Commission commends the attention given by the Discussion Paper to the extent to which possible models for substantial reform are available, within the existing body of Australian law and internationally, rather than wholly novel and untested approaches being required.

Recommendation 4: The Commission recommends that the review pursue consistency, as far as possible, between a consolidated Commonwealth equality law, the Fair Work Act, and best practice features of State and Territory anti-discrimination and equal opportunity laws.

20. A distinctive feature of Commonwealth discrimination law from the outset (that is, from the RDA onwards) has been the provision for high level and specialised leadership capacity on issues affecting sections of the community experiencing particular disadvantage and discrimination. This leadership capacity is provided through the offices of the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, and the Age Discrimination Commissioner. The Commission does not understand the review and consolidation process as including any proposal to remove or diminish this specialist capacity, and would not support such a proposal.

Recommendation 5: The Commission recommends that the offices of the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, and the Age Discrimination Commissioner be maintained within a consolidated Commonwealth equality law.

21. As the Discussion Paper notes, there is now almost 40 years of experience with Commonwealth anti-discrimination law to draw on in considering how best to define and address discrimination. The Commission notes that there is also substantial international and Australian experience in the establishment and operation of human rights institutions including in administering anti-discrimination law. The Commission draws attention to the [Principles relating to the Status of National Institutions](#) (The Paris Principles) which have been endorsed by the United Nations General Assembly⁷ and explicitly supported by Australia, including in its [Universal Periodic Review](#) in the United Nations Human Rights Council⁸ and in sponsoring the 2011 resolution in the Human Rights Council⁹.

Recommendation 6: The Commission recommends that a consolidated Commonwealth equality law refer to and reflect the Principles relating to the Status of National Institutions (The Paris Principles).

4 Meaning of Discrimination

22. The Commission agrees that the definitions of discrimination in Commonwealth discrimination law can and should be made simpler, easier to understand and more effective.

4.1 Defining discrimination: A unified test

23. In the Commission's experience, legislative use of the terms direct and indirect discrimination, and separation of direct and indirect discrimination into different

sections within the legislation, introduces unhelpful technicality and complexity and can be misleading.

(a) *Separate and non-overlapping concepts of discrimination?*

24. Separate provision for direct and indirect discrimination has led to the conclusion in most judicial interpretation that the concepts are separate and do not overlap.¹⁰ A need to choose which category of discrimination a particular situation falls within, introduces an unnecessary layer of complexity for the Commission in seeking to explain rights and responsibilities, and for people and organisations seeking to understand, use, or comply with the legislation.

25. Presenting direct and indirect discrimination as separate concepts raises particular difficulties in relation to disability. For example, discrimination because a person who is blind cannot read print on paper would appear to meet any current definition for indirect discrimination (there is clearly a condition or requirement imposed which disadvantages people with the disability). But it would be artificial to state that there is not here also direct discrimination because the person is blind: the inability to see is what being blind is, or at the least is a characteristic appertaining to people who are blind. Other examples could be identified by reference to other forms of disability, and other attributes such as family responsibilities or pregnancy.

(b) *Terminology of “direct discrimination” may be misleading*

26. The number of occasions on which courts have found it necessary to emphasise that motive or malice is not required in order to find direct discrimination indicates that the terminology of direct discrimination may be misleading to people who are not experts in discrimination law, by suggesting that these elements are required when they are not.

(c) *Terminology of “indirect discrimination” may be misleading*

27. Reference to indirect discrimination may also be misleading in conveying an impression that coverage of this form of discrimination is artificial, or less important to consider. This may also have contributed to views that the law is principally concerned with addressing individual actions undertaken for discriminatory reasons, rather than (as the objects clauses of the ADA, DDA and SDA indicate), it being recognised that the objective is to promote the achievement of equality, with provision of redress for instances of discrimination (which may be individual or more widespread in their impact) being one means towards that objective.

(d) *Possible Australian models for a unified test are available*

28. The Commission suggests that a unified definition of discrimination which is clearer and more consistent with the objects of the legislation, but which does not risk the uncertainties of a wholly new legislative approach, could be developed by reference to a combination of existing provisions.
29. Section 8 of the ACT *Discrimination Act 1991*, while avoiding the terms direct and indirect discrimination, provides what the Commission identified in its SDA submission as best practice versions of tests derived from substantial experience in interpreting and applying direct and indirect discrimination provisions in Australian discrimination laws. Features of these elements are discussed further below.
30. In the broader context of review and consolidation of Commonwealth discrimination law more generally, and bearing in mind the Government's commitment to non-diminution of existing rights, the Commission suggests that, rather than simply reproducing the ACT definition, it may also be necessary to consider including a provision modelled on RDA subsection 9(1), or the similar section 20 of the NT *Anti-Discrimination Act 1992*.
31. It is not suggested that a broad human rights based test such as provided by RDA subsection 9(1) should be adopted alone. The RDA itself proceeds to confirm in subsection 9(1A) that discrimination can be established by what might be termed an indirect discrimination pathway. Conversely, the NT legislation states a broad equality based test, and then proceeds to confirm that this can be met by establishing what might be termed direct discrimination.
32. The Commission suggests consideration of combining these approaches to state a general human rights or equality based test and then confirming pathways for establishing discrimination in terms similar to those provided by the ACT legislation.

Recommendation 7: The Commission recommends consideration of a unified test for discrimination based on a combination of the approaches taken in the ACT Discrimination Act 1991 and the RDA or the NT Anti-Discrimination Act 1992.

4.2 "Direct discrimination"

As noted above the Commission's preference is for a unified test for discrimination incorporating best practice versions of current tests for direct and indirect discrimination in addition to a more general test such as is provided in the RDA and the NT legislation. Whether this approach is adopted, or whether separate tests are maintained for different forms of discrimination, attention is required to improvements

needed within the current tests in Commonwealth discrimination laws for direct and indirect discrimination.

(a) *Comparator issues*

33. The Commission agrees with the assessment in the Discussion Paper that the application of the comparator test used in the SDA, the DDA and the ADA has presented significant difficulties, including complexity in interpretation and uncertainty of outcome.
34. The Commission's SDA review submission recommended that the express comparator requirement should be removed from the definition of direct discrimination, with a "detriment test" provision on the lines of that in the ACT legislation being used instead. This approach was also recommended by the NSW Law Reform Commission in 1999 in its [review](#) of the NSW *Anti-Discrimination Act 1977*. As noted by the Discussion Paper this approach has been followed in the Victorian *Equal Opportunity Act 2010*. The Commission considers that this approach would be appropriate for a consolidated Commonwealth equality law.

Recommendation 8: The Commission recommends that a consolidated Commonwealth equality law avoid requiring the use of a comparator test in establishing "direct discrimination" and instead use a detriment test based on the ACT Discrimination Act 1991.

(b) *Characteristics extensions*

35. The Commission's 2008 submission to the Senate Legal and Constitutional Affairs Committee emphasised the importance of the "characteristics extension" in the definitions of direct discrimination which appear in the SDA, whereby discrimination is unlawful not only if it occurs because of an aggrieved person's sex, for example, but also if it occurs because of a characteristic which generally appertains, or is generally imputed, to people of that sex. The ADA makes very similar provision. Further, each State and Territory anti-discrimination or equal opportunity law already applies characteristics extensions to a range of grounds.
36. As noted in that earlier submission, discrimination frequently occurs because of concerns about characteristics which members of the group either often have, or have imputed to them. The Commission noted that without provision for characteristic extensions, definitions of direct discrimination could have much reduced effect.
37. The DDA does not include express provision for characteristics extensions in the same terms as the SDA and ADA. However it does refer to a number of characteristics appertaining to some people with disability – requiring

adjustments; using assistive devices, or being accompanied by an assistant or an assistance animal. Further, in response to concerns raised in [Purvis v NSW \(Dept of Education\)](#), the following provision, which performs part of the role that would otherwise be played by a characteristics extension, was included in section 4 of the DDA: “To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability”.

38. Characteristics such as pregnancy, potential pregnancy, breastfeeding and family responsibilities, use of assistive devices, or being accompanied by an assistant or an assistance animal, would be likely as a matter of law to be covered by an appropriately broadly drafted characteristics extension. However the Commission considers that specific recognition of these particular characteristics plays an important role in making the application of the legislation clear, and should be maintained together with a general characteristics extension.
39. The Commission notes that the current provisions in the ADA and the SDA for characteristics extensions apply only to characteristics which are “generally” imputed. This issue was considered in 1999 by the NSW Law Reform Commission in its review of the NSW legislation. As well as questioning how prevalent a characteristic or its imputation need to be to apply “generally”, the Law Reform Commission noted that this could have the perverse outcome of putting an unusually prejudiced or misinformed respondent in a better legal position than one whose imputation of a characteristic is more in line with general community attitudes:
- 3.49 . . . it is not clear why the conduct is unlawful only if the employer has selected a characteristic which is generally imputed to people of that class. For example, it seems most unlikely that any court would find that, within the Australian community, women were generally considered to be less intelligent than men, although such an imputation might have been generally made in other communities or at other times. However, the eccentricity of a particular employer who held such a view should not take the conduct outside the prohibition in the Act.
40. In its submission to the SDA Review, the Commission recommended that this restriction be removed and that discrimination be covered if done on the basis of any characteristic which is actually imputed by the discriminator to people of a particular sex. This appears to be the effect of s.14 of the Tasmanian *Anti-Discrimination Act 1998* for example.
41. The same approach appears appropriate for consideration in providing for a characteristics extension applying to all attributes within a consolidated Commonwealth equality law.

Recommendation 9: The Commission recommends that a consolidated Commonwealth equality law provide for characteristics extensions applying to all protected attributes, including characteristics which are actually imputed by a discriminator, whether or not generally imputed.

Recommendation 10: The Commission recommends that a consolidated Commonwealth equality law provide specific recognition for the characteristics of pregnancy or potential pregnancy, family responsibilities, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal.

4.3 “Indirect discrimination”

42. As noted by the Discussion Paper, by comparison to the ADA and SDA definitions of indirect discrimination, the DDA and RDA definitions add a further requirement that the aggrieved person must not comply, or must be unable to comply, with the condition, requirement or practice.
43. In the Commission’s view, this further requirement should not be applied in that part of the definition of discrimination for the purposes of a consolidated Act which deals with disparate impact discrimination. To do so could reduce protection in practice compared to the current provisions of the SDA and ADA. Inclusion of this additional element would also appear unnecessarily confusing, overly technical, and potentially misleading, in view of case law which, as noted by the Discussion Paper, has generally¹¹ (although not uniformly¹²) adopted tests of disadvantage and practical compliance, rather than the strict view suggested by the terms of this element as written.
44. The Discussion Paper raises the possibility of replacing the present reference in definitions of indirect discrimination to whether the condition requirement or practice was reasonable, with reference instead to whether the condition requirement or practice was for a legitimate purpose and proportional to that purpose. The Commission recommended consideration of this approach in its SDA Review submission, together with recommending provision of guidance (which could include provisions of examples in the Act) on what would and would not be considered legitimate and proportionate.
45. As noted in the Discussion Paper, this approach is taken in the United Kingdom and is also more consistent with international law approaches. Adoption of this approach could significantly simplify the legislation if the possibility raised in the Discussion Paper were adopted of applying the same test in place of a range of exceptions and exemptions currently applied to both direct and indirect discrimination.

Recommendation 11: The Commission recommends that in establishing “indirect” discrimination, a consolidated Commonwealth equality law require

only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply.

Recommendation 12: The Commission recommends further consideration of replacing the “reasonableness” test with a “legitimate and proportionate” test.

4.4 Proposed discrimination

46. The Commission notes that the DDA and ADA expressly cover proposed discrimination as well as discrimination which has already occurred. The Commission’s SDA Review submission argued for extension of the SDA in this respect. It would be appropriate for a consolidated Commonwealth equality law to make the same provision, to ensure that it is 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 any of the protected attributes.

Recommendation 13: The Commission recommends that a consolidated Commonwealth equality law clearly cover proposed discrimination.

4.5 Burden of proof

47. The Commission notes that issues of the legal burden of proof only arise directly in the small proportion of matters under Commonwealth discrimination law which cannot be resolved by conciliation. The Commission is able to require appropriate evidence in dealing with complaints, including through the power to terminate its inquiry into complaints which the Commission concludes are lacking in substance. The Commission’s inquiry and conciliation functions however are administrative rather than judicial.

48. Proof of unlawful discrimination involves proof of a series of elements. Depending on the particular provision involved, this may involve

- Proof that the action complained of has actually occurred (or, in “indirect discrimination” matters, that a condition, requirement or practice has been imposed);
- Proof that the complainant has the relevant protected attribute;
- Proof that the action, condition, requirement or practice complained of is covered by the legislation;
- Proof that the respondent bears the requisite degree of responsibility for the action, condition, requirement or practice complained of;

- Proof of causation by a protected attribute, or of disparate impact on people with a protected attribute;
- Proof that the action, condition, requirement or practice complained of is not justified or excused by an exception, exemption, limitation or defence provided for in the legislation.

The Commission notes that existing legislative provisions and previous proposals for a shifting or shared onus of proof involve maintenance of an onus on the complainant to provide proof of the first four elements identified above, with a sharing or shifting of onus arising in relation to the final two elements.

(a) *Proof in “indirect discrimination” matters*

49. As noted in the Discussion Paper, in some instances of indirect discrimination under existing Commonwealth discrimination law, there is a shifting onus of proof. This reflects well established common law principle that evidence should be weighed according to the capacity of the party to produce it, and is consistent with long standing industrial law provisions that shift the onus of proof where one party is in the better position to provide that particular evidence¹³.
50. Under the ADA as introduced, and the DDA and SDA as amended, but not the RDA, there is express provision that once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging people with the relevant attribute, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the alleged discriminator.
51. No clear rationale is apparent for this same shift in onus not applying similarly to racial discrimination matters. The Commission’s Federal Discrimination Law publication refers to a number of cases under the RDA in which a complainant was unable to meet the onus of proving that a condition or requirement was not reasonable, and where the respondent would be expected to have far more ready access to relevant evidence.
52. As noted in the Discussion Paper, a shifting onus in indirect discrimination matters is also already provided for by the ACT, Queensland, and Victorian legislation. On the basis of consistency across grounds of discrimination as well as effective access to justice the Commission supports application of the ADA, DDA and SDA shifting onus in indirect discrimination matters to all grounds of discrimination covered by a consolidated Commonwealth discrimination law.

53. In those instances where appropriate justification of an action constitutes a defence or an exception (such as unjustifiable hardship, inherent requirements, or compliance with a prescribed law), the onus of proof lies with the respondent as a matter of course. Consolidation of disparate exceptions and limitations into instances of a single concept of reasonableness or legitimacy and proportionality could assist in simplifying and rationalising approaches to onus of proof.
54. In some instances the same approach may be appropriately applicable not only to issues of reasonableness but to establishing disparate impact, given that for example many employers or service providers may have more ready access to employment or customer records than an employee or customer would.

(b) *Proof in “direct discrimination” matters*

55. The Discussion Paper points to difficulties for complainants in proving matters relating to the state of mind of respondents, and raises the possibility of adopting a reverse onus on the same lines as the Fair Work Act.
56. In its SDA Review submission, the Commission similarly pointed to difficulties for complainants in establishing causation on matters predominantly or uniquely within the respondent’s knowledge. This submission pointed to the same options for reducing difficulties in establishing causation in direct discrimination matters as are identified in the Discussion Paper.
57. The Commission does not yet have a concluded view on which specific option would be appropriate to adopt for the purposes of a consolidated Commonwealth discrimination law.
58. The Discussion Paper refers to options provided by overseas models for shifting burdens of proof in direct discrimination matters similar to those which apply under the ADA, DDA and SDA in indirect discrimination matters, and to the endorsement by the SDA Review of the UK approach of a shift in burden of proof once a prima facie case of discrimination is established.
59. The Commission’s SDA Review submission recommended consideration of the UK model as a possible option. This submission also drew attention to, and recommended legislative confirmation of, well established case law on drawing adverse inferences, and noted the degree to which the UK model codifies this case law:

[155] One option would be for the SDA to clarify that where an inference is available that the respondent’s conduct may have been based on the applicant’s sex (or other protected attribute or characteristic), the failure on the part of the respondent to plausibly explain the basis of the relevant conduct

gives rise to an adverse inference that sex (etc) was a causal factor.^[111] This would be an appropriate and adapted extension of the settled rule in *Jones v Dunkel*^[112] that an adverse inference may be drawn where particular information is within the domain of a particular party who fails to present it. For example, in *G v H*,^[113] Deane, Dawson and Gaudron JJ stated:

[I]t is well settled that, in the course of the ordinary processes of legal reasoning, an inference may be drawn contrary to the interests of a party who, although having it within his or her power to provide or give evidence on some issue, declines to do so.^[114]

[156] Similarly, the Full Federal Court recently confirmed that, when assessing whether evidence supports an inference of discrimination, courts should apply

...the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict...^[115]

[157] A similar approach was taken by the UK courts (prior to the enactment of s 63A, discussed below) in discrimination matters. For example, in *King v Great-Britain-China Centre*,^[116] Neil LJ noted that once an applicant had established a prima facie case of less favourable treatment in circumstances where race was a possible basis:

...the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the tribunal to infer that the discrimination was on racial grounds.^[117]

[158] Similarly, in *Shamoon*, Lord Scott noted that, in assessing whether evidence gave rise to an inference of discrimination:

Unconvincing denials of a discriminatory intent given by the alleged discriminatory, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice.^[118]

Recommendation 14: The Commission recommends that a consolidated Commonwealth equality law provide for a shifting onus of proof on elements regarding causation and justification of prima facie discriminatory conduct, to confirm that the obligation to produce evidence sits with the party best placed to produce that evidence.

4.6 Special measures

60. The Commission endorses the importance of recognition in discrimination law that in some instances insistence on identical treatment may in fact entrench discrimination and prevent achievement of equality, and that positive measures to ensure equal enjoyment of human rights should be permitted in

appropriate circumstances, rather than being regarded as impermissible discrimination. The RDA, SDA, DDA and ADA each contain this recognition in varying terms as noted by the Discussion Paper.

61. Having regard to the desirability of simplicity and removing unnecessary inconsistency in the operation of the legislation across different grounds of discrimination, the Commission supports consideration of a single special measures provision to apply to all attributes.
62. The Commission notes that some State and Territory discrimination and equal opportunity laws already provide a single special measures provision applying to all covered attributes¹⁴.
63. The Commission notes however that before deciding on a preferred model for a special measures provision, and on whether this can appropriately be applied uniformly across all attributes, further consideration is required of the context presented by the role of Commonwealth discrimination law in implementing obligations under international conventions. As noted by the Discussion Paper some of these instruments make specific provision on what should be regarded as constituting special measures; and all of these instruments operate within a broader context of the meaning of special measures within human rights law more generally.
64. In particular the Commission notes that there is a need to ensure that any approach to special measures within a consolidated Commonwealth discrimination law
 - does not diminish existing protections in the area of racial discrimination; and
 - is consistent with the requirements of the *Convention on the Elimination of All Forms of Racial Discrimination*, including as explained by the *Declaration on the Rights of Indigenous Peoples*.
65. The Discussion Paper refers to special measures taken to promote substantive equality or achieve equality of opportunity, particularly where a group within the community has experienced entrenched discrimination and disadvantage. The Commission notes that there is also recognition within the existing Commonwealth discrimination laws of other positive measures to address specific needs or rights of people in particular groups, which may only partially overlap with measures to reduce or redress disadvantage, and submits that it is important that a consolidated Act maintain this recognition.

Recommendation 15: The Commission recommends that so far as possible a consolidated Commonwealth equality law provide a single special measures and specific needs provision applying to all protected attributes.

4.7 Reasonable adjustment

66. As noted in the Discussion Paper, while a duty to make reasonable adjustments is implicit in the prohibition of indirect discrimination in each of the current Commonwealth discrimination Acts, only the DDA makes this duty explicit. The Commission submits that in the interests of clarity a consolidated Commonwealth discrimination law should include express provision for reasonable adjustment and that this provision should apply to all covered attributes.
67. As also noted in the Discussion Paper, the Commission considers that the drafting of the reasonable adjustment provision as currently included in the DDA could be improved and simplified. The stand-alone provisions in the Victorian Equal Opportunity Act provide one possible approach. The Commission's submission to the SDA review pointed to section 24 of the NT Anti-Discrimination Act as providing another possible model. The Commission looks forward to further discussion in detail of options in this area.

Recommendation 16: The Commission recommends that a consolidated Commonwealth equality law provide expressly for reasonable adjustments in relation to all protected attributes.

4.8 Positive duties

68. The Commission's SDA review submission recommended consideration of a positive duty to take reasonable steps to eliminate discrimination and promote gender equality.
69. The Commission notes that the Discussion Paper helpfully separates discussion of duties to make reasonable adjustments to accommodate specific needs, from discussion of positive duties to promote substantive equality or to address systemic discrimination.
70. As noted in the Discussion Paper, the first of these categories of duty is already implicit in existing indirect discrimination law. While the second category should not in the Commission's view be regarded as imposing new substantive obligations, it is recognised that it would involve new procedural requirements for duty holders and as such would be likely to require formal regulation impact assessment before it could be applied to private sector entities.
71. Less formal and time consuming processes of consideration of costs and benefits would be involved in considering of positive duties to public sector entities.

Recommendation 17: The Commission recommends that the Attorney-General's Department

- **conduct specific consultations with other areas of government towards design of effective and efficient provisions for duties for public authorities to promote the objectives of a consolidated Commonwealth discrimination law, including considering experience to date with comparable provisions now contained in Victorian and UK legislation; and**
- **give consideration to ensuring that the review includes processes which would satisfy RIS requirements for wider application of positive duties; and**
- **commence consideration and discussion with the Commission of resourcing implications of possible models for positive duties.**

4.9 Attribute-based harassment

72. As noted by the Discussion Paper, provisions expressly dealing with harassment in existing Commonwealth discrimination law are inconsistent and confusing in their extent.
73. The SDA's express provisions on harassment deal only with unwelcome conduct of a sexual nature. 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.
74. Further, while the SDA's express provisions on sexual harassment have now been extended to apply to most of the circumstances covered by the general discrimination provisions and remove most of the anomalies identified in the SDA review, some anomalies remain.
75. As noted by the Discussion Paper, coverage of attribute based harassment in all areas of public life covered by the legislation would reduce complexity and reduce uncertainty. More limited coverage would be confusing and potentially misleading, given that, as noted by the Discussion Paper, case law indicates in any event that harassment is in itself a form of discrimination. It may also be appropriate to consider how to deal with overlaps between concepts of discrimination and harassment and concepts of vilification, noting the varying express coverage of vilification in State and Territory laws and in Commonwealth discrimination law.

Recommendation 18: The Commission recommends that a consolidated Commonwealth equality law discrimination law 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.

5 Protected Attributes

5.1 Sexual orientation and sex and/or gender identity

76. As noted in the Discussion Paper

- cross-party commitments to include sexual orientation, and sex and/or gender identity, in Commonwealth discrimination law were made at the most recent Commonwealth election; and
- there is coverage of sexual orientation and gender identity in each State and Territory discrimination or equal opportunity law – albeit to varying extent and in various terms.

77. The Commission agrees that the issue to be considered is accordingly how, rather than whether, sexual orientation (including status as a member of a same sex couple) and sex and/or gender identity are to be included in Commonwealth discrimination law.

78. The Commission has previously reported on the stigmatisation and discrimination faced by lesbian, gay, bisexual, trans and intersex people in the [Same-Sex: Same Entitlements](#) (2007) and [Sex Files: The legal recognition of sex in documents and government records](#) (2009).

79. During 2010 the Commission conducted [consultations](#) to canvass the experiences and views of people who may have been discriminated against on the basis of their sexual orientation and sex and/or gender identity. The Commission's intention in conducting this process was to assist the implementation of the national Human Rights Framework and strengthen human rights safeguards for everyone in Australia. The consultation report is now available on the Commission's website together with background papers and a selection of comments received and provides access to a diverse range of views.

80. Participants in the Commission's consultations revealed personal stories of discrimination, vilification and harassment that provide compelling evidence of a need for change. They also presented evidence of the negative impact discrimination has had on their health and wellbeing.

81. Participants presented varying views on appropriate terminology. A consistent message, however, from those participants supporting Commonwealth legislation in this area was the need to ensure that the protection of the law be

as inclusive as possible, including protection on the basis of sex characteristics, gender identity and gender expression in order to achieve the broadest coverage of people of all sex and/or gender identities and to provide improved protection. The Commission also heard of the need to ensure that people who are intersex are expressly included in legislative protections from discrimination.

82. The Commission acknowledges that a small number of participants did not support the inclusion of protection from discrimination on the basis of sexual orientation and sex and/or gender identity in Commonwealth law. Some participants argued that there should be exemptions to laws prohibiting discrimination on these bases, particularly for religious organisations. Determining the extent of any exemptions will necessarily involve careful balancing of the right to be free from discrimination with the right to freedom of religion and belief.
83. The Commission notes that from 2008 to 2010 the Commission undertook a major research and consultation project on [freedom of religion and belief](#). The project report produced by the Australian Multicultural Foundation on behalf of the Commission, together with a range of background papers, are now available on the Commission's website. The report and background papers set out a range of strongly held and diverse views on the appropriate relationship between discrimination law and freedom of religion and belief.
84. The Commission notes that some contributions to earlier stages of the consolidation and review process have suggested that an appropriate mechanism for balancing rights to protection against discrimination on the basis of sexual orientation and sex and/or gender identity with other potentially competing rights including freedom of religion would be through provision for application to the Commission for temporary exemptions.
85. The Commission is not at this point persuaded that this would be the most appropriate approach.
86. As a matter of principle and to avoid excessive regulatory burden and costs of administration, the Commission endorses the view that the extent to which rights and responsibilities are dependent on administrative discretion should be minimised.
87. As discussed elsewhere in this submission in relation to compliance mechanisms, the Commission has viewed the temporary exemption mechanism as more suited to instances where the need and justification for exemption is temporary (in particular in structuring movement over time towards equality) than to instances where the need and justification may be more enduring.

88. In a democratic society it may be seen as more appropriate for any decisions to limit protection against discrimination on the basis of other competing considerations, including balancing with other rights, to be made in a manner which is more democratically accountable, such as through the framing of the legislation itself and/or through legislative provision for subsequent making of standards or other legislative instruments.

Recommendation 19: The Commission recommends that coverage of sexual orientation, sex characteristics, gender identity and gender expression in a consolidated Commonwealth equality law be framed to achieve the broadest coverage of people of all sex and/or gender identities and to provide improved protection against discrimination.

5.2 Additional attributes

89. As noted by the Discussion Paper, a further range of attributes not presently covered by the RDA, SDA, DDA and ADA is nonetheless covered by the discrimination in employment and occupation provisions of the Australian Human Rights Commission Act, and in most cases by the Fair Work Act and State and Territory discrimination laws.

90. On the basis of promoting simplicity it would be appropriate to give favourable consideration to coverage by Commonwealth discrimination law of all attributes covered by the existing ILO jurisdiction and the Fair Work Act. The same reasoning supports consideration of coverage of attributes currently covered by State and Territory laws.

91. The Commission notes that although the *Discrimination (Employment and Occupation) Convention* only provides a basis for legislative action in relation to employment and occupation, the *International Covenant on Civil and Political Rights* (article 2.1) and the *International Covenant on Economic Social and Cultural Rights* (article 2.2) each clearly provide a basis for legislative action against discrimination more broadly.

92. The Commission agrees with the assessment in the Discussion Paper that in most instances any adverse impacts on business from extension of Commonwealth discrimination law to additional grounds of discrimination should be expected to be modest in view of existing coverage by other laws. The Commission also emphasises the importance of consideration of positive social and economic impacts for individuals, enterprises and the Australian community through improved measures to promote economic and social inclusion. The Commission will consider with interest submissions on this issue from other organisations.

Recommendation 20: The Commission recommends that the Government give favourable consideration to inclusion within a consolidated Commonwealth

equality law of attributes covered by the Commission's existing ILO jurisdiction under the Australian Human Rights Commission Act and by the Fair Work Act.

93. As noted in the Discussion Paper, there is also a need to consider how best to cover attributes which are not presently covered clearly and expressly, such as:

- domestic violence and
- homelessness.

Further discussion appears required in relation to each of these additional grounds to ensure that coverage is not more restricted or complicated than intended. The Commission anticipates that submissions from and consultation with organisations with specific expertise in these areas will be particularly valuable.

94. The Commission notes that the Australian Law Reform Commission has been undertaking substantial work with a view to achieving a suitably comprehensive definition of violence for consistent use across areas of Commonwealth law (including in encompassing forms of bullying and harassment which do not extend to physical violence). The Commission also hosted a workshop in November 2011 on the desirability of adding protections to discrimination laws relating to domestic violence. Accordingly, the Commission flags that it intends to make a further submission in this area in February 2012.

95. The Commission notes that in view of evidence that domestic violence disproportionately affects women, and that homelessness disproportionately affects people with attributes already covered by Commonwealth discrimination law including people affected by mental illness, specific coverage of these issues within Commonwealth discrimination law could be seen to some extent as constituting clearer statement of existing rights and responsibilities rather than involving wholly new regulatory requirements.

Recommendation 21: The Commission recommends favourable consideration of coverage by a consolidated Commonwealth equality law of discrimination based on

- **accommodation status; and**
- **experience of violence, in particular domestic violence.**

5.3 Intersectional discrimination

96. The Commission notes that when a complaint is made alleging discrimination on the basis of more than one attribute or on the basis of a combination of attributes, the complaint is routinely accepted by the Commission and handled as a single complaint rather than as a series of complaints on separate grounds. The effect of expressly providing for intersectional coverage would in the Commission's view be to make the present position clearer and to avoid unnecessary disputes, rather than creating a new set of obligations. The Commission anticipates that a simple and effective drafting approach to this issue can readily be identified.

Recommendation 22: The Commission recommends that a consolidated Commonwealth equality law apply to discrimination based on one or more protected attributes or a combination of protected attributes.

5.4 Associates

97. Discrimination because a person is associated with a person with a protected attribute has obvious negative consequences for social inclusion and participation by people with that attribute.

98. As noted in the Discussion Paper, the DDA and RDA include protection against discrimination based on the disability or race of an associate of the aggrieved person. The Commission's SDA review submission recommended applying the same approach to the SDA. As also noted by the Discussion Paper, most State and Territory discrimination and equal opportunity laws also already apply expressly to discrimination against associates.

99. On the basis of non-diminution of existing protections, and promotion of consistency and simplicity, the Commission agrees it would be appropriate to provide for protection against discrimination against associates of persons with any protected attribute or attributes.

100. The Commission notes that a simpler and more consistent approach to defining discrimination and to exceptions and exemptions would be expected to make easier the task of achieving clear and simple coverage of discrimination against associates.

Recommendation 23: The Commission recommends that a consolidated Commonwealth equality law apply to discrimination on the basis of association with a person with a protected attribute or attributes.

6 Protected Areas of Public Life

101. The Commission notes that there are a number of areas of public life covered by existing Commonwealth discrimination law which 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.
102. The Commission anticipates, on the basis of the Government's commitment to non-diminution of existing rights, and having regard to the objectives of simplicity and consistency, that a consolidated Commonwealth discrimination law would be drafted to maintain these areas of coverage and to apply them to all protected attributes.
103. The Commission also notes that the application provisions of the legislation are inconsistent, and in the case of the SDA, DDA, and ADA particularly complex. The Commission noted in its initial submission to the Productivity Commission review of the DDA that the complex structure of section 12 of the DDA had led to uncertainty, expenditure of time and money in litigation, and in at least one case a plainly incorrect result being reached.

Recommendation 24: The Commission recommends that a consolidated Commonwealth equality law adopt a broad and simple approach to its application comparable to that of the RDA, in preference to the complex approach of the SDA, DDA and ADA.

6.1 General prohibition on discrimination in any area of public life

104. As noted in the Discussion Paper, the SDA Review supported amendment of the SDA to include a general prohibition on sex discrimination and sexual harassment in any area of public life, equivalent to section 9 of the RDA, to remove gaps and limitations in coverage. The Commission's SDA review submission made the same recommendation for the same reasons. This would be in addition to, rather than in substitution for, the listing of specific areas of life covered as in the existing provisions of the SDA.
105. The Commission supports consideration of application of the same approach to all attributes covered by Commonwealth discrimination law. As noted in the Commission's SDA Review submission this would ensure more complete and faithful implementation of Australia's international obligations in relation to prohibiting discrimination and reduce scope for disputes about what matters are covered.

Recommendation 25: The Commission recommends favourable consideration be given to coverage by a consolidated Commonwealth

equality law of discrimination in any area of public life, equivalent to section 9 of the RDA.

6.2 Equality before the law

106. The SDA Review and the Commission's submission to that Review supported application to the SDA of an equivalent to RDA section 10 on the right to equality before the law. As noted by the Discussion Paper, it is already possible to challenge State or Territory laws which require conduct that would be unlawful under the SDA, by virtue of the inconsistency of laws provision of s.109 of the Constitution. Stating the position more directly by including an equivalent to s.10 of the RDA would make rights and obligations clearer.
107. As noted by the Discussion Paper, the Productivity Commission in its review of the DDA indicated that concerns regarding needs to maintain distinct legal provisions by reference to disability in areas such as mental health and guardianship could be met by use of the capacity to protect actions done in compliance with laws prescribed by regulation for that purpose.
108. The Commission supports consideration of a general equality before the law provision applying to all protected attributes under Commonwealth discrimination law. Introduction of such a provision might be accompanied by phased implementation and/or a prescribed laws provision similar to that in the DDA and ADA to permit review of affected laws to identify inconsistencies.

Recommendation 26: The Commission recommends favourable consideration be given to inclusion within a consolidated Commonwealth equality law of an equivalent to RDA section 10 applying to all protected attributes.

6.3 Coverage of work

Recommendation 27: The Commission recommends that a consolidated Commonwealth equality law provide broad coverage of all occupational relationships and that the Tasmanian Anti-Discrimination Act be considered as an appropriate starting point in this respect.

109. The Commission's SDA review submission recommended removal of a number of gaps and inconsistencies in protection against discrimination and harassment in relation to work. The Commission's submission to the Productivity Commission's review of the DDA also recommended wider coverage of occupational relationships, to avoid anomalies such as that participation in franchise arrangements are covered by the DDA principally by reference to the fact that such arrangements appear to meet the DDA definition of a club.

110. The Commission considers that the definition of “employment” in the Dictionary provided by the Tasmanian legislation may provide an appropriately broad and simple starting point for consideration. This definition takes an approach consistent with the ILO *Discrimination (Employment and Occupation) Convention* in referring to “employment or occupation in any capacity with or without remuneration”. It also combines in the one definitional provision matters which currently take up multiple sections of Commonwealth discrimination law: partnerships; professional and trade associations; qualifying bodies; commission agents; employment agencies; contract work; and vocational training bodies.
111. It may however be helpful to adopt the approach of the Queensland legislation in applying the heading “work” rather than “employment” to such a provision. While all the categories covered clearly do involve work, equally clearly these categories do not all involve employment in its familiar legal sense.
112. The Commission in its SDA Review submission recommended applying the legislation to partnerships irrespective of size. As noted by the Discussion Paper, there is inconsistency in current Commonwealth discrimination law provisions in this respect, with the RDA applying (by virtue of section 9) to all partnerships, the DDA to those of 3 or more, and the SDA and RDA to those of 6 or more. To achieve consistency without diminution of current coverage would clearly involve applying the RDA (and the ACT, South Australian and Tasmanian) approach of avoiding any minimum size requirement.
113. This would also make coverage of partnerships consistent with coverage of other working relationships in Commonwealth discrimination law since no other form of working relationship is subject to a minimum size requirement.
114. The Commission’s SDA Review submission also recommended coverage of voluntary work.
115. As noted by the Discussion Paper, the RDA already applies in this area. The Queensland, South Australian, Tasmanian and ACT legislation apply to discrimination as well as sexual harassment against volunteers, with the Victorian legislation applying only to sexual harassment.
116. The Commission will consider with interest submissions on the issue of regulatory burden raised in the discussion paper, including from organisations with experience with State and Territory legislation where this already covers volunteers. Subject to this, the Commission supports coverage of voluntary workers by Commonwealth discrimination law. The Discussion Paper notes that volunteers make significant economic and social contributions to Australian society. It should also be noted that volunteering provides important opportunities for social participation and for development and maintenance of

work related skills and experience. Measures to advance equality in this area are thus an important component of advancing equality more generally.

6.4 Domestic work

117. As noted in the Discussion Paper, the existing provisions of the RDA, SDA, DDA and ADA provide for exceptions in relation to determining who should be offered work in a private dwelling (but not for other aspects of work in this context, such as discrimination or harassment during employment or termination.)

118. These exceptions clearly attempt to strike a balance between rights to equality and non-discrimination and the right to private life. The Commission will consider submissions in this area with interest.

6.5 Clubs and associations

119. As noted in the Discussion Paper, the provisions of Commonwealth discrimination laws which deal specifically with clubs and associations are particularly complex and inconsistent in their terminology, and in the coverage and exceptions provided.

120. The Discussion Paper raises the option of applying across all protected attributes the SDA approach of covering only those clubs which are licensed to sell alcohol and which have 30 or members. As noted by the Discussion Paper, this would provide diminished protection in comparison to the existing DDA provision. To be consistent with the Government's commitment not to diminish existing protections, uniform coverage across all protected attributes would need to adopt the alternative option identified by the Discussion Paper of following an approach similar to the DDA definition.

121. The Commission questions how far this option would represent a substantial increase in regulation, considering that, as noted by the Discussion Paper, all clubs, voluntary bodies and incorporated or unincorporated associations are already covered by the general provisions of Commonwealth discrimination laws in relation to provision of goods, services and facilities.

122. The varying definitions and sizes of clubs covered may be seen as varying attempts to establish an appropriate balance between freedom of association and freedom from discrimination. However it appears arbitrary to say that a voluntary body with 29 members rather than 30 necessarily belongs in the sphere of private life; or that a voluntary body with 3000 members still necessarily belongs in the sphere of private life so long as it does not sell or supply liquor.

123. The Commission suggests that it would be more appropriate to seek to establish an appropriate balance between freedom of association and freedom from discrimination by less arbitrary means. This could be achieved by adopting broad coverage along the lines of the DDA, and limiting this not by a numerical or alcohol related cut-off, but rather through any exemptions, based on more substantive principle, which are identified as appropriate through submissions and consultation.
124. As noted by the Discussion Paper, the SDA Review recommended expansion of coverage of clubs by the SDA; removal of the exemption for voluntary bodies; and extension to all clubs covered of the exemption for single sex clubs.
125. Section 27 of the DDA provides an exception for clubs and associations for people with a particular disability. It is not clear that this this exception is in fact necessary in the particular context of the DDA. (For example, a person who is not Deaf but has a mobility disability is ineligible for membership of a social club for Deaf people not because she has a mobility disability but because she is not Deaf. There is no capacity under the DDA to make a valid complaint of discrimination because a person does not have a disability or does not have a particular disability.)
126. However there may be more justification for such a provision in the context of a consolidated Act, in order to ensure that associations can lawfully be established and function for people, for example, who share a particular political opinion, or religion, or sexual orientation.
127. A special measures exception may not be sufficient for this purpose. While in some instances the existence and operation of such associations might be able to be shown to constitute a special measure, other justifiable instances of associations for people with a particular attribute would not fit well within this concept. In this context it would appear appropriate to ensure that such a provision also covers associations for people with a particular combination of attributes (such as race and disability for example, or gender and religious affiliation).
128. The Discussion Paper notes that the UK legislation provides an exemption for associations of people who share a protected attribute.
129. The Commission notes however that, while in many instances permitting associations for people who share a particular attribute appears an appropriate response to the right to freedom of association, this response does necessarily imply permitting exclusion of people who do not share the attribute. Instances could be identified from Australian and international experience – through superior opportunities or facilities being available on a

“whites only” basis for example, or only to men, or only to members of a dominant political party or religion.

130. Options for ensuring that there is recourse available in such circumstances while permitting the operation of attribute specific associations might include:

- subjecting an exemption for attribute specific associations to a “legitimate and proportionate” test, as has been proposed as a general limitations clause;
- making clear that specific coverage of, and specific exemptions for, clubs and associations is additional to rather than exclusive of coverage by provisions modelled on s.9 of the RDA providing a human rights based test for discrimination which applies to any area of public life.

Recommendation 28: The Commission recommends favourable consideration be given to a consolidated Commonwealth equality law adopting a broad definition of clubs and associations comparable to that in the DDA, subject to any appropriate exceptions identified in submissions and consultations, including in relation to associations for people with a protected attribute or combination of attributes.

6.6 Sport

131. As the Discussion Paper notes, discrimination in relation to sporting activity should be regarded as covered by section 9 of the RDA, and would be within the scope of a similar provision in a consolidated law applying across all attributes and all areas of public life.

132. The Commission agrees that in many instances discrimination in relation to sporting activity would be covered by other provisions, including provision of services and facilities; and membership and benefits of clubs and associations (particularly if a broad approach such as that of the DDA is adopted). Sporting activity as part of education would also be covered by provisions addressing discrimination in education. Coaching and other activity would also be covered by a broad provision on work, on the lines of the Tasmanian legislation.

133. However, the Commission considers that the specific recognition of sport in the DDA has provided useful emphasis and clarity of coverage. Sporting participation is clearly an important part of social inclusion and participation, and promoting non-discriminatory participation in sport has important practical and symbolic roles in promoting equality and inclusion in Australian society.

134. The Commission suggests that simplicity of drafting is an important factor in this area. The DDA, similarly to the Victorian legislation referred to in the Discussion Paper, refers to discrimination by excluding a person from a sporting activity. Compared to an approach on the lines of section 20 of the

Tasmanian Anti-Discrimination Act, which would simply list “sport” among covered areas of life, the DDA approach involves a degree of complexity and potential uncertainty.

135. A number of complaints under the DDA have involved issues of reasonable adjustment to enable effective participation in sporting activity rather than only involving simple exclusion. For example, a recently publicised conciliated outcome involved a young athlete who is Deaf being provided with a visual cue for the start of races to enable him to compete on equal terms. The complaint and conciliation process worked quickly and effectively in this instance to achieve equal opportunity and participation.
136. However, if a similar matter were litigated, there could be considerable time and resources expended pursuing issues about whether the reference to “exclusion” in section 28 of the DDA limits the applicability in this area of obligations to make reasonable adjustment; or whether exclusion should be read in a practical manner consistent with the objects of the legislation so as to import into the concept of exclusion elements of reasonable adjustment and indirect discrimination analysis.
137. An approach which simply covers sport and then provides appropriate exceptions in the interests of maintaining fairness in competitive activities appears preferable. As noted by the Discussion Paper, the Tasmanian Anti-Discrimination Act provides a possible model for an approach in this and other areas of life, through covering any discrimination in relation to covered areas of life rather than further specifying particular actions covered. So far as exceptions are concerned, the Commission agrees that the exceptions provided in the Victorian Equal Opportunity Act provide an appropriate starting point for discussion.

Recommendation 29: The Commission recommends that specific reference to discrimination in relation to sport be included in a consolidated Commonwealth equality law.

6.7 Requests for information

138. As noted in the Discussion Paper, the SDA, DDA and ADA contain provisions intended to prevent information being sought as a precursor to discrimination, while not preventing information being sought for legitimate and necessary purposes, such as to enable reasonable adjustments to be made and to ensure protection of health and safety. The Commission agrees that each of these objectives is important.
139. The drafting of the existing provisions has some complexity, which may be a reflection of the policy challenge involved in achieving the appropriate balance

between competing considerations in this area, including related objectives regarding privacy.

140. The Commission discussed issues in this area in its initial submission to the Productivity Commission review of the DDA , including the following:

Intrusive requests for personal information in application forms (or at other stages of selection processes) can discourage people with a disability from applying for jobs, from continuing with an application, or from accepting or remaining in a position. Similarly to the impact of questions to women (in particular) about marital status, or concerning intentions about having children, people with a disability may also often be concerned that information requested about disability will be used for discriminatory purposes. These concerns have a substantial basis in the experience of many people with a disability.

Equally, however, it is not in anyone's interests for employers to be denied information needed to determine whether a person can perform inherent job requirements; or to identify and make necessary reasonable adjustments. There may also be other legitimate and necessary reasons for requests for information about disability. If employers are prevented (or believe they are prevented) from getting information to resolve concerns about these issues, the end result may often be that the person with a disability is denied equal opportunity.

141. This submission also referred to guidance material published on the Commission's website which seeks to provide assurance that requests for disability-related information for legitimate purposes are in fact permitted.

142. This submission also raised the issue noted in the Discussion Paper, that a provision which only applies to requests for information directed to people with a protected attribute has limited usefulness in dealing with requests addressed to all people but which then gather information applicable to people with a protected attribute. As noted in the Discussion Paper this limitation of the DDA has now been addressed by amendments.

143. The approaches of the Victorian and Queensland legislation, which prohibit requests for information which could be used as the basis for unlawful discrimination, and then provide defences regarding legitimate purposes, has advantages in terms of simplicity as noted by the Discussion Paper. There may however be some presentational issues with such an approach in its impact on what employers and other relevant parties believe they are allowed to ask. For example, to ask a person's name is highly likely to reveal their gender, and likely to reveal ethnicity in many cases, and to ask for photographic identification would also reveal a range of attributes. The Commission will consider with interest submissions from organisations and individuals with experience in the operation of the Victorian and Queensland provisions.

Recommendation 30: The Commission recommends further discussion of legislative approaches to requests for information, with a view to finding approaches which do not discourage legitimate and necessary request but which do discourage requests which are unnecessarily intrusive or illegitimate.

6.8 Vicarious liability

144. As noted in the Discussion Paper, there is inconsistency between the RDA and DDA on the one hand, and the SDA and ADA on the other hand, in their approaches to defining a relationship giving rise to vicarious liability and in how a defence is specified for reasonable preventative action. In both respects the Commission views the SDA / ADA model as simpler and better suited to the purpose.

Recommendation 31: The Commission recommends that a consolidated Commonwealth equality law adopt the SDA / ADA approach to vicarious liability.

7 Exceptions and Exemptions

145. As the Discussion Paper notes, the range of exceptions and exemptions provided under Commonwealth discrimination law is inconsistent and potentially confusing.

146. The SDA Review recommended consideration of replacement of a number of permanent exemptions with a general limitations clause. The Commission's SDA Review submission similarly recommended consideration of replacement of permanent exemptions as far as possible with a general limitations clause.

147. The Commission agrees with the view indicated in the Discussion Paper that there is a need to ensure that replacement of specific exceptions by adoption of a general limitations clause does not result in excessive uncertainty, but notes that:

- there is potential for this issue to be addressed by other mechanisms for providing certainty; and that
- a number of existing and more specific exceptions are themselves complex and uncertain in effect.

148. The Commission has not yet formed a concluded view on what if any modifications to the form of general limitations clause proposed in the context of the SDA Review would be necessary in the broader context of a

consolidated Commonwealth discrimination law. Close consideration appears required to ensure that:

- such a clause would not result in any diminution of rights in the area of racial discrimination in particular; and that
- it can be made sufficiently clear that what is legitimate and proportionate should be assessed having regard to and consistently with the objects of the legislation

The Commission will view with interest submissions and further discussion on this point.

Recommendation 32: The Commission recommends favourable consideration be given to adoption of a general limitations clause to replace other exceptions as far as possible, subject to further discussion of the impacts of this approach on clarity and certainty for affected parties and of any areas of possible diminution of existing protection.

149. On the issue of inherent requirements and genuine occupational qualifications, the Commission notes that, as pointed out in the Discussion Paper, an exception for measures based on the inherent requirements of the particular job directly reflects Australia's obligations under the *Discrimination (Employment and Occupation) Convention* in a way in which concepts of "genuine occupational qualification" do not.

Recommendation 33: The Commission recommends that a consolidated Commonwealth equality law adopt an inherent requirements test in the area of employment and occupation and that consideration be given to the relationship of such a test to a general limitations clause for legitimate and proportionate measures.

150. Issues regarding temporary exemptions granted by the Commission are discussed below in the context of an appropriate compliance framework for the legislation.

151. Issues regarding specific exemptions for religious organisations in relation to discrimination on the grounds of sexual orientation or gender identity are discussed above in relation to protected attributes.

152. Issues regarding specific exceptions in relation to sporting activity are discussed above in relation to protected areas of life.

8 Complaints and Compliance Framework

153. The Commission supports consideration of measures for improved access to justice for people and organisations seeking to assert rights under Commonwealth discrimination law, and for increased certainty for people and organisations seeking to comply with their responsibilities – noting that the objective should be to ensure that complaint processes are linked with other elements of an effective and efficient compliance framework, rather than additional mechanisms diminishing or displacing the effective functioning of existing mechanisms.
154. A range of compliance mechanisms are already provided (although not consistently across grounds) in the RDA, SDA, DDA, ADA and AHRCA for achievement of their objects. The present review of these Acts provides an opportunity for consideration of possible improvements in the compliance framework for Commonwealth discrimination law to ensure that it meets, or better meets, the goals of efficiency and effectiveness in promoting the objectives of the legislation.
155. The need for a mix of regulatory approaches within a compliance framework is not unique to discrimination or equality law. For example, the Trade Practices Act, the Telecommunications Act and all Australian occupational health and safety laws, each include multiple mechanisms in their compliance frameworks. A brief and preliminary survey is presented below of compliance mechanisms which are already provided in Commonwealth discrimination law, or in other Commonwealth laws, or which have been recommended for inclusion in Commonwealth discrimination law.

8.1 Educative and compliance promoting effects of the legislation itself.

156. The [Best Practice Regulation](#) guide identifies improving legislative clarity as an important compliance strategy. It should also be seen as a means of reducing compliance costs.

8.2 Information, education and compliance promotion activities.

157. All Australian discrimination laws include this function, the principal constraint being resourcing rather than a need for legislative changes to the powers and functions of the Commission being apparent. The Commission notes that
- information, education, and compliance promotion activities should be expected to be substantially more efficient and effective if based on legislation which is clearer and more consistent; but that

- there will be a need to consider enhanced resourcing of these activities leading up to and into the initial transitional period of operation of a revised and consolidated law.

Recommendation 34: The Commission recommends that the Attorney-General's Department commence discussions on transitional requirements for resourcing for information, education and compliance promotion activities related to introduction of a consolidated Commonwealth equality law.

8.3 Provision for development and publication of compliance guidelines

158. All Commonwealth discrimination laws include a function of developing and publishing guidelines - although the degree to which it has been exercised has varied across grounds. As with more general information provision, guidelines can be seen as aimed at:

- Informing relevant persons and organisations of the existence of the legislation and its provisions and providing information or advice on the meaning of the legislation and its application to particular situations
- Influencing attitudes and persuading people and organisations towards compliance
- Enhancing the capacity of people and organisations to act in compliance with the legislation (including providing access to practical information and strategic advice on approaches to compliance).

159. As with other more general information and compliance strategies, the Commission notes the need for consideration of resourcing the function of provision of guidelines in the transitional period of introduction of a consolidated law.

160. Guidelines under the discrimination Acts do not have any defined legal status. There may be some uncertainty for enterprises accordingly regarding the effect and benefit of acting in compliance with Commission guidelines, and some potential for limited take-up and effectiveness accordingly; or for inefficiency and possible injustice if litigation fails to take account of actions undertaken in reliance on guidelines issued by the Commission.

161. On this point the NSW Anti-Discrimination Act s120A(4) for example indicates in relation to codes of practice issued by the ADB that

A code of practice is not legally binding on any person [but] evidence of compliance with or contravention of a code may be considered by the President

and the Tribunal in the exercise of functions under this Act or the Administrative Decisions Tribunal Act 1997.

162. A similar provision clarifying the relevance of Commission guidelines may be appropriate.

163. The Commission does not propose at this point however that Commission guidelines should be given greater legal status than this, for example by defining compliance or non-compliance with Commission guidelines as evidence of compliance or non-compliance with the legislation). Possible provision for codes of practice which have regulatory effect rather than purely advisory or informational effect raises distinct issues from those regarding guidelines, and accordingly is discussed separately below.

8.4 Provision for development of voluntary compliance plans by regulated entities.

164. The DDA provides that Action Plans are to include provisions relating to:

- devising of policies and programs to achieve the objects of the Act;
- communication of these policies and programs;
- review of practices with a view to the identification of any discriminatory practices;
- setting of goals and targets against which the success of the plan in achieving the objects of the Act may be assessed, and/or other means for evaluating policies and programs; and
- designation of responsibility for implementation.

165. Action Plans may be, but are not required to be, submitted to the Commission. The Commission is required to make publicly available those Action Plans which are submitted. Electronic submission and publication of the majority of plans has enabled this to occur with modest administrative costs, and enables public access to Action Plans free of charge via a register on the Commission's website.

166. The Commission does not have sufficient resources to produce any assessment of the adequacy of individual Action Plans submitted, but has produced guidance materials on preparation of Action Plans. The major quality control elements for Action Plans have been:

- the level of discussion and consultation within organisations and externally which preparation of many Action Plans has produced;

- that they are made available for public scrutiny; and
- that many Action Plans include commitments to processes of evaluation and review.

167. When the DDA was introduced in 1992, the legislative invitation to prepare Action Plans was addressed only to entities in their capacity as service providers. Pursuant to recommendations from the Productivity Commission review of the DDA, this provision was amended in 2009 to extend the invitation to persons and organisations with responsibilities under the Act in any capacity.

168. Preparation and submission of action plans is voluntary. The Commonwealth Government's initial Commonwealth Disability Strategy included a commitment (which achieved partial compliance from Departments and limited compliance from agencies) for all Departments and agencies to prepare Action Plans. This commitment was subsequently subsumed into more generic diversity reporting which does not specifically relate to the discrimination Acts.

169. Some State governments have adopted requirements for disability planning and reporting by public authorities either in legislation¹⁵ or policy directives¹⁶; and in some instances the resulting plans have also been submitted to the Commission as DDA Action Plans. This might be considered as a (relatively informal) model for mutual recognition of diversity plans or of other compliance strategies.

170. More formal provision for mutual recognition might require consideration of elements of compliance frameworks with greater legal effect – including enforceable undertakings as are provided for in the recent Victorian legislation and as recommended in the Commission's SDA review submission.

171. Action Plans do not have definitive legal status in themselves. However:

- the Commission has promoted Action Plans as a proactive compliance strategy to minimise the risk of complaints occurring;
- in some instances Action Plans have formed part of the resolution of complaints;
- in some instances Action Plans have formed the basis of an application for temporary exemption;
- the DDA provides that an Action Plan is to be taken into account (among all other relevant factors) in determining issues of unjustifiable hardship in the event of a complaint. An equivalent provision in relation to other grounds of

discrimination, where an unjustifiable hardship defence is not provided for could be to provide that an Action Plan is to be taken into account as evidence of compliance and/or in determining what remedies should be awarded for discrimination.

172. The SDA, RDA, and ADA do not contain any equivalent provision. The RDA and SDA pre-dated the development of the Action Plan concept which was initiated with the DDA. It is not clear why provision for Action Plans was not made in the ADA. It is possible that the relevance of Action Plans in this context was not as clear, at a point when the action plan concept was restricted to service provision only, as it appears now with Action Plans providing a more general compliance approach.

173. The Commission's submission to the SDA review recommended that similar provision for gender equity plans be made under the SDA, noting that this would enable organisations not covered by compulsory gender equity reporting (which applies to larger employers and to public sector agencies) to demonstrate voluntary commitment to the objects of the SDA, and would also provide a structure for agreements to achieve systemic outcomes in response to complaints or other investigations or inquiries by the Commission.

174. Consideration of extension of provision for voluntary compliance plans across all grounds of Commonwealth discrimination law appears similarly warranted as a minimum. Mandatory action plans for public authorities and organisations in receipt of public funds or exercising public functions would be a further step for possible consideration as a form of "positive duty".

175. Preparation and ongoing review of an Action Plan can be a substantial exercise including internal and external consultation and in some instances the engagement of specialist advice. However if preparation of action plans remains voluntary, it would be a decision for enterprises whether to incur costs involved rather than these costs being imposed.

176. Access to published action plans produced by other enterprises would reduce information search costs and costs of advice for organisations seeking information on how to comply, and accordingly would reduce relative compliance costs for small enterprises in particular.

Recommendation 35: The Commission recommends that a consolidated Commonwealth equality law provide for development and provision to the Commission of voluntary Action Plans in relation to any or all protected attributes.

Recommendation 36: The Commission recommends favourable consideration be given to provision in a consolidated Commonwealth

equality law for mandatory development by public authorities of Action Plans covering all protected attributes.

8.5 Provision for recognition or certification of compliance plans.

177. As noted earlier, action plans under the DDA, while providing for a positive approach to compliance, have only limited legal effect. Incentives to prepare, submit and implement an action plan may be limited by this.
178. In some instances enterprises or industry bodies have sought and gained a greater degree of certainty and endorsement for action plans or other compliance plans, by means of the DDA temporary exemption process.¹⁷
179. A more explicitly positive mechanism for certification of compliance plans could however be considered, to avoid disincentives to proactive compliance measures which could arise from negative reputation effects associated with applying for an “exemption” from the legislation. A positive mechanism for certification of compliance plans would reduce or avoid this disincentive, and focus attention more beneficially on whether approval of the compliance plan would be appropriate in advancing the objects of the legislation.
180. The SDA and ADA have similar provision for temporary exemptions and similar arguments appear to apply in favour of providing a positive mechanism for recognition of positive compliance measures. The Commission’s submission to the SDA review recommended consideration of such a mechanism for the SDA.
181. The RDA does not contain provision for temporary exemptions. Provision for certification of positive compliance measures in relation to racial discrimination may however present a less problematic range of issues than those which would be presented by a broad power to permit racial discrimination pure and simple through exemptions.
182. The incentive provided by increased regulatory certainty may be expected to increase the preparedness of enterprises to commit to proactive compliance measures compared to purely voluntary action plans on the existing DDA model.
183. The Commission’s submission to the Productivity Commission review of the DDA proposed that approved compliance plans should operate as a defence for actions in accordance with the plan (in the same way as temporary exemptions do) rather than as becoming mandatory in themselves. Enterprises would thus be able to show compliance through compliance with an approved plan, but would retain flexibility through the ability to demonstrate legislative compliance by other means.

184. The Commission emphasises that these issues are raised here to facilitate community discussion rather than as matters on which the Commission itself has formed or is putting to Government a definite and concluded view. Before decisions were taken to an approved compliance plan approach careful consideration would be needed of:

- Whether compliance plan approval would be likely to involve significantly greater workload and resourcing requirements;
- What processes should apply for approval to ensure transparency and accountability and that such a process advances rather than undermining the objects of the legislation;
- Whether power to approve compliance plans can be conferred in a manner which is not mandatory or compellable (to permit the Commission to manage workload implications);
- Related to this, whether a capacity to approve compliance plans can be conferred in a manner which makes sufficiently clear that seeking approval is not mandatory, to avoid in effect imposing a substantial new regulatory burden on enterprises;
- Whether this form of co-regulation, if provided for, should be provided for generally or only in relation to defined matters;
- Whether an approved compliance plan should constitute compliance in itself (as is the effect of such a plan in some areas of road transport regulation for example); or should only constitute evidence of compliance (as is the case with plans in the occupational health and safety area); or whether a two tier approval system should be provided to cater for different circumstances.

185. For example, a plan which specifies reasonably readily measured events over time (such as percentages of broadcast time captioned) and/or events where the benefits of certainty and thus the resulting incentive to take positive measures are very large (such as numbers of accessible railway stations measured against the indicators specified in standards) might appropriately be given conclusive effect. By contrast a plan specifying measures to satisfy the obligation to take reasonable precautions and exercise due diligence to prevent sexual harassment might be regarded as more comparable with plans in the OH&S area, which have evidentiary effect only.

Recommendation 37: The Commission recommends further discussion on possible provision for certification of compliance plans within a consolidated Commonwealth equality law, including the extent of effect of such certification if provided for, and resource implications of a certification procedure.

8.6 Provision for recognition or certification of industry codes and other co-regulatory measures.

186. In addition to certification of compliance plans for a particular organisation or group of organisations (which might either emerge out of complaint processes or be initiated from within the organisation concerned) co-regulatory mechanisms could include certification of codes developed by industry bodies or other standard setting bodies.

187. The report of the Productivity Commission's review of the DDA included recommendation 14.5 as follows:

The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.

188. The Productivity Commission stated:

The Productivity Commission considers that the benefits of co-regulation, particularly its flexibility to deal with a variety of different circumstances and changes over time, are compelling. The Commission is not suggesting that it be mandatory for industry organisations to formulate and implement codes of conduct, just that this form of regulation be an option.

The Commission considers that HREOC should be able to approve and register codes of conduct, including dispute resolution mechanisms, subject to criteria such as consistency with the objects of the DDA and adherence to good regulatory practice. Consultation is fundamental to developing good regulation, including codes of conduct. Codes of conduct should be certified only after organisations have consulted with stakeholders, including people with disabilities and relevant government departments and agencies.

189. As noted under the previous item regarding certification of compliance plans, the Australian Human Rights Commission's submission to the SDA review (in line with the Productivity Commission's recommendations in its earlier DDA review) supported consideration of co-regulatory mechanisms featuring a certification function for the Commission.

190. Certification would create a (partial or complete) defence for actions in accordance with a certified code, rather than making compliance with such a code mandatory. This approach offers potential to:

- Increase upfront certainty for enterprises with responsibilities;
- Provide incentives for improved compliance, avoidance of discrimination and achievement of equal social and economic participation and contribution accordingly (particularly if a positive duty is in place).

- Provide opportunities for partnership approaches between government, industry and community in planning human rights compliance (on the basis that one of the requirements for certification would be having conducted appropriate consultation - as is the case in existing models of co-regulation for example under the Telecommunications Act and as is required under the Legislative Instruments Act). As noted in Best Practice Regulation, consultation can in itself provide a means of encouraging compliance - through for example developing greater understanding and ownership among the regulated entities.

191. No State or Territory equal opportunity law currently provides for Standards or for certified codes or compliance plans. The Commission's position as a national body administering Commonwealth law offers potential to be able to provide a uniform national approach with benefits including a simplified regulatory environment for enterprises, in priority areas as identified by enterprises (and thus also an incentive for enterprises to engage in compliance efforts).

192. The recent Victorian review recommended against introducing these mechanisms to the Victorian Act in the revised compliance framework in that jurisdiction. However, the context presented by State legislation is clearly different. There would be difficulties in gaining certainty through State based standards or certified codes when open ended Commonwealth discrimination laws would continue to apply in any event. Provision on these lines in Commonwealth law would not suffer the same problem.

193. A certification role has been performed to a limited extent through the temporary exemptions process under the SDA and the DDA in particular. For example, as noted, advances in television captioning have been procured through the DDA exemption process, following DDA complaints. However:

- As already noted, the RDA does not contain provision for temporary exemptions (although it might be appropriate to be able to certify codes in relation to some racial discrimination issues);
- The SDA, DDA and ADA do not contain any express criteria for exercise of the temporary exemption powers (although the Commission has adopted some criteria in its published policy, including that exemption applications should be considered having regard to the objects of the relevant Act);
- The Acts do not provide any procedure for exercise of these powers (although in its published policy the Commission has committed to consultation as appropriate in the circumstances of each application and in particular to consultation with State decision makers exercising similar powers);

- Decisions to grant or refuse an exemption are reviewable and re-makeable by the Administrative Appeals Tribunal (again without the benefit of any specification of criteria or procedures) rather than by disallowance in Parliament - despite exemptions being able to be granted on a broad-ranging basis for a class of persons (including a whole industry) and thus in some respects resembling quasi-legislative power;
- Since temporary exemptions are classified as exercises of administrative jurisdiction rather than being legislative instruments, it is not certain that granting of a Commonwealth exemption would preclude liability under parallel State / Territory legislation. This could be seen as presenting a serious limitation on the ability of exemption based approval to provide certainty or a single national regulatory environment where this is desirable.

194. If codes are to be certified for compliance purposes, it might thus be more appropriate to provide expressly for a mechanism for certification of codes, rather than relying on the existing exemption provisions for this purpose. As with certification of compliance plans, decisions would be required on:

- Whether certification should be conclusive of compliance, or constitute evidence of compliance, or whether a two tier system should be available to accommodate different circumstances;
- What processes should apply for certification;
- Whether certification of codes would involve significant resource demands. In this respect it should be noted that the approach contemplated in the Legislative Instruments Act, and in the provisions on co-regulation in the Telecommunications Act, is that community consultation is a role required principally from code proponents rather than from the Commission.

195. Discussion would also be appropriate of whether it is possible to provide such a power in a manner which is not mandatory or compellable to exercise.

8.7 Provision for recognition of codes or standards developed by other regulatory and expert bodies.

196. Discussion of certification of codes and standards for discrimination law purposes has generally been conducted by reference to co-regulatory approaches from industry bodies. The relevance of certification mechanisms is not, however, confined to this.

197. For example, in the United States, as a means of regulatory co-ordination and harmonisation the US Access Board has a function of certifying codes developed by authorities at State level as sufficient for compliance with relevant provisions of the Americans with Disabilities Act . Such a mechanism

could similarly serve as a means of advancing harmonisation and mutual recognition of regulatory requirements in the Australian context.

198. In particular, some of the complexity currently involved in developing Standards under the DDA might be able to be reduced, in instances where the aim is to provide a vehicle for recognition by discrimination law of an upgraded version of another regulatory regime, by a provision to do this more directly through certification.

199. For example, the Disability Standards for Access to Premises could be seen as constituting a technically quite complex mechanism for what was in substance intended to be a process for certification of upgraded access provisions in the Building Code of Australia.

200. Prescription of other laws under Commonwealth discrimination laws (for example for the purposes of DDA section 47) may not at present fully meet the same purpose since:

- this only protects actions in “direct compliance with” the prescribed law rather than “in accordance with” - and hence it is not certain (although possible) that actions which are permitted but not required by the prescribed law are protected;
- if this provision were altered to protect actions “in accordance with” a prescribed law from liability under Commonwealth law (so as to be consistent for example with section 34 of the DDA), it would still remain to be considered whether prescription for Commonwealth discrimination law purposes was sufficient to exclude liability under State and Territory discrimination laws, or only under Commonwealth law;
- the prescribed laws provisions of the SDA, DDA and ADA only refer to “laws”, not to codes and standards emanating from other sources (such as Australian Standards);
- the RDA does not contain a prescribed laws provision.

201. A certification mechanism which permitted certification of codes and standards generally, rather than industry codes only, could promote regulatory efficiency by reduction of duplication and inconsistency. A certification process could provide a venue for negotiation and consultation to these ends.

202. The successful interaction between the Commission, the Australian Building Codes Board, other areas of government, and industry and community representatives in development and authorisation of improved building access standards provides an illustration. Other instances might involve negotiation with the owners of health and safety standards to ensure that these facilitate

safe participation by (for example) women and older workers, rather than these standards being (or being seen as) in unresolved competition with discrimination law and its objects.

203. On this approach, negotiation would need to occur both initially and in considering further certification (assuming that the general approach were applied pursuant to the Legislative Instruments Act of requiring reconsideration of instruments every 5 years).

204. This approach would involve certification of codes and standards developed by other bodies as being sufficient, but not necessary, for Commonwealth discrimination law compliance, and accordingly should not be regarded as involving imposition of substantive new regulatory requirements on enterprises.

205. As with other aspects of code certification, consideration would be needed of likely demands on, and need for, resources in such a function. Capacity to endorse codes developed by other regulatory and standard setting bodies could however provide a means for avoiding significant costs in time and money for development of standards specifically under Commonwealth discrimination law, and assist both in processes and outcomes of complaint handling.

Recommendation 39: The Commission recommends that consideration of co-regulatory mechanisms include consideration of provision for recognition for the purposes of a consolidated Commonwealth equality law of codes and standards issued by other regulatory or expert bodies, in addition to industry based codes.

8.8 Exemptions: provision for permission to be given for actions that are, or might be, otherwise prohibited.

206. The SDA, DDA and ADA provide for the Commission to grant temporary exemptions from the unlawful discrimination provisions of these Acts. Exemptions may be granted for periods of up to five years at a time and on such conditions as the Commission sees fit. The legislation does not specify any criteria or procedures for consideration of exemption applications.

(a) Exemptions as a means of structuring movement towards compliance

207. The temporary exemption power has performed a significant role in promoting compliance under the DDA in particular (albeit on a narrow range of issues and in a small number of matters) through providing for timetables for compliance and providing a mechanism for approving technical and other approaches to compliance.

208. For the reasons set out in preceding sections of this submission consideration should be given to whether this role might be better performed by purpose built mechanisms to certify compliance plans and codes by means of legislative instrument.

(b) Exemptions as a means of certifying permissibility of beneficial measures

209. Another role which temporary exemption processes have performed has been to confirm the permissibility of measures intended to redress disadvantage or address specific needs.

210. This has not been a major source of activity under the DDA. As explained by (then) Deputy Commissioner Graeme Innes in his [recommendation](#) for decision on an exemption application by Employers Making a Difference:

The Disability Discrimination Act provides for complaints only where a person alleges discrimination on the basis of a disability which that person has (or which is imputed to him or her, or he or she had in the past or may have in the future or the disability of an associate). A complaint that a person has been discriminated against because he or she does not have a disability or the particular disability which is a criterion for eligibility for a program or opportunity would lack any valid basis in the Disability Discrimination Act - or for that matter under its State and Territory equivalents, each is which is in similar terms in relevant respects.

211. Applications for exemption to protect measures intended to address specific needs or redress disadvantage have been more common under the SDA. In some instances the Commission has refused an application of this kind because it was satisfied that the matter clearly involved a special measure and therefore involved no unlawful act for which exemption could be granted: for example [Dell Women and Children's Centre](#) (refusing an exemption regarding women only health services including rape crisis facilities) and [Griffith City Council](#) (refusing an exemption regarding women only sessions at a council pool and fitness centre to enable participation by survivors of domestic violence and by women unable to use mixed pool or gym facilities for religious and cultural reasons).

212. These decisions support the view that temporary exemptions may not be the most appropriate instrument for providing certainty regarding the permissibility of beneficial measures and that provision of a more appropriate mechanism may need to be considered.

213. Exemption applications for similar purposes have been made in relation to racial discrimination under State and Territory laws. The Commission does not have power to authoritatively certify special measures under the RDA however, by way of exemption or otherwise. The Commission has from time to time issued certificates indicating an opinion that a measure constitutes a special measure, but such certificates lack any defined legal effect.

214. Needs for exemptions for this purpose may be hoped to be minimised by improved drafting of the substantive provisions of the legislation regarding the permissibility of beneficial measures. The Commission has also previously recommended (in its SDA review submission) provision for positive certification of special measures to redress disadvantage and past discrimination or address special needs and circumstances.

215. The NSW Anti-Discrimination Act for example provides for certification of special measures by the Minister (see section 126A) in addition to its provision for temporary exemptions. Provision of certification under Commonwealth discrimination law could have advantages in reducing needs for enterprises (including small voluntary organisations and small businesses as well as national enterprises) to seek permission from multiple regulators if it were clear that a legislative instrument or other form of certification declaring an action lawful would displace potential State and Territory discrimination law liability.

216. Before specific provision for certification of special measures could be implemented there would clearly need to be consideration of

- likely resource demands
- appropriate provisions on procedure and criteria for certification
- review processes and accountability.

(c) Exemptions as a means of regulatory co-ordination

217. A third and small category of uses of temporary exemption powers has been to co-ordinate the relationship between the SDA and DDA and other regulatory regime, in particular [an exemption granted to persons acting pursuant to Civil Aviation Safety Regulations](#). As discussed elsewhere in this submission however it appears likely that more appropriate provision could be made for this class of matter through improvements in the capacity for prescription by regulation of other legislative provisions for Commonwealth discrimination law purposes and/or inclusion of capacity for the Commission to certify other laws and regulatory standards rather than this being done by way of exemption.

(d) Exemptions permitting non-compliance for external reasons

218. Matters discussed so far in this submission which have been dealt with by way of temporary exemption under Commonwealth discrimination law have concerned:

- timetables for movement towards compliance;

- defining what compliance means, including instances where departures from formal equality are nonetheless justified by pursuit of substantive equality or recognition of specific needs and rights; and
- co-ordination of the roles of Commonwealth discrimination law and of other regulatory regimes in achieving compliance with their respective objects.

219. As noted above, consideration should be given to whether each of these categories might be able to be better dealt with by mechanisms other than the temporary exemption process.

220. There remains a residual category where what is sought is a genuine exemption from compliance.

221. As indicated in its policy on temporary exemptions, the Commission has ordinarily not been prepared to grant exemptions simply to allow discrimination to continue. For example, applicants who have asserted simply that actions to comply with provisions of the DDA would involve unjustifiable hardship, and who have not proposed reasonable measures to reduce discrimination over time, have been advised that while they may seek to establish a defence of unjustifiable hardship in response to complaints, they should not expect the grant of a temporary exemption simply to certify that unjustifiable hardship exists or that compliance is not required for some other reason.

222. The Commission's practice in this respect 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.

223. Discussion appears necessary of whether there would nonetheless be a need for maintenance of an exemptions power alongside capacities to certify compliance plans, codes and standards, and special measures, in the event that those capacities were provided for.

224. If a general power to grant exemptions is to be maintained, consideration appears desirable of what provision should be made in relation to

- criteria;
- consultation;
- accountability for exercise of quasi-legislative power;
- publication and access;
- status in relation to State and Territory discrimination law.

225. It might also be argued that any bare power to provide exemptions other than for the purposes of promoting the objectives of the legislation is so exceptional that if available at all it should be a Ministerial rather than Commission function (and in that case reviewable by disallowance and by judicial review).

Recommendation 40: The Commission recommends further consideration be given to the extent to which the purposes of a temporary exemption power within a consolidated Commonwealth equality law might be met by alternative positive mechanisms.

Recommendation 41: The Commission recommends that if a temporary exemption power is included in a consolidated Commonwealth equality law its exercise be subject to substantive criteria and process criteria.

8.9 Provision for development of regulatory standards.

226. The DDA (but not the other Commonwealth discrimination Acts) provides for development of regulatory standards. Where they apply, compliance with these standards is both necessary and sufficient for compliance with the DDA. Further, it appears clear that, as a matter of direct inconsistency for the purposes of s.109 of the Constitution, these standards are conclusive of obligations under State and Territory discrimination laws.

227. For example this means that it would not be competent for a State court or tribunal under a State anti-discrimination Act to require more rapid implementation of, or more demanding specifications for, provision of accessible public transport than is required by the Disability Standards for Accessible Public Transport. Conversely, it would not appear to be possible – at least in the absence of arrangements for mutual recognition - for State level standards to exclude the operation of general Commonwealth discrimination law provisions. There is thus not necessarily any inconsistency between the Commission in its SDA review submission having supported expanded provision for regulatory standards under Commonwealth discrimination laws, and Victorian authorities having concluded in the review of the Victorian Equal Opportunity Act that it would not be worthwhile to provide for standards at State level.

228. Standards have been introduced under the DDA which:

- Provide specifications for what compliance is, and timetables or trigger events for when compliance must occur (Disability Standards for Accessible Public Transport; Disability Standards for Access to Premises – Buildings);
- Provide principles and processes for compliance in greater detail than the head legislation (Disability Standards for Education).

229. The Commission (in its SDA review submission) and the Australian Law Reform Commission (in its [Equality Before the Law](#) report) recommended that the SDA include a provision allowing the introduction of enforceable standards to deal with systemic issues, similar to those present in the DDA. The Commission noted that standards would permit simplification of multiple legal precedents on the SDA into a single authoritative document to provide clarity for both employers and other bodies, and potential applicants under the SDA about how to implement gender equality rights and responsibilities, and would be an additional tool available to address entrenched inequalities. The Commission noted that while enforceable standards may not be suitable for all aspects of discrimination, areas such as pregnancy and potential pregnancy discrimination (as recommended in the Commission's [Pregnant and Productive](#) report in 1999), and sexual harassment could benefit from such a power.
230. The SDA review noted that standards processes could be initiated by industry or other bodies or by the Commission.
231. A decision to proceed with development and endorsement of fully regulatory standards would, of course, be subject to RIS requirements in each case and to decisions on a case by case basis whether to embark on standards development.
232. Such a decision would also require consideration of the resource demands involved and alternative means for achieving the same purposes, noting that DDA standards development processes have been highly resource intensive and time extensive. The decision to embark on development of standards on a particular issue is however distinct from a decision to provide for standards to be developed when found to be appropriate.
233. This point was accepted by Government when the power to make standards under the DDA was amended so as to be available in any area covered by the general non-discrimination provisions of that Act. Not all areas where standards are able to be made under the DDA have in fact been the subject of standards development – that is, provision of the power has not compelled performance of the activity in practice.

Recommendation 41: The Commission recommends favourable consideration be given to provision within a consolidated Commonwealth equality law for subsequent development of regulatory standards regarding any area of public life and any attributes covered by the legislation.

8.10 Provision for reporting by regulated entities.

234. There is no direct provision for reporting requirements in Commonwealth discrimination laws, although some temporary exemptions granted have included reporting requirements as a condition of the exemption.

235. Specific proposals for notification or reporting requirements under Commonwealth discrimination laws have not been put forward to this point by the Commission (other than in the context of positive duties for government bodies). However, the Commission's SDA review submission recommended consideration of a positive duty to take reasonable steps to eliminate discrimination and promote gender equality, which could include some reporting components.

236. Positive duties may cover a number of distinct elements:

- General requirements to promote equality as provided in the UK legislation (which although expressed as "positive duties" do not appear to involve any corresponding justiciable or enforceable rights, the main obligations under these duties being to undertake planning and reporting);
- Requirements such as have now been provided under the Victorian legislation for public bodies (which in addition to planning and reporting obligations engage the capacities provided for the Victorian Equal Opportunity and Human Rights Commission including to conduct inquiries and to seek enforceable undertakings).

237. The Discussion Paper appears helpful in the current context in separating these two categories - more clearly than the SDA review process may have done - from a third and potentially less controversial category: duties to make reasonable adjustments to accommodate specific needs.

238. As noted in the Discussion Paper, this last category of duty is already implicit in existing indirect discrimination law (and as discussed above the Commission recommends express provision for duties to make reasonable adjustments in relation to all attributes covered). It is also already provided for in a number of State and Territory anti-discrimination laws. While such provision might be described as a "positive duty", it does not involve any significant change in regulatory approach beyond the existing body of Australian anti-discrimination law. In particular, duties to make reasonable adjustments do not necessarily involve any reporting requirements.

239. While the first two categories of duty listed above should not be regarded as imposing new substantive obligations, it is recognised that they would involve new procedural requirements for duty holders. These categories of duty would be expected to require formal regulation impact assessment if applied to

private sector entities; and less formal processes of consideration of costs and benefits for application to public sector entities.

240. It is also relevant to note (as the Commission's SDA Review submission did) that any new reporting requirements would involve resourcing issues for the body being reported to as well as the bodies required to report.

241. The Commission does not have a concluded view, pending consideration of submissions from other organisations and further discussion with government, on whether and to what extent positive duties including reporting requirements should be provided

- by a revised and consolidated Commonwealth equality law or
- by Standards or other instruments to be developed subsequently.

242. The Commission does however support specific discussion of options for positive duties in the course of this review.

Recommendation 43: The Commission recommends further discussion of provision within a consolidated Commonwealth equality law for positive duties to promote equality.

8.11 Inspection and audit functions for the regulator or administering body.

243. The Commission has legal capacity under the Australian Human Rights Commission Act to conduct an inquiry in any form it sees fit for the purposes of its functions, although there is some complexity around how this capacity fits with non-complaint related functions under the discrimination Acts.¹⁸ The Commission has a range of statutory powers to use in support of this capacity if necessary including powers to require provision of documents and other information. The Commission supports existing Commission powers being applicable to all areas of life and attributes covered by the legislation in the interests of consistency and reduced complexity.

244. In its submission to the SDA review the Commission raised for future consideration (but did not definitively recommend) an option of conferring on the Commission more specific functions and powers for auditing compliance in relation to discrimination. The Commission noted that an audit program could lead to enterprises adopting voluntary measures such as compliance plans, and could also be linked to possible new provisions for enterprises to enter into enforceable undertakings. The Commission also indicated a need to consider resourcing of any such function.

245. The Commission is aware that as noted by the Best Practice Regulation Handbook the issue of costs incurred by business in co-operating with audits and inspections would also be a factor in assessing the regulatory impact of any proposal to confer an audit function on the Commission.

Recommendation 44: The Commission recommends that existing Commission inquiry powers and functions under the AHRC Act apply in relation to all areas of public life and attributes covered by a consolidated Commonwealth equality law.

Recommendation 45: The Commission recommends further discussion of resource implications and regulatory impact of more specific provision for an equality audit function for the Commission.

8.12 Complaints investigation and dispute resolution

246. All Commonwealth discrimination laws include capacity for complaints by or on behalf of persons aggrieved by discrimination, leading to investigation and dispute resolution functions for the Commission.

247. The Commission views complaints as an important part of a compliance framework directed to achieving the objectives of the legislation, in addition to providing a means of access to justice.

248. 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.

249. Complaint processes provide means for achieving remedies for past acts of discrimination and also for putting in place agreed measures to eliminate and prevent discrimination into the future.

250. Complaints can provide avenues for participation by people affected by discrimination in achieving change. Participation of this kind is valuable in itself as a means of empowerment (as noted in the Government's Social Inclusion Policy) - although (as noted by the Productivity Commission in its review of the DDA) it is important for reasons of equity, efficiency and effectiveness in pursuing compliance with discrimination law not to place sole or excessive reliance on complaints by disadvantaged people to achieve social changes.

251. Complaints also have important information collection and distribution roles within a compliance framework:

- Complaints have capacity to bring to regulatory attention issues which might otherwise escape detection, even in those cases where legislation is

accompanied by provision for and resourcing of more active regulatory oversight mechanisms such as audit and inspection;

- Complaint processes (particularly where flexibility is provided regarding investigation and alternative dispute resolution approaches) have capacity to bring in a range of information and expertise on solutions;
- Agreed complaint outcomes, while not constituting legal precedents, can build up a substantial information base for people with rights and responsibilities, on matters including financial settlements that have been agreed to in recompense for alleged discrimination, and practical and policy approaches to avoid or remove discrimination for the future;
- While resolution can be a confidential settlement, where settlements are confidential as between the parties the Commission generally remains able to use de-identified outcome information for public awareness and education purposes. In some instances outcomes are fully public - for example a published apology or an announcement of positive measures arising from the complaint.

252. Alternative dispute resolution allows flexibility in response to different issues and circumstances. This includes flexibility of process and also comprises flexibility of outcomes , for example:

- individual compensation and/or or apology (private or public);
- development of enterprise level compliance policies (such as Disability Action Plans, diversity plans, anti-harassment strategies, and plans on workplace flexibility); development of industry wide compliance approaches, including voluntary strategies;
- co-regulatory approaches (for example as discussed above the agreed industry targets for increased television captioning which have been encapsulated in temporary exemptions under the DDA were initiated in response to complaints);
- and/or support for and participation in development of fully regulatory frameworks (for example the development of the Disability Standards for Accessible Public Transport was initiated and led by transport authorities in response to DDA complaints).

253. The Commission's current complaint process ensures an accessible, timely and inexpensive means to resolve disputes about discrimination and breaches of human rights. Statistics regarding the Commission's complaint service indicate an ongoing high conciliation rate and conciliation success rate as well as high levels of public satisfaction with the service¹⁹.

254. Accordingly, the Commission does not see a need for significant legislative changes to the current complaint inquiry and conciliation provisions.
255. In particular, the Commission would not support an approach which removed its complaint inquiry function and focuses solely on dispute resolution. The Commission notes that 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. It is the Commission's view that the current combination of inquiry and conciliation functions and lack of overly prescriptive process requirements is central to its ability to provide a flexible, timely and appropriate service with reference to the vast array of subject matter and types of disputes that are brought to the Commission.
256. The Commission notes that while it is generally understood that conciliation proceedings are confidential as described in the discussion paper, the current law does not fully reflect this understanding. Rather, the AHRCA provides that compulsory conciliation conferences are to be held in private (section 46PK) and the President must not include information about anything said or done in the course of conciliation proceedings in any report that is provided to the court regarding a complaint (section 46PS). The law does not provide any similar requirements on parties to complaints. The Commission has suggested that consideration be given to clarifying the confidentiality requirements on all participants in conciliation by including a provision along the lines of section 117 of the Victorian Equal Opportunity Act 2010.
257. As correctly stated in the Discussion Paper, while the current provisions provide for the President to hold compulsory conciliation conferences, the Commission rarely does so as in the majority of cases parties to complaints voluntarily agree to participate in the Commission's conciliation process.
258. The Commission notes that directions regarding the conciliation processes are currently contained in section 46PK of the AHRCA which only applies expressly to compulsory conciliation. The Commission recommends that the legislation be amended to ensure that it is clear that these directions apply to both voluntary and compulsory conciliation processes.
259. The Commission understands that the term 'compulsory conciliation' as raised in the Discussion Paper relates to an apparent concern that involvement in conciliation is mandatory in order to access the court. However, the Commission notes that currently complainants are able to make an application to the court regardless of the ground on which their complaint was terminated and that there are options in the law which provide for parties to access the court outside of conciliation.

260. For example, section 46PH(1)(g) of the AHRCA provides that the President can terminate a complaint where satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court. Additionally, in relation to section 46PH(1)(i), termination on the ground that the President is satisfied that there is 'no reasonable prospect of the matter being settled by conciliation' does not necessarily only arise after participation in a conciliation process. For example, where there is significant dispute about the merit of a matter and vast discrepancies between the parties in relation to the options for resolution it is open to the President to terminate a complaint on this ground without a conciliation process.
261. The Commission would have concerns about introducing a provision to enable direct access to court. As well as the likely increased workload on the court arising from a direct access provision, the Commission is of the view that the current scheme which provides for access to the court after an administrative complaint process, encourages parties to utilise more informal and less expensive avenues for dispute resolution in the first instance. The administrative inquiry and conciliation process 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. While generalist court-based ADR services are available to litigants, it is the Commission's view that its conciliation process offers a more accessible, informal and specialist service in relation to the often complex area of human rights and anti-discrimination law.
262. The Commission currently provides a flexible complaint resolution process that extends beyond a single model of ADR. While the law refers to 'conciliation', in practice the complaint resolution process is best classified as a hybrid ADR model which can span the traditional facilitative model of mediation and the more advisory aspects of statutory conciliation. With this in mind, the Commission is not adverse to possible change in the terminology of the legislation to include reference to mediation and conciliation.
263. The Commission notes that its conciliators are trained with reference to the National Mediators Standards and are also trained to facilitate a more advisory ADR process as may be appropriate to the particular matter.
264. The Commission does not support the option of using external mediation services. It is understood that this has been adopted in some overseas jurisdictions such as the Equal Employment Opportunity Commission in the United States, as a means to address delays due to lengthy complaint investigations before conciliation and potential perceptions of bias in the in-house conciliation process where the agency also has a role to litigate on

behalf of complainants. This is a very different context to that of the Commission.

265. The Commission's current ADR process provides for matters to proceed directly to conciliation where appropriate and statistics in relation to the Commission's complaint service indicate that there are very low perceptions of bias reported by those involved in the complaint process²⁰. In light of this and the fact that the Commission's current complaint resolution process incorporates more facilitative forms of dispute resolution, the use of a separate and external mediation service would appear to be a duplication of services with minimal real benefits.

266. The Commission notes that while there are possible benefits in providing for a voluntary arbitration process as referred to in the Discussion Paper, such processes traditionally require significant resourcing arising from the more detailed and thorough investigation associated with determinative processes.

Recommendation 46: The Commission recommends that a consolidated Commonwealth equality law 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.

8.13 Provision for enforcement action

267. Regulators in areas such as consumer and competition law and occupational health and safety have capacity to undertake a range of enforcement actions including issuing compliance notices, entering into enforceable undertakings, and initiating court proceedings.

268. There is no capacity in Commonwealth discrimination laws - other than capacity to seek an injunction to maintain the status quo in relation to a complaint - for enforcement action of this kind by the Commission. The current structure, operations and resourcing of the Commission are significantly different from that of regulatory bodies in these areas and provision for enforcement roles would involve significant change.

269. Provision for the Commission or Commissioners to be able to initiate proceedings in court has been raised in the Discussion Paper and on previous occasions as a means of achieving increased effectiveness of the legislation in achieving its broad goals of promoting social and economic participation.

270. The Commission does not have a single settled view on this issue at this point and will consider this issue further in the light of submissions from other organisations.

271. As noted by the Commission on previous occasions, possible adverse impacts on the effectiveness of complaint investigation and resolution functions through effects on perceptions regarding impartiality would require careful consideration, together with potential impacts on the Commission's resources including financial resources.

272. The possibility of enforcement action might be likely in some instances to increase incentives for respondents to settle complaints rather than expend their own and justice system resources in litigation. However it is also possible that in other instances adverse effects on perceptions of impartiality in complaint handling processes could reduce the preparedness of respondents to engage in the conciliation process.

273. The United Nations Office of the High Commissioner for Human Rights in a recent publication has emphasised that:

The difference between NGOs and NHRIs are perhaps most pronounced with regard to the investigation of complaints. National human rights institutions are neutral fact finders, not advocates for one side or another.²¹

and that

... it must be remembered that NHRIs are not a substitute for law enforcement officials or a properly functioning judiciary.²²

although, contrastingly, the same publication also indicates that seeking redress or remedies through courts or specialised tribunals is a typical role for national human rights institutions.²³

274. A capacity to act in the absence of a complaint, but as if a complaint had been received, was included in the DDA as passed. There was provision made for the Commissioner to pursue discrimination issues as if a complaint had been lodged. This power was seen as highly important by disability community organisations, partly because of their own limited resources and concerns about the ability of disadvantaged and vulnerable people to use the legislation sufficiently effectively in driving large scale social change.

275. However, the "self-start" power as originally framed involved the Commission referring a matter to the Commissioner, who would then take the matter to the Commission as the tribunal, as if a complaint had been lodged. This process - which in effect involved the Commission complaining to itself - was seen as presenting serious problems of apparent or actual bias, which contributed to this process going unused in practice. It was removed when the machinery provisions of the DDA and other Commonwealth anti-discrimination legislation were revised in 1999 with effect from 2000.

276. The possibility of reinstatement of this capacity in a more appropriate and workable form was raised by the Commission in its submission to the Productivity Commission review of the DDA, but was not the subject of recommendations by the Productivity Commission. The Commission noted in its submission to the Productivity Commission that concerns had been expressed regarding possible perceptions of conflict between a self-start role and the Commission's role in impartial investigation and resolution of complaints, and agreed that this concern would need to be addressed in any consideration of reinstatement of a self-start power.
277. Consideration of provision for the Sex Discrimination Commissioner to take proceedings in the Federal Court without a complaint being required was proposed by the Commission in 2008 in its SDA review submission.
278. Power to initiate proceedings would clearly have resource implications, depending in part on the approach taken to whether and to what extent losing parties in discrimination matters remain exposed to costs orders.
279. If this option were pursued, some concerns might be met by including provisions requiring a Commissioner with such a power to obtain the approval of the Commission before exercising it; including duties to make reasonable efforts to reach an agreed settlement before proceeding to court, and to afford persons whose interests may be affected by the matter a reasonable opportunity to participate including in commenting on proposed settlements (e.g. by published a notice on the Commission's website).
280. Conversely it might be argued that improved provisions to enable action by persons or organisations with a sufficient interest in the matter could address concerns about effective access to justice and effective compliance without raising the same issues of the Commission's role and resourcing.

Recommendation 47: The Commission recommends that proposals for initiation of matters in court by the Commission without requiring a complaint be considered further following receipt of public submissions.

8.14 Provision for civil action by persons or organisations with a sufficient interest in the matter.

281. The Australian Human Rights Commission Act provides for complaints to the Commission by or on behalf of persons aggrieved by alleged unlawful discrimination under any of the discrimination Acts. Complaints can be made by any person on behalf of a person or persons aggrieved. In the event that the matter is not resolved by conciliation, proceedings are able to be initiated in the Federal Court or Federal Magistrates Court.

282. Availability of remedies through proceedings in the Federal Court or Federal Magistrates Court in the event that a conciliated settlement is not reached clearly provides an incentive for respondents to seek to resolve complaints by conciliation. Conversely, this incentive may be reduced to the extent that there are constraints on use of court proceedings (in relation to standing, costs and availability of advice and advocacy).

283. The ability to take court proceedings under Commonwealth discrimination law is currently more constrained than the ability to bring complaints to the Commission. Complaints to the Commission can be made by *or on behalf* a person or persons aggrieved by an alleged act of unlawful discrimination. Court proceedings can only be initiated *by* a person or persons aggrieved.

284. “Person aggrieved” is not defined in the legislation. It seems clear however that this test is not identical with the general law test for standing. As stated by the High Court in [Australian Conservation Foundation Inc. v. The Commonwealth](#), the long-standing general law position is that, except where applicable statutory provisions supply a different test, standing will be granted to a plaintiff to pursue public interest litigation:

- if a private right of the plaintiff is interfered with; or
- if the plaintiff has a “special interest” in the subject matter of the action (beyond an intellectual or emotional interest or the general interest of all members of the public in having the law upheld).

285. Concerns regarding the meaning of ‘person aggrieved’ for Commonwealth discrimination law purposes and the effect of the distinction in standing between the Commission and Court stages of complaint handling have been highlighted by [Access For All Alliance \(Hervey Bay\) Inc v Hervey Bay City Council](#). The applicant was a volunteer incorporated association that was established to advance equitable and dignified access to premises and facilities. It alleged that the respondent council was in breach of s 32 of the DDA by maintaining bus stops that failed to comply with the relevant Disability Standard. Collier J summarily dismissed the application, finding that the applicant was not a “person aggrieved”.

286. Although noting that “person aggrieved” should not be interpreted narrowly, and should be given a construction that promotes the purpose of the relevant Act, Collier J held that Access For All Alliance (Hervey Bay) Inc was not a “person aggrieved” on the basis that its interest in the proceedings was no greater than the interest of an ordinary member of the public. Justice Collier said:

Notwithstanding its intellectual and emotional concern in the subject matter of the proceedings, the interest of the applicant is no more than that of an ordinary

member of the public; the applicant is not affected to an extent greater than an ordinary member of the public, nor would the applicant gain an advantage if successful nor suffer a disadvantage if unsuccessful.

287. This result may be contrasted with the decision of Wilcox J in [Executive Council of Australian Jewry v Scully](#). Wilcox J held that the Executive Vice President of the Executive Council of Australian Jewry, Mr Jones, was a 'person aggrieved'. The complaint related to material distributed to members of the public in Launceston which was alleged to constitute racial hatred in breach s 18C of the RDA. Wilcox J found that the Executive Vice President was a "person aggrieved", despite the fact that Mr Jones lived in Sydney, not Launceston. Wilcox J noted that

Mr Jones' claim of special affection did not depend on his place of residence. He offered himself as complainant because he was the Executive Vice President of a body that represented 85% of the Jewish population of Australia. He was a senior officer of the Council with major responsibility for the achievement of its objects. They included representing Australian Jewry, including Jews resident in the Launceston district. To describe Mr Jones' connection with the matter simply as 'a Jewish Australian living in Sydney' was to ignore his representative role.

288. His Honour concluded that Mr Jones had a "special responsibility to safeguard the interests of a group" and was therefore a "person aggrieved".

289. The differing results in these cases may be explained by:

- the point (as noted by Collier J) that standing is a mixed question of law and fact and decisions will depend on the factual circumstances;
- Access for All, while having the local presence lacking in the *Scully* case, lacking the national and representative status of the Council of Australian Jewry.

290. Consideration may be nonetheless be appropriate of:

- whether the distinctive "person aggrieved" test for standing has in fact been shown to be more suited to the beneficial purposes of the legislation than the general law test;
- whether the general law test (including with any reforms which might be adopted over time in implementation of previous general law reform recommendations from the ALRC) should be applied to Commonwealth discrimination law instead of or in addition to the person aggrieved test;
- whether either test should be augmented with further provisions providing certainty or guidance to parties, the Commission and the courts on who should be accepted as having standing to bring discrimination cases;

- whether there are alternative tests in other areas of law which might be more appropriate.

291. The terminology of “person aggrieved” may have unhelpful effects in that it appears to suggest meanings both inappropriately broader than the general law and in other respects inappropriately narrower.

- Reference to a person “aggrieved” might suggest to persons not expert in this area of law that a sense of grievance is sufficient (contrary to the general law of standing, and contrary also to the decision of the Full Federal Court in *Cameron v Human Rights & Equal Opportunity Commission*²⁴ under the RDA regarding the proper meaning of the person aggrieved test)
- Conversely, a person or body might well have a “special interest” in a matter not because of grievance in the sense of prejudice to personal interest, but because of a particular responsibility to act in the matter (whether a representative role as noted in the Scully case, or due to other responsibilities to act, as was noted by Gibbs CJ to be the case for the applicants in [Onus v Alcoa](#)).

292. If Commonwealth discrimination law were to be amended to provide clearer recognition of organisations with a special interest for the purposes of having standing to bring public interest cases, it would be important to ensure that this did not involve inadvertent narrowing or closing of categories of organisation with standing.

293. The Queensland Anti-Discrimination Act (s.134) provides express recognition of standing for organisations with a special interest, but only to a limited extent. That Act provides for complaints by a person subjected to an alleged contravention, or an agent of such a person, or a person authorised to complain on behalf of a person unable to complain. Being “subjected to” discrimination is obviously a concept both clearer but also more restrictive than being “aggrieved by” discrimination. Section 134 of the Queensland Act goes on however to provide for complaints by “a relevant entity” (on conditions including, importantly, that it is in the interests of justice to accept such a complaint). A relevant entity is defined as “a body corporate or an unincorporated body, a primary purpose of which is the promotion of the interests or welfare of persons of a particular race, religion, sexuality or gender identity”.

294. Omission of reference to persons with a disability or of women (or of people of a particular age) from the list in this definition may be explained to some extent by the fact that “relevant entities” are recognised only in relation to “vilification” complaints, and that complaints of this kind are not provided for in the Queensland Act in relation to disability or gender or age.

295. The Queensland legislation does go beyond Commonwealth discrimination law in recognising unincorporated associations as having capacity to bring complaints and pursue remedies - whereas as has been pointed out in decisions including the Access for All case, an unincorporated association is not a “person”, and thus faces grave difficulties in being a “person aggrieved” for Commonwealth discrimination law purposes.

296. However, in addition to the omission of gender, disability and age, and the restriction to “vilification” complaints, the Queensland provision regarding proceedings by “relevant entities” also appears to narrow or close off possible avenues under the general law test for standing for proceedings by organisations whose objects do not relate specifically to interests or welfare of a group defined by a particular attribute, but which nonetheless do have a special interest in the matter.

297. For example a trade union would not meet the “relevant entity” definition, but is recognised under Commonwealth discrimination law (AHRCA s.46P) as having capacity to bring complaints – a clearly proper role of a trade union being to defend and advance the interests of all its members, rather than only those of a particular race etc. The same point would seem to apply to professional and industry representative bodies, although these have not to date had similar express recognition as complainants.

298. Public authorities with relevant functions and responsibilities might well also satisfy the general law test for standing, but would not appear to meet either the “person aggrieved” test or the Queensland “relevant entity” definition.

299. The Commission recognises that some increase in the range of parties bringing complaints could result from reform of standing and that this could involve some additional administration costs. Offsetting this, confirmation of standing for organisations better placed than disadvantaged individuals to pursue systemic outcomes could be expected to have some impact in reducing societal and system costs overall by achieving broad negotiated or adjudicated outcomes in a single matter, compared to repeated individual complaints on the same issue.

Recommendation 48: The Commission recommends consideration of options for simplifying standing requirements, and providing for consistent standing rules in Commonwealth discrimination law matters in bringing complaints to the Commission and to the courts, either

- ***by reference to general law requirements; or***
- ***by reference to requirements applicable in other areas of law such as environmental law; or***

- ***by retaining the person aggrieved test but also allowing proceedings by a person or organisation with a special or sufficient interest in the matter.***

8.15 *Intervention by the regulator or administering body in legal proceedings brought by other parties.*

- The Commission may appear in legal proceedings raising issues under each of the RDA, SDA, DDA and ADA with the leave of the court. It would be appropriate for this capacity to apply across any and all additional grounds covered by Commonwealth discrimination law. The Commission recommends consideration of the appropriateness of current provisions in this area including distinctions between amicus and intervention roles; and amicus roles in appellate proceedings.

Recommendation 49: The Commission recommends that the Commission have power to appear in legal proceedings in relation to discrimination on the basis of any attributes covered under a consolidated Commonwealth equality law.

Recommendation 50: The Commission recommends further consideration of the appropriateness of current provisions for amicus and intervention roles, including distinctions between amicus and intervention roles; and amicus roles in appellate proceedings.

8.16 *Provision for criminal prosecutions.*

300. There are a range of criminal provisions in each of the Commonwealth discrimination laws. No role is specified for the Commission itself in relation to prosecutions. There may be a need in the current review for consideration of how far there is a clear and consistent rationale for the criminal sanctions which are and are not provided, and an effective regime for their application.

Recommendation 51: The Commission recommends further discussion in the course of the review of the appropriateness and effectiveness of current provisions in Commonwealth discrimination law for criminal sanctions.

9 Interaction with Other Laws and Application to State and Territory Governments

301. The Commission agrees with the view indicated in the Discussion Paper that it is important that Commonwealth discrimination law provide appropriate mechanisms for managing overlaps with other laws, including:

- other laws directed specifically to equality and non-discrimination (the Fair Work Act and State and Territory non-discrimination laws);
- general laws which may include provisions directed to achieving equality (for example disability access provisions in the Telecommunications Act or the Broadcasting Services Act, or laws implementing the access requirements of the Building Code of Australia); and
- laws with potentially competing objectives (such as health and safety legislation).

9.1 Relationship with complaints under State and Territory discrimination laws

302. The Discussion Paper refers to an objective of avoiding a capacity for forum shopping in making discrimination complaints. The Commission notes that under present legislative arrangements complainants have a choice of jurisdiction. This is subject to the restriction that complaints cannot be made to the Commission where the same matter has been the subject of complaint to a State or Territory body.

303. The Commission's present view is that the current position. This is subject to a possible need to confirm that a complaint made to a State or Territory authority which is found to be outside of that authority's jurisdiction does not constitute a complaint such as to activate the statutory bar to Commission jurisdiction.

9.2 Interaction with other laws

304. The Commission agrees with the view indicated in the Discussion Paper that it is important to ensure as far as possible that Parliament has turned its mind to issues of consistency of other laws with discrimination law. Application within a consolidated law of a "prescribed laws" provision such as is contained in the DDA may provide an appropriate and manageable mechanism for this purpose.

305. The Commission notes that to apply to discrimination on grounds of race, sex or disability the reverse approach of exempting actions in compliance with all State and Territory laws unless otherwise specified by regulation would permit diminishing existing protections under the RDA, SDA and DDA at the initiative of State and Territory legislatures. Accordingly the Commission would not support such an approach. Application of the DDA approach to all grounds, including age, for consistency appears preferable.

Recommendation 52: The Commission recommends consideration be given to a “prescribed laws” provision in a consolidated Commonwealth equality law as a means for managing interaction of this law with other laws.

9.3 Application to State and Territory Governments and instrumentalities

306. The Commission’s SDA Review submission recommended that the coverage of the SDA be extended to apply to actions by State and Territory governments and instrumentalities. The Commission notes that the RDA and DDA already do have application in this respect and that a similar extent of application for a consolidated Commonwealth equality law would promote the objective of consistency.

Recommendation 53: The Commission recommends that a consolidated Commonwealth equality law have the same extent of application to State and Territory governments and instrumentalities as the RDA or DDA.

10 Appendix : List of recommendations

Recommendation 1: The Commission recommends that a consolidated law state objectives of promoting the achievement of equality and the elimination of discrimination, and indicate clearly that it is intended to be interpreted in accordance with Australia's international obligations on human rights.

Recommendation 2: The Commission recommends that any regulatory impacts and resourcing issues arising in the context of measures for improved effectiveness of discrimination law be assessed having regard to the potential for large scale economic and social benefits through such measures.

Recommendation 3: The Commission recommends that beneficial and best practice features of legislation currently applicable to one ground of discrimination be maintained and as far as possible applied to all covered grounds of discrimination.

Recommendation 4: The Commission recommends that the review pursue consistency as far as possible between a consolidated Commonwealth equality Act, the Fair Work Act, and best practice features of State and Territory anti-discrimination and equal opportunity laws.

Recommendation 5: The Commission recommends that the offices of the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, and the Age Discrimination Commissioner be maintained within a consolidated Commonwealth equality law.

Recommendation 6: The Commission recommends that a consolidated Commonwealth equality law refer to and reflect the Principles relating to the Status of National Institutions (The Paris Principles).

Recommendation 7: The Commission recommends consideration of a unified test for discrimination based on a combination of the approaches taken in the ACT Discrimination Act 1991 and the NT Anti-Discrimination Act 1992.

Recommendation 8: The Commission recommends that a consolidated Commonwealth equality law avoid requiring the use of a comparator test in establishing "direct discrimination" and instead use a detriment test based on the ACT Discrimination Act 1991.

Recommendation 9: The Commission recommends that a consolidated Commonwealth equality law provide for characteristics extensions applying to all protected attributes, including characteristics which are actually imputed by a discriminator, whether or not generally imputed.

Recommendation 10: The Commission recommends that a consolidated Commonwealth equality law provide specific recognition for the characteristics of

pregnancy or potential pregnancy, family responsibilities, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal.

Recommendation 11: The Commission recommends that in establishing “indirect” discrimination, a consolidated Commonwealth equality law require only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply.

Recommendation 12: The Commission recommends further consideration of replacing the “reasonableness” test with a “legitimate and proportionate” test.

Recommendation 13: The Commission recommends that a consolidated Commonwealth equality law clearly cover proposed discrimination.

Recommendation 14: The Commission recommends that a consolidated Commonwealth equality law provide for a shifting onus of proof on elements regarding causation and justification of prima facie discriminatory conduct, to confirm that the obligation to produce evidence sits with the party best placed to produce that evidence.

Recommendation 15: The Commission recommends that so far as possible a consolidated Commonwealth equality law provide a single special measures and specific needs provision applying to all protected attributes.

Recommendation 16: The Commission recommends that a consolidated Commonwealth equality law provide expressly for reasonable adjustments in relation to all protected attributes.

Recommendation 17: The Commission recommends that the Attorney-General’s Department:

- conduct specific consultations with other areas of government towards design of effective and efficient provisions for duties for public authorities to promote the objectives of a consolidated Commonwealth discrimination law, including considering experience to date with comparable provisions now contained in Victorian and UK legislation;
- give consideration to ensuring that the review includes processes which would satisfy RIS requirements for wider application of positive duties;
- commence consideration and discussion with the Commission of resourcing implications of possible models for positive duties.

Recommendation 18: The Commission recommends that a consolidated Commonwealth equality law discrimination law 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 19: The Commission recommends that coverage of sexual orientation, sex characteristics, gender identity and gender expression in a consolidated Commonwealth equality law be framed to achieve the broadest coverage of people of all sex and/or gender identities and to provide improved protection against discrimination.

Recommendation 20: The Commission recommends that the Government give favourable consideration to inclusion within a consolidated Commonwealth equality law of attributes covered by the Commission's existing ILO jurisdiction under the Australian Human Rights Commission Act and the Fair Work Act.

Recommendation 21: The Commission recommends favourable consideration of coverage by a consolidated Commonwealth equality law of discrimination based on

- accommodation status
- experience of violence, in particular domestic violence.

Recommendation 22: The Commission recommends that a consolidated Commonwealth equality law apply to discrimination based on one or more protected attributes or a combination of protected attributes.

Recommendation 23: The Commission recommends that a consolidated Commonwealth equality law apply to discrimination on the basis of association with a person with a protected attribute or attributes.

Recommendation 24: The Commission recommends that a consolidated Commonwealth equality law adopt a broad and simple approach to its application, comparable to that of the RDA, in preference to the complex approach of the SDA, DDA and ADA.

Recommendation 25: The Commission recommends favourable consideration be given to coverage by a consolidated Commonwealth equality law of discrimination in any area of public life, equivalent to section 9 of the RDA.

Recommendation 26: The Commission recommends favourable consideration be given to inclusion within a consolidated Commonwealth equality law of an equivalent to RDA section 10 applying to all protected attributes.

Recommendation 27: The Commission recommends that a consolidated Commonwealth equality law provide broad coverage of all occupational relationships

and that the Tasmanian Anti-Discrimination Act be considered as an appropriate starting point in this respect.

Recommendation 28: The Commission recommends favourable consideration be given to a consolidated Commonwealth equality law adopting a broad definition of clubs and associations comparable to that in the DDA, subject to any appropriate exceptions identified in submissions and consultations, including in relation to associations for people with a protected attribute or combination of attributes.

Recommendation 29: The Commission recommends that specific reference to discrimination in relation to sport be included in a consolidated Commonwealth equality law.

Recommendation 30: The Commission recommends further discussion of legislative approaches to requests for information, with a view to finding approaches which do not discourage legitimate and necessary request but which do discourage requests which are unnecessarily intrusive or illegitimate.

Recommendation 31: The Commission recommends that a consolidated Commonwealth equality law adopt the SDA / ADA approach to vicarious liability.

Recommendation 32: The Commission recommends favourable consideration be given to adoption of a general limitations clause to replace other exceptions as far as possible, subject to further discussion of the impacts of this approach on clarity and certainty for affected parties and of any areas of possible diminution of existing protection.

Recommendation 33: The Commission recommends that a consolidated Commonwealth equality law adopt an inherent requirements test in the area of employment and occupation and that consideration be given to the relationship of such a test to a general limitations clause for legitimate and proportionate measures.

Recommendation 34: The Commission recommends that the Attorney-General's Department commence discussions on transitional requirements for resourcing for information, education and compliance promotion activities related to introduction of a consolidated Commonwealth equality law.

Recommendation 35: The Commission recommends that a consolidated Commonwealth equality law provide for development and provision to the Commission of voluntary Action Plans in relation to any or all protected attributes

Recommendation 36: The Commission recommends favourable consideration be given to provision in a consolidated Commonwealth equality law for mandatory development and publication by public authorities of Action Plans covering all protected attributes.

Recommendation 37: The Commission recommends further discussion on possible provision for certification of compliance plans within a consolidated Commonwealth equality law, including the extent of effect of such certification if provided for, and resource implications of a certification procedure.

Recommendation 38: The Commission recommends further discussion on possible provision for certification of compliance plans within a consolidated Commonwealth equality law, including the extent of effect of such certification if provided for, and resource implications of a certification procedure.

Recommendation 39: The Commission recommends that consideration of co-regulatory mechanisms include consideration of provision for recognition for the purposes of a consolidated Commonwealth equality law of codes and standards issued by other regulatory or expert bodies in addition to industry based codes.

Recommendation 40: The Commission recommends further consideration be given to the extent to which the purposes of a temporary exemption power within a consolidated Commonwealth equality law might be met by alternative positive mechanisms.

Recommendation 41: The Commission recommends that if a temporary exemption power is included in a consolidated Commonwealth equality law its exercise be subject to substantive criteria and process criteria.

Recommendation 42: The Commission recommends favourable consideration be given to provision within a consolidated Commonwealth equality law for subsequent development of regulatory standards regarding any area of public life and any attributes covered by the legislation.

Recommendation 43: The Commission recommends further discussion of provision for positive duties to promote equality within a consolidated Commonwealth equality law.

Recommendation 44: The Commission recommends that existing Commission inquiry powers and functions under the AHRC Act apply in relation to all areas of public life and attributes covered by a consolidated Commonwealth equality law.

Recommendation 45: The Commission recommends further discussion of resource implications and regulatory impact of more specific provision for an equality audit function for the Commission.

Recommendation 46: The Commission recommends that a consolidated Commonwealth equality law 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 improve clarity of applicability of confidentiality provisions to voluntary as well as compulsory conciliation conferences.

Recommendation 47: The Commission recommends that proposals for initiation of matters in court by the Commission without requiring a complaint be considered further following receipt of public submissions

Recommendation 48: The Commission recommends consideration of options for simplifying standing requirements, and providing for consistent standing rules in Commonwealth discrimination law matters in bringing complaints to the Commission and to the courts, either

- by reference to general law requirements; or
- by reference to requirements applicable in other areas of law such as environmental law; or
- by retaining the person aggrieved test but also allowing proceedings by a person or organisation with a special or sufficient interest in the matter.

Recommendation 49: The Commission recommends that the Commission have power to appear in legal proceedings in relation to discrimination on the basis of any attributes covered under a consolidated Commonwealth equality law.

Recommendation 50: The Commission recommends further consideration of the appropriateness of current provisions for amicus and intervention roles, including distinctions between amicus and intervention roles; and amicus roles in appellate proceedings.

Recommendation 51: The Commission recommends further discussion in the course of the review of the appropriateness and effectiveness of current provisions in Commonwealth discrimination law for criminal sanctions.

Recommendation 52: The Commission recommends consideration be given to a “prescribed laws” provision in a consolidated Commonwealth equality law as a means for managing interaction of this law with other laws.

Recommendation 53: The Commission recommends that a consolidated Commonwealth equality law have the same extent of application to State and Territory governments and instrumentalities as the RDA or DDA.

¹ Racial Discrimination Act 1975 (“RDA”); Sex Discrimination Act 1984 (“SDA”); Australian Human Rights Commission Act 1986 (“AHRCA”); Disability Discrimination Act 1992 (“DDA”); Age Discrimination Act 2004 (“ADA”)

² Information on complaint and other outcomes is presented in the Commission’s Annual Reports which are available on the Commission’s website <http://www.humanrights.gov.au>.

³ Including by reference to the Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; and relevant International Labour Organisation conventions including the Discrimination (Employment and Occupation) Convention and the Workers with Family Responsibilities Convention.

⁴ ADA subsection 3(e) states that an objective of the ADA is to “respond to demographic change and Australia’s ageing population by removing barriers to older people participating in society, particularly in the workforce, and changing negative stereotypes about older people”.

⁵ Available at http://www.pc.gov.au/_data/assets/word_doc/0020/94007/11-chapter06.doc.

⁶ Goldman Sachs JBWere.

⁷ UN GA resolution 48/134 of 20 December 1993.

⁸ Australia’s Universal Periodic Review National Report includes the following (at para.21): “The AHRC is Australia’s national human rights institution. It is an independent statutory authority and meets the criteria for human rights institutions set out in the Paris Principles. It has been accredited as ‘A-Status’ by the International Coordinating Committee of National Human Rights Institutions.”

⁹ Resolution A/HRC/17/L.18, adopted 17 June 2011, available via http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/17/L.18.

¹⁰ But see discussion by Mason CJ and Gaudron J in *Waters v Public Transport Corporation*, (1992) 173 CLR 349.

¹¹ See in particular Full Federal Court decision in [Hurst v State of Queensland](#) 2006.

¹² See [Hinchcliffe v University of Sydney](#) 2004.

¹³ Relevant case law and statutory provisions are referenced in the Commission’s SDA Review submission as discussed below.

¹⁴ ACT *Discrimination Act 1991* s.27; NT *Anti-Discrimination Act 1992* s.57; Tas. *Anti-Discrimination Act 1998* s. 25 and s.26; Qld *Anti-Discrimination Act 1991* s.105.

¹⁵ Public authorities are required to develop disability action plans under the NSW *Disability Services Act 1993*; WA *Disability Services Act 1993*; Qld *Disability Services Act 2006*; and the Vic. *Disability Act 2006*.

¹⁶ “[Promoting Independence: Disability Action Plans for South Australia](#)”, 2000.

¹⁷ For example, this has been the mechanism (coupled with other elements of the existing compliance framework, including complaint processes) for increases in free to air broadcast television captioning: from the 38-40% requirements implicit in the Broadcasting Services Act to the current levels of over 80% and in some instances over 90% captioning now being attained.

¹⁸ AHRCA ss.14(1) provides that “For the purpose of the performance of its functions, the [Commission](#) may make an examination or hold an inquiry in such manner as it thinks fit and, in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence” . However AHRCA

ss.14(8) states that “ In subsection (1), *function* does not include a function conferred on the Commission by the *Sex Discrimination Act 1984* , the *Disability Discrimination Act 1992*, or the *Age Discrimination Act 2004*” .

¹⁹ Over the past five years the Commission has an average conciliation success rate of 69%. In the last reporting year, 94% of surveyed parties reported that they were satisfied with the service and 61% rated the service as ‘very good’ or ‘excellent’.

²⁰ The Commission regularly surveys parties to complaints about perceptions of bias. In the last five years the reported perceptions of bias ratings have been around 6%.

²¹ Office of the High Commissioner for Human Rights, National Human Rights Institutions: History, Principles, Roles and Responsibilities: http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf , 2010, p.13.

²² Op cit p.77.

²³ Op cit p.22.

²⁴ (1993) 46 FCR 509.