Equality Rights Alliance
Women's Voices for Gender Equality

Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (19 December 2011)

INTRODUCTION

The following submission was prepared by Equality Rights Alliance ('ERA') and endorsed by a range of leading women's organisations and women's equality specialists. This document represents a collaborative vision for strengthening and improving the anti-discrimination protections in Australia.

ERA is Australia's largest network advocating for women's equality, women's leadership and recognition of women's diversity. We bring together 56 organisations with an interest in advancing women's equality. ERA is led by the YWCA Australia and is one of six National Women's Alliances funded by the Australian government's Office for Women.

ERA notes the timeliness of the present inquiry in light of recent international commentary on the status of anti-discrimination law in Australia[1] and the reforms the government has proposed to the Equal Opportunity for Women in the Workplace Act 1999 (Cth). ERA welcomes the opportunity to make the following recommendations in response to the government's Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws. This submission considers each of the questions posed by the Discussion Paper from the perspective of achieving equality for women and promoting gender equality. We note that the government left some recommendations from the Senate's 2008 inquiry into the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality ('Senate SDA Inquiry') to be considered by the consolidation project. We have highlighted those recommendations in our submission where relevant. We reiterate our call for a report on how these recommendations are reflected in any exposure Bill which results from this consolidation project.

RECOMMENDATIONS

Recommendation 1
The definition of 'discrimination' should be reformulated as per the proposal by the Discrimination Law Experts' Group of 19 December 2011.

Recommendation 2
The comparator element should be removed from the definition of 'direct discrimination'.

[1] See outlined in Gender Equality Roundtable, Submission to the Consolidation Project (2010), 1-2.

Recommendation 3
The phrase 'so far as possible' should be removed from the objects clauses in the consolidated Acts and replaced by an objects clause which clearly sets out the conceptual basis for the Act. The consolidated Act should include a reference to CEDAW and the other relevant international instruments on which it is based.

Recommendation 4
The burden of proof should shift to the respondent once the complainant has established a prima facie case of discrimination.

Recommendation 5
The consolidated Act should include a single provision for measures aimed at achieving substantive equality across the protected attributes.

Recommendation 6
The requirement to make reasonable adjustments should be extended to employees with family or caring responsibilities. In formulating such an obligation, it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal.

Recommendation 7
The consolidated Act should introduce a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote equality which clearly defines the equality goals it seeks to achieve and include effective monitoring and enforcement mechanisms. The new duty should include a compliance regime which moves from a facilitative role to sanctions as a measure of last resort. The AHRC should bear responsibility for monitoring compliance and non-compliance should be enforced in the Federal Court or Federal Magistrates Court.

Recommendation 8
The definition of 'carer' and 'family responsibilities' should be broadened to include domestic relationships and cultural understandings of family, including kinship groups, and include all areas of employment.

Recommendation 9
The list of attributes included in the consolidated Act should be reviewed within five years to ensure it captures those groups in need of protection.

Recommendation 10
'Survivor of domestic or family **violence status' should be included in the list of attributes upon which it is unlawful to discriminate across all areas.**

Recommendation 11
The definition of 'pregnancy' should be reformulated to a definition of pregnancy and maternal care that encompasses the period from the start of pregnancy to three months after a woman returns from maternity leave.

Recommendation 12
In the consolidated Act, the complainant should not have to prove which attribute is the cause of the disadvantage provided they can establish that they were subject to discrimination on the basis of one or more of the attributes set forth in the relevant section.

Recommendation 13
The consolidated Act should include a general provision requiring equality before the law across all protected attributes.

Recommendation 14
The consolidated Act prohibits sex discrimination and sexual harassment in any area of public life.

Recommendation 15
Under the consolidated Act, volunteers should receive the same protection as employees.

Recommendation 16
The consolidated Act should apply to all clubs and member-based association regardless of size.

Recommendation 17
The consolidated Act should apply to all partnerships regardless of their size.

Recommendation 18
The consolidated Act should not contain any automatic or permanent exceptions.

Recommendation 19
The consolidated Act should include a general limitations clause, namely that the respondent must show that the conduct in question was a "proportionate means of achieving a legitimate end or purpose".

Recommendation 20
An exception for religious organisations which would enable them to discriminate on the basis of sexual orientation or gender identity should not be included in the consolidated Act and the exceptions for religious organisation in ss 37 and 38 of the SDA should not be included in the consolidated Act.

Recommendation 21
The AHRC should continue to grant temporary exemptions under the consolidated Act but this should be done according to clear published guidelines and the AHRC's power should be exercised in accordance with the new objects included in the Act (as per Recommendation 3).

Recommendation 22
Under the consolidated Act, organisations should be required to develop action plans and the AHRC should be empowered to issue practice guidelines and standards to improve compliance.
Recommendation 23

The AHRC should receive increased funding to enable the collection, publication and use of de-identified complaint data for research purposes as an education mechanism for both potential complainants and respondents.

Recommendation 24
Introduce a quicker complaint resolution process using a 'triage' procedure so that complainants receive early intervention and have access to dispute resolution at the earliest opportunity. Dispute resolution services should be provided in a manner which is consistent with the Act's objects.

Recommendation 25
The consolidated Act should ensure that the provision of compensation properly values the loss suffered in sex discrimination cases – including future loss of pay and career advancement. Damages should not be limited to compensation. The nature of the loss may establish the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination. The jurisdiction should be no-costs, with the exception of vexatious complaints.

Recommendation 26
The consolidated Act should contain civil penalty provisions, similar to those in the Fair Work Act's General Protections provisions, to assist a complainant with mitigating their costs by way of complainants applying for the penalty to be payable to themselves when filling out forms to refer the matter to hearing.

Recommendation 27
Systemic remedies should be explicitly part of the court's powers and courts should be directed in awarding remedies to do what is necessary not only to compensate the particular complainant but to ensure that any discriminatory practices identified are changed so that others will not be similarly affected.

Recommendation 28
The consolidated Act should include effective representative complaints provisions to enable organisations to engage in strategic litigation on behalf of complainants.

Recommendation 29
Working women's centres, community legal centres, specialist low cost legal services and legal aid should receive increased funding so they have the resources to provide advice about matters under the consolidated Act.

Recommendation 30
The AHRC and/or the Sex Discrimination Commissioner should have the power to initiate inquiries into systemic discrimination in the consolidated Act and exercising this power should not rely on the lodgement of an individual complaint.

Recommendation 31
The Sex Discrimination Commissioner should be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality. Government should be required to respond within one month to such reports, which should focus on key performance indicators.

Recommendation 32
A discrete unit should be established within the AHRC to undertake the research required for the monitoring and reporting role and the AHRC should receive increased funding to enable it to effectively perform its additional monitoring and enforcement roles under the consolidated Act.

Recommendation 33
The Sex Discrimination Commissioner should be able to appear as an amicus curiae in appeals from decisions made by the Federal Court and the Federal Magistrates Court about the consolidated Act.

Recommendation 34
The Sex Discrimination Commissioner should be able to exercise her amicus curiae function and be able to intervene in matters beyond the Federal Court and the Federal Magistrates Court which involve sex discrimination, pay equity or relate to gender equity.

Recommendation 35
The consolidated Act should apply to the Crown in right of the States and Territories without exception.

PART 1. MEANING OF DISCRIMINATION

1. Definition of Discrimination

Since the introduction of anti-discrimination law in Australia, courts have grappled with how to interpret the technical definitions of discrimination contained in the various Acts. The 'comparator' requirement and the 'causation' requirement in direct discrimination in s 5 of the Sex Discrimination Act 1984 (Cth) ('SDA') are difficult to establish and many claims have failed as a result. The 'reasonableness' requirement in indirect discrimination has also been interpreted inconsistently. The Racial Discrimination Act 1975 (Cth) ('RDA') does not distinguish between direct and indirect discrimination, nor does s 351 of the Fair Work Act 2009 (Cth) ('FWA'), which prohibits various forms of discrimination in employment. Other comparable countries, such as Canada and South Africa, have not maintained the distinction between direct and indirect discrimination, and international human rights conventions, such as the International Covenant on Civil and Political Rights, do not maintain the distinction, although both forms of discrimination are clearly prohibited.

The Discussion Paper seeks views on the best way to define discrimination. We support the simplified single definition of discrimination proposed by the Discrimination Law Experts' Group which maintains the distinction between direct and indirect discrimination but ensures that the two concepts are not mutually exclusive:

1. **Unlawful discrimination**
   Discrimination is unlawful in public life unless it is justified within the scope and objects of this Act.
2. **Definition of discrimination**
   Discrimination includes:
   (a) treating a person unfavourably on the basis of a **protected attribute**;
   (b) imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same **protected attribute** as the aggrieved person; or
   (c) failing to make **reasonable adjustments** if the effect is that the aggrieved person experiences unfavourable treatment under (a) or is disadvantaged under (b)

   The conduct described in 2(a) and (b) is not mutually exclusive.
3. **Public life and protected areas**
   For the purposes of this Act 'public life' includes work, education, the supply of goods and services, accommodation, clubs, the delivery of government programs, the disposition of land and superannuation.
4. **Justifying discrimination**
   The matters to be taken into account in deciding whether discrimination is not unlawful because it is justified include:
   (a) the public interest in achieving the objects of the Act; and
   (b) the nature and extent of the disadvantage resulting from the treatment under s 2(a) or imposition of the condition, requirement or practice under s 2(b); and
   (c) if the discrimination relates to conduct under s 2(c), the nature of the adjustment required and the consequences for the complainant and other

people in similar circumstances to the complainant if such an adjustment is not made; and

(d) the availability, cost and feasibility of an alternative that is not discriminatory; and
(e) Whether the discrimination is justified as a **special measure**; and
(f) If the discrimination is in the protected area of work, the inherent requirements of the relevant work.

5. Burden of proof

The burden of proving that an act of discrimination is not unlawful because it is justified under section 1 lies on the person who did the act.[2]

Recommendation 1
The definition of 'discrimination' should be reformulated as per the proposal by the Discrimination Law Experts' Group of 19 December 2011.

If the distinction between direct and indirect discrimination is maintained, we recommend that the 'comparator' requirement is removed from the statutory definition of direct discrimination. The Senate Report also recommended this in relation to the SDA.[3]

As the Discussion Paper notes, the 'comparator' requirement has led to unpredictable results in discrimination cases and created significant uncertainty. For women, it is often problematic to identify an appropriate comparator but there will be no discrimination if the way the female complainant was treated is not less favourable by comparison to another. This is made more complicated because the law currently does not prohibit compounded or intersectional discrimination, as discussed below.

In recognition of these problems, Victoria recently removed the 'comparator' requirement from its legislation,[4] while the ACT has never included the 'comparator' requirement in its anti-discrimination legislation,[5] nor does the RDA (see s 9(1)).

Recommendation 2
The comparator element should be removed from the definition of 'direct discrimination'.

The SDA's objects clause continues to undermine the Act's effectiveness with the use of the qualifier 'so far as possible' in ss 3(b), (ba) and (c). For this reason, the Senate Report recommended that this phrase was removed.[6] The Report notes that this suggests a "half-hearted conviction that eliminating discrimination is desirable and achievable."[7]

As currently formulated, the objects clause offers courts little guidance about how to interpret the SDA, nor does it ground Australia's obligation to eliminate sex discrimination in international law and require the Act to be interpreted consistently with international law. By contrast, the objects

[2] Discrimination Law Experts' Group, 'Consolidation of Commonwealth Anti-Discrimination Laws Submission' (16 December 2011), 8-9.
[3] Senate SDA Inquiry, Recommendation 5.
[4] Equal Opportunity Act 2010 (Vic), s 8(1).
[5] Discrimination Act 1991 (ACT), s 8(1)(a).
[6] Senate SDA Inquiry, Recommendation 1.
[7] Ibid 146.

clause in the Equal Opportunity Act 2010 (Vic) ('EOAVIC') provides much clearer guidance by referring to equality as a human right and grounding the Act in substantive equality, rather than formal equality.[8] We recommend that the objects clause in the consolidated Act is reformulated to provide courts with greater understanding of the conceptual basis upon which the Act is based and the Act's goals, namely eliminating discrimination and sexual harassment and promoting substantive equality.

Recommendation 3
The phrase 'so far as possible' should be removed from the objects clauses in the consolidated Acts and replaced by an objects clause which clearly sets out the conceptual basis for the Act. The consolidated Act should include a reference to CEDAW and the other relevant international instruments upon which it is based.

2. Burden of Proof
The difficulties with proving discrimination, whether on the basis of sex or another attribute, are well documented. A woman alleging discrimination must establish on the balance of probabilities that she was treated less favourably due, for example, to her gender, marital status or pregnancy, even though the true reason for her treatment is known only to the respondent who is unlikely to have articulated the reason why they treated the woman in such a way. This can be an insurmountable hurdle for women who have experienced discrimination, who may not have access to legal assistance, and who themselves are unlikely to have the technical legal expertise to establish their case.

We strongly recommend the introduction of a shifting burden of proof in discrimination cases so that the complainant does not bear the entire burden of establishing discrimination. This model has been used in industrial legislation in Australia for some time and in 2008, the Senate recommended inserting a shifting burden into the SDA.[9] Shifting the burden of proof would harmonise the consolidated Act with the FWA and international trends:

- Under the FWA, once an employee makes a claim of discrimination under s 351, the employer is required to establish a non-discriminatory reason for the treatment (s 361);
- Following Directives from the European Council,[10] the United Kingdom introduced a shifting burden of proof. Under s 136 of the Equality Act 2010 (UK), once the complainant establishes facts from which the court could find, in the absence of any other explanation, that the respondent engaged in discrimination, the court must find they discriminated unless the respondent shows otherwise.

Our recommendation is not the same as a reversal in the onus of proof which would require the respondent to disprove an allegation of discrimination. The model we support follows the FWA - the obligation remains on the person alleging discrimination to establish a prima facie case of discrimination under the amended definition. Once they have, the burden shifts to the respondent to establish the non-discriminatory reason for the behaviour or treatment. If the respondent fails to provide an adequate explanation for the behaviour, it is open to the court to make a finding of discrimination.

[8] Section 3.
[9] Senate SDA Inquiry, Recommendation 22.
[10] Burden of Proof Directive 97/80/EC, art 4(1); Racial Equality Directive 2000/43/EC, art 8.

Recommendation 4
The burden of proof should shift to the respondent once the complainant has established a prima facie case of discrimination.

3. Special Measures
Temporary special measures have been acknowledged at the international level as a valid an effective means for promoting gender equality. Article 3 of CEDAW identifies an obligation to take all appropriate measures to realise the equality of women and Article 4 of CEDAW authorises the adoption of 'temporary special measures' to accelerate the realisation of substantive equality.

Under the SDA, such action has to pass the test in s 7D for special measures intended to achieve equality. In these situations, it is counterproductive to label the necessary action positive discrimination, affirmative action, or even special measures of positive action. All these terms tend to suggest that special favours or unfair advantages are being given. A more accurate term should be adopted which will help to keep the justification for such action at the forefront, such as 'action towards substantive equality' or 'substantive equality measures'.

In the view of the CEDAW Committee, to fully realise CEDAW rights, states parties need to ensure that they are not simply achieving formal equality for women, but also substantive equality for women. The CEDAW Committee has elaborated their understanding of substantive equality in four key paragraphs of its general recommendation on temporary special measures. In essence, the CEDAW Committee articulates an obligation for states parties to ensure that legislative protections pursue a substantive equality agenda which takes into account a) biological differences between women and men, b) the ongoing impact of historical inequalities between women and men, c) the importance of non-identical treatment of women and men in certain circumstances as a mechanism to achieve substantive equality, and d) the transformation of harmful social, political, economic and cultural mores, based on stereotypical assumptions about women and men.[11]

We acknowledge the value that measures aimed at achieving substantive equality can have for members of other groups who have experienced discrimination, such as on the basis of race, age and disability, and we support the inclusion of a single provision for such measures. These measures should be reconceptualised as actions which are necessary for achieving substantive equality. For example, although the EOAVIC uses the phrase 'special measures', the Act's objects state that taking such measures is necessary for achieving substantive equality.[12]

Recommendation 5
The consolidated Act should include a single provision for measures aimed at achieving substantive equality across the protected attributes.

4. Extension of Reasonable Adjustments
The purpose of 'reasonable adjustments' is to place an obligation on an employer, educator or service provider to make reasonable adjustments in order to accommodate a particular attribute.

[11] www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf
[12] Section 3(d)(iii).

This concept has most commonly been used to require organisations to change their practices and policies to accommodate people with a disability but it could be extended to other attributes.

Victoria's anti-discrimination legislation includes a provision which states that employers must not unreasonably refuse to accommodate the responsibilities that an employee has as a parent or carer in relation to the employee's work arrangements.[13] The Senate Report recommended introducing a similar requirement into the SDA.[14] We note that the FWA only contains a limited right for employees to request flexible working arrangements if they have children under school age or a child under 18 with a disability. An employer can refuse their request on reasonable business grounds.[15] We propose a stronger obligation.

We support extending the concept of reasonable adjustments to people with family or caring responsibilities. This would place an obligation on employers to make adjustments for women and men with such responsibilities. The value of extending the obligation to people with family or caring responsibilities is that it would encourage more family friendly work practices, increase workforce participation and address discriminatory policies and practices proactively, rather than relying on someone to experience discrimination and make a complaint.

Recommendation 6
The requirement to make reasonable adjustments should be extended to employees with family or caring responsibilities. In formulating such an obligation, it should be clear that an employer can only refuse on the basis of a specific justification and must provide evidence for such a refusal.

5. Positive Duty on Public Sector Bodies
Since its introduction, Australia has relied on an individualised, reactive complaints-based model to address discrimination and promote equality. Under this model, discrimination will only be remedied if the victim takes action. The law is limited and cannot address problems proactively before someone experiences discrimination, nor can it address things complaints are not made about. For this reason, the Senate Report recommended the introduction of a positive duty to eliminate sex discrimination and sexual harassment and promote gender equality.[16]

The Affirmative Action (Equal Opportunity for Women in the Workplace) Act 1986 (Cth), replaced by the Equal Opportunity for Women in the Workplace Act 1999 (Cth), places a duty on employers in relation to women, but this is limited to large workplaces. It does have the advantage of relating to primarily to the private sector, although it also includes some significant public sector employers, such as universities. The Anti-Discrimination Act 1977 (NSW), Part 9A makes proactive provision for equal opportunity in the public sector in relation to race, sex, marital or domestic status and disability.

We strongly support the introduction of a positive duty across all attributes but we support a duty which does more than simply eliminate discrimination. We support a duty that promotes equality and which is aimed at achieving substantive equality. This form of equality duty would place the legal responsibility for promoting gender (inter alia) equality and eliminating sex (inter alia)

[13] EOAVIC, s 19.
[14] Senate SDA Inquiry, Recommendation 14.
[15] Section 65.
[16] Senate SDA Inquiry, Recommendation 40.

discrimination on public and private bodies in respect of employment, the provision of services and policy making. In respect of employment, for example, an equality duty would shift the burden onto the workplace to identity and address systemic disadvantage regardless of whether it received any complaints.

We recommend that the positive duty should contain a clear definition of the conceptual basis for the duty, which should be substantive equality, as required by CEDAW and the other human rights instruments to which Australia is party. We further recommend that the duty is formulated in such a way that it is goal oriented, action based and progressive, as recommended by Fredman and Spencer in relation to Britain's single equality duty.[17]

We do not support the limitation of a positive duty to the public sector. We recommend that the duty should extend to employers, educational institutions and other service providers, as recommended by the Senate in its inquiry into the SDA.[18] The ambit of this duty would need to be delineated in the context of the Workplace Gender Equality Act, proposed to replace the Equal Opportunity for Women in the Workplace Act 1999 in 2012.

We recommend that the Australian Human Rights Commission ('AHRC') is given responsibility and resources to provide education and guidance to organisations about complying with the positive duty, to audit equality plans developed by organisations to achieve compliance, and that the AHRC is given the power to enforce compliance by taking legal action. Legal action should be a measure of last resort and the AHRC should work with organisations to achieve voluntary compliance. This form of regulatory model was recently recommended for introduction into Victoria's anti-discrimination law[19] and is currently used by the Fair Work Ombudsman, the Australian Competition and Consumer Commission and by OH&S regulators at the State and Territory level.

We note that this model is used in Britain and Northern Ireland, where positive duties have operated for over a decade.[20] For example, Britain adopted a gender equality duty in 2007 which required public authorities to have to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women in carrying out their functions.[21] The duty was supplemented by specific duties which included requirements for public authorities to produce equality schemes detailing how they would fulfil the obligations imposed on them by the gender equality duty; report on progress; take action outlined in their equality scheme; identify gender equality objectives and identify whether one of these objectives should address the cause of the gender pay gap. Since April 2011, the gender equality duty has been part of a single duty which covers eight protected grounds.[22] Britain's statutory human rights commission, the Equality and Human Rights Commission, is responsible for enforcing the single equality duty, initially by encouraging voluntary compliance. If the Commission finds that a

[17] Sandra Fredman, Sarah Spencer, Delivering Equality: Towards an Outcome- Focused Positive Duty Submission to the Cabinet Office Equality Review and to the Discrimination Law Review (June 2006), from 3.
[18] Senate SDA Inquiry, Recommendation 15.
[19] Department of Justice (Vic) An Equality Act for A Fairer Victoria (2008). See also the EOAVIC as it was introduced into the Victorian Parliament in 2010 in relation to the Commissions power after conducting an investigation into alleged discrimination.
[20] Northern Ireland Act 1998 (UK) s 75, sch 9; Equality Act 2010 (UK) s 149.
[21] Sex Discrimination Act 1975 (UK), ss 76A, 76B, 76C.
[22] Equality Act 2010 (UK), s 149(7).

public authority is non-compliant following an investigation, it can issue a compliance notice and ultimately, court enforcement and the imposition of sanctions is available.[23]

Recommendation 7
The consolidated Act should introduce a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote equality which clearly defines the equality goals it seeks to achieve and include effective monitoring and enforcement mechanisms. The new duty should include a compliance regime which moves from a facilitative role to sanctions as a measure of last resort. The AHRC should bear responsibility for monitoring compliance and non-compliance should be enforced in the Federal Court or Federal Magistrates Court.

PART 2. PROTECTED ATTRIBUTES

7. Definition of Sexual Orientation and Gender Identity

We support a definition that does not conflate sexual 'sexual orientation', 'gender identity and 'intersex status'. We support a definition that extends to discrimination whether real, actual or perceived, by appearance, imputation, assumption or association. We refer the Committee to the work the AHRC has done on this matter – 'Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination Consultation Report' (2011).[24]

8. Protection from discrimination from associating with a person with a protected attribute

As noted in the Discussion Paper, the Commonwealth anti-discrimination Acts are not consistent in their approach to prohibiting discrimination of someone who is associated with a person with a protected attribute and the SDA does not address this issue. We support a consistent approach in the consolidated Act.

9. Additional Attributes to be Protected

We note that the Commonwealth anti-discrimination Acts prohibit discrimination based on a narrow list of attributes which are far more limited than their State and Territory equivalents. We make the following recommendations about additional attributes which require protection.

We support the introduction of additional attributes: religion, homelessness, socio-economic status and irrelevant criminal record, and note that these attributes have been recommended by other organisations including the Human Rights Law Centre and Australian Lawyers for Human Rights. We also note that they were recommended for inclusion as protected attributes in Victoria which conducted the most recent review of anti-discrimination law in Australia.[25]

Recommendation 8
The definition of 'carer' and 'family responsibilities' should be broadened to include domestic relationships and cultural understandings of family, including kinship groups, and include all areas of employment.

[23] Equality Act 2006 (UK), ss 31(1), 32.
[24] Available at http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/index.html (accessed 6/12/11).
[25] Apart from 'religion' which was already protected as an attribute in Victoria: Department of Justice (Vic) An Equality Act for A Fairer Victoria (2008), Recommendations 46-48, 50.

Recommendation 9
The list of attributes included in the consolidated Act should be reviewed within five years to ensure it captures those groups in need of protection.

We identify the failure to protect victims of domestic violence as a significant gap in anti-discrimination law. Adverse treatment on the basis of being a survivor of domestic violence is an issue that severely affects a large number of women, especially in the workplace.[26] Smith and Orchiston have determined that current protections under the SDA and DDA do not provide adequate protection against the various kinds of discrimination experienced by victims of domestic violence and propose that a new ground be introduced.[27]

Other jurisdictions have addressed this in their equivalent legislation. For example, New York State is one of the many American states to list lists 'domestic violence victim status' as an attribute in its anti-discrimination legislation [28] and 'gender based violence' is included in the definition of 'gender' in South Africa's anti-discrimination legislation.[29] We note also that at its recent national conference, the Australian Labor Party committed to changing anti-discrimination legislation and the FWA so that they provide "appropriate protection to victims of domestic violence in the workplace".[30] Accordingly, we recommend the inclusion of this attribute in the consolidated Act but we do not support the use of the term 'victim'. We recommend using 'survivor of domestic or family violence status' or 'gender based violence' which do not contain the pejorative connotations associated with victimhood.

Recommendation 10
'Survivor of domestic or family **violence status' should be included in the list of attributes upon which it is unlawful to discriminate across all areas.**

For over a decade, the European Court of Justice has held that European Community laws provide that from the beginning of pregnancy until the end of maternity leave, a woman must not be treated unfavourably at work because she is pregnant, about to take, is on or has taken maternity leave. No comparator is needed.[31] Many jurisdictions in Europe provide more protection from pregnancy and maternity discrimination than simply removing the need for a comparator. For example, the Equality Act 2010 (UK) protects women from pregnancy and maternity

[26] See further research carried out by the Domestic Violence Workplace Rights and Entitlements Project available at http://www.dvandwork.unsw.edu.au/research (accessed 6/12/11).
[27] Belinda Smith, Tashina Orchiston, 'Domestic Violence Victims at Work: The Role of Anti-discrimination Law' (Working Paper 9 December 2011 available at http://sydney.edu.au/law/about/staff/BelindaSmith/index.shtml). See also Alana Heffernan, Lee Matahaere, Domestic violence discrimination in the workplace: Is statutory protection necessary? (Our Work Our Lives Conference, 2010, available at http://www.qwws.org.au/index2.php?option=com_docman&task=doc_view&gid=25&Itemid=51) and Andrea Durbach, Deputy Sex Discrimination Commissioner 'Domestic Violence Discrimination and the Consolidation of Commonwealth Anti-Discrimination Laws' (Paper delivered at the Safe at Home, Safe at Work Conference, Melbourne, 5 December 2011, available at http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2011/20111205_domestic_violence.html (accessed 19 December 2011).
[28] Human Rights Law, Art 15, § 296. See other examples in Heffernan and Matahaere from 8.
[29] The Promotion of Equality and Prevention of Unfair Discrimination Act, Act No 4 of 2000, s 8.
[30] Australian Labor Party 46th National Conference, Amendment 448A. See http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/ (accessed 6/12/11).
[31] See eg C Palmer, J. Wade, Maternity and Parental Rights, (2001, Legal Action Group, London, 28).

discrimination in employment, including unfavourable treatment, because of pregnancy or illness resulting from pregnancy, because she is on maternity leave or because she is seeking additional maternity leave (s 19(2)-(4)). The Act also defines the period during which a woman is protected from discrimination on the basis of her pregnancy, namely from pregnancy until she returns from maternity leave or when she returns to work following birth (if earlier) if she is entitled to such leave or two weeks following the pregnancy if she is not entitled to maternity leave (s 18(6)).

We recommend that a similar approach is taken in Australia. Any dismissal or unfavourable treatment or discrimination during pregnancy, maternity leave and in the three months after returning to work should be regarded as having taken place because of pregnancy or maternity leave. It would therefore be unlawful sex discrimination. It would then be open for the employer to prove that pregnancy or maternity leave was not a reason for the treatment. In conjunction with the changes to proof and the definitions recommended above, a comparator would be unnecessary, it would be clear where the burden of proof lay and women would have stronger protection for discrimination during and following pregnancy.

Recommendation 11
The definition of 'pregnancy' should be reformulated to a definition of pregnancy and maternal care that encompasses the period from the start of pregnancy to three months after a woman returns from maternity leave.

10. Prohibition of Compounded Discrimination
Women's life experiences and identities (for example class, nationality, ethnicity or sexuality) can mean that policies have a differential impact on them. While CEDAW focuses specifically on distinctions grounded in sex, recent debates have highlighted the limitation of a single factor analysis of discrimination. The term 'intersectional discrimination' recognises that some people experience discrimination on the basis of more than one aspect of their identity.[32] Intersectional discrimination reveals 'both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination'.[33]

The CEDAW Committee has recognised the importance of an intersectional analysis in a general recommendation on temporary special measures:

> certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compound negative impact on them.[34]

32 For an insightful discussion into intersectional discrimination see Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics,' in Feminist Legal Theory: Foundations, D Kelly Weisberg (ed) (1993, Temple University Press, Philadelphia).
33 UN Division for the Advancement of Women, Gender and Racial Discrimination, Report of the Expert Group Meeting No UN Document Number (New York: United Nations, 2000).
34 www.un.org/womenwatch/daw/**cedaw**/**recommendations**/**General**%20**recommendation**%2025%20(English).pdf

Intersectional discrimination recognises that a person may be subject to discrimination based on several aspects of their identity. As each woman's experience of life is different, a woman may simultaneously experience discrimination in one or more aspects of her life including gender, race, class, ethnicity, sexual orientation, ability, age, language, and religious beliefs. Intersectional discrimination acknowledges that discrimination can be experienced as a combination of many factors rather than one factor at a time. Intersectional discrimination cannot be distinguished as the sum of its parts; rather it is a compounded discrimination which is unique compared to discrimination based on a single factor.

The Discussion Paper refers to 'intersectional' discrimination but we prefer the phrase 'compounded' discrimination because this idea refers to the lived experience of discrimination which occurs on the basis of a combination of varying attributes.

The Women's Rights Action Network Australia use a baking analogy to demonstrate the limitations of discrimination models that require individuals to point to the component parts of their discriminatory experiences. In making a chocolate cake, the cook uses a variety of ingredients such as eggs, flour, milk, cocoa powder, sugar and butter. At the start of the cooking process, each ingredient can be distinguished but by the end of the process, each ingredient is indistinguishable, and instead of constituent items, there is a chocolate cake. In this analogy, intersectional discrimination is the chocolate cake; a women's experience cannot be broken down into attributes (such as gender, age, disability or socio-economic status); her experience is about how these 'ingredients' have compounded and it the combination of attributes (or intersection of attributes) upon which she will lodge a discrimination claim.[35]

Australian's anti-discrimination framework does not adequately address intersectional discrimination. In the early days of anti-discrimination legislation, Professor Margaret Thornton identified this limitation:

> As there may be an intersection between two or more proscribed grounds, such as in the case of an Aboriginal woman confronted by racism and sexism, or in the case of a lesbian confronted by homophobia and sexism, it may be artificial to select one ground only and to deny the significance of other causative factors giving rise to the less favourable treatment. The compartmentalised approach adopted by legislation suggests clear lines and sharp edges between discrete categories, rather than a blurred morass of proscribed and extraneous reasons which more closely approximate the reality.[36]

Compounded discrimination must be recognised as a specific issue for women in the consolidated Act. Furthermore, the difference between 'joining grounds' or attributes for discrimination in an action must be distinguished from 'intersectional' or 'compounded' discrimination. The former is simply a mechanism through which the AHRC can accept a complaint based on more than one attribute (and indeed, most complaints are made about more than one attribute).

[35] See quoted in the Senate SDA Inquiry, 4.50 and others expressing the same view about the Act's limited effectiveness in this regard.
[36] Margaret Thornton, The Liberal Promise (1990), 96 (footnotes omitted).

The Senate Report recommended that each factor in compounded discrimination should be accounted for in legislation, together with an account of the combined impact of the multiple factors of discrimination.[37] We recommend that this is incorporated explicitly into the consolidated Act .

Recommendation 12
In the consolidated Act, the complainant should not have to prove which attribute is the cause of the disadvantage provided they can establish that they were subject to discrimination on the basis of one or more of the attributes set forth in the relevant section.

PART 3. PROTECTED AREAS OF PUBLIC LIFE

11. Extension of the Right to Equality before the Law

Achieving equality of all people regardless of gender is a key principle underpinning the SDA yet as noted above, the objects clause is limited and provides no guidance about the form of equality that underpins the Act in order to aid courts in interpreting the law or to provide guidance for duty-holders about how to implement it, nor does the Act protect the right to equality before the law. The Senate Report recommended the inclusion of a general equality before the law provision in the SDA, modelled on s 10 of the RDA.[38] We support the introduction of such a provision in the consolidated Act which extends to all protected attributes.

Recommendation 13
The consolidated Act should include a general provision requiring equality before the law across all protected attributes.

12. Defining Protected Areas of Public Life

We reiterate the findings of the Senate Report that the SDA's limited coverage of public life diminishes the Act's effectiveness and makes it unduly complex. We support the Report's recommendation that a general prohibition against sex discrimination and sexual harassment in any area of public life, like s 9 of the RDA, is introduced.[39]

Recommendation 14
The consolidated Act prohibits sex discrimination and sexual harassment in any area of public life.

13. Protection of Volunteer Workers

We note the inconsistency in relation to the protection of volunteers by Commonwealth anti-discrimination legislation. The RDA protects volunteer workers from discrimination but the remaining Acts do not cover volunteers. The Senate recommended that the SDA should cover volunteers.[40] We support harmonising the Acts in this regard by 'levelling up' to the protection in the RDA.

[37] Senate SDA Inquiry, Recommendation 19.
[38] Senate SDA Inquiry, Recommendation 10.
[39] Ibid.
[40] Senate SDA Inquiry, Recommendation 10.

Recommendation 15
Under the consolidated Act, volunteers should receive the same protection as employees.

15. Clubs and Member-based Associations

We support the Senate Report's recommendation that the definition of clubs should be broadened under the consolidated Act[41] but we do not support either the extension or the continuation of the automatic exception for single-sex clubs. As outlined below, we do not support the continuation of permanent exemptions. We recommend that the consolidated Act include a general limitations clause and temporary exceptions. Therefore, for a club to continue to maintain its single-sex membership, it would need to obtain a temporary exemption or have to establish that limiting membership to one sex was a proportionate means of achieving a legitimate end or purpose, as discussed further below.

Recommendation 16
The consolidated Act should apply to all clubs and member-based association regardless of size.

16. Application to Partnerships

We note the inconsistency in relation to the application of Commonwealth legislation to partnerships. The Senate Report recommended that the SDA should apply to partnerships regardless of size.[42] We support harmonising the Acts in this regard by 'levelling up' to the protections in the RDA, namely that the Act applies to partnerships regardless of size.

Recommendation 17
The consolidated Act should apply to all partnerships regardless of their size.

17. Discrimination in Sport

As outlined below, we do not support the continuation of permanent exceptions and therefore we do not support the exclusion of one sex from participating in any competitive sporting activity where the strength, stamina or physique of competitors is not relevant. However, we acknowledge that in such circumstances, such as for health and safety reasons, it is desirable to separate competitive sports along gender lines if the strength, stamina or physique of players is relevant to the players' ability to compete. Should a sporting team want to do this, it would have to establish that the conduct was a proportionate means of achieving a legitimate end or purpose if a person of the opposite sex brought a discrimination claim or obtain a temporary exemption for this activity, as described below.

PART 4. EXCEPTIONS AND EXEMPTIONS

The number and extent of exceptions to the SDA attest to the weak commitment on the part of the legislature to the non-discrimination principle and contrast sharply with the RDA, which contains no provision for exceptions. This is particularly a problem in regard to the wide exceptions for religious organisations.

[41] Senate SDA Inquiry, Recommendation 26.
[42] Senate SDA Inquiry, Recommendation 10.

Automatic exceptions for religious and other bodies need to be removed from the SDA, because they entrench discrimination against women in significant male-dominated sectors of Australian society. As the exemptions are automatic, religious bodies are not required to justify exemption, or demonstrate if and how they are promoting the equality of women as far as is possible within the parameters of their doctrines, tenets or beliefs. Nor are they required to demonstrate if and how they ensure that individual officers responsible for employment, training and education always act in good faith when they discriminate 'in order to avoid injury to the religious susceptibilities of adherents of [their] religion or creed' under s 38.

Automatic exceptions for religious bodies take no account of a range of important factors. Religious bodies are, to a greater or lesser degree, male-dominated. The views of female adherents – those who are disadvantaged by the exceptions - are not able to be heard because of the nature of the exemption. Systemic discrimination against women is thus entrenched, prolonging a situation where issues of equality and discrimination are absent from the agenda of the (mostly male) leadership. As it stands, the SDA abandons significant numbers of women in certain occupations, roles and activities and fails to protect their rights - the rationale for the SDA in the first place.

Automatic exceptions have significant flow on effects. For example, there is no incentive for an exempted religious body to ensure that it provides significant, let alone mandatory, levels of representation for women in areas that do not conflict with its doctrines, tenets or beliefs. An example would be representation levels of women on lay church bodies. The automatic exception makes it difficult for women adherents to argue for a satisfactory level of representation. If religious bodies had to apply for an exemption, a demonstrated commitment to equality principles could be required as part of the application process.

Automatic exceptions allow religious bodies to resist re-examination of their beliefs regarding the role of women. If an exemption had to be sought at regular intervals, re-examination would be required from time to time, and female adherents would take encouragement to challenge the status of current beliefs. At present, women members of major religious bodies that claim their beliefs prevent extending full equality to women, have little opportunity or incentive to challenge their situation. Many feel that the discrimination they face is not taken seriously by wider society. Removing automatic exception would redress that perception.

It is unacceptable for educational institutions conducted by religious organisations (the preponderance of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the SDA and CEDAW about the position of women and girls in contemporary Australian society.

As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds. Furthermore, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds. The inclusion of s 38 is over-inclusive and unnecessary. Since education is widely regarded as the key to the acceptance of the non-

discrimination principle, educational institutions that are the recipients of substantial government funding should not be permitted to flout the general law of the land.

As long as automatic exceptions exist, the SDA is fundamentally flawed and compromised, and a significant body of women, who are left without the protection of law against discrimination, are effectively discriminated against by the SDA.

Recommendation 18
The consolidated Act should not contain any automatic or permanent exceptions.

20. General Limitations Clause
We support the inclusion of a general limitations clause as the only exception to the general non-discrimination principle contained in the consolidated Act. We agree with the Senate inquiry's finding that a general limitations clause is "clearly more flexible and allows for a more nuanced approach to balancing rights and interests where these are in conflict."[43] The consolidated Act should include a simple test which looks at whether the conduct in question is a "proportionate means of achieving a legitimate end or purpose", which is the test used in the Equality Act 2010 (UK).[44]

[43] Senate SDA Inquiry, 157.
[44] The Act refers to "aim" rather than "end or purpose. See eg s 19(2)(d).

Recommendation 19
The consolidated Act should include a general limitations clause, namely that the respondent must show that the conduct in question was a "proportionate means of achieving a legitimate end or purpose".

21. Operation of an 'Inherent Requirements' Exception for Employment
We do not support the continuation of the 'inherent requirements' test. The introduction of a general limitations clause will make this exception unnecessary.

22. Application of Religious Exemptions on the Ground of Sexual Orientation and Gender Identity
As stated above, we do not support the continuation of permanent exceptions in the consolidated Act. We are disappointed that the government will not consider removing the broad exceptions for religious organisations contained in the SDA as part of the consolidation project particularly as such a review was another of the recommendations contained in the Senate Report.[45] We have outlined above the problems the continuation of these exceptions pose for achieving gender equality in Australia.

We propose that the consolidated Act should include a general limitations clause and temporary exemptions. Therefore, we do not support an exception for religious organisations which would enable them to discriminate on the basis of sexual orientation or gender identity. Under our proposal, religious organisations could apply for a temporary exemption or they would have to show that such conduct is a proportionate means of achieving a legitimate end or purpose.

Recommendation 20
An exception for religious organisations which would enable them to discriminate on the basis of sexual orientation or gender identity should not be included in the consolidated Act and the exceptions for religious organisation in ss 37 and 38 of the SDA should not be included in the consolidated Act.

23. Temporary Exemptions
We support the continuation of the AHRC's role of granting temporary exemptions from the SDA and the other Commonwealth anti-discrimination Acts which will enable organisations which would previously have been protected by a permanent exception to seek a temporary exemption from such conduct. This process will bring the behaviour into the public eye and enable the AHRC to apply a principled approach to each application to determine whether the temporary exception is sought in accordance with the non-discrimination and equality principles in the consolidated Act. To that end, we also recommend that the AHRC should publish guidelines about the process and criteria for assessing applications for temporary exceptions and its power to grant exceptions should be exercised in accordance with the (revised and strengthened) objects of the consolidated Act.[46]

[45] Senate SDA Inquiry, Recommendation 35. See also discussion at 158.
[46] See also Senate SDA Inquiry, Recommendation 28.

Recommendation 21
The AHRC should continue to grant temporary exemptions under the consolidated Act but this should be done according to clear published guidelines and the AHRC's power should be exercised in accordance with the new objects included in the Act (as per Recommendation 3).

PART 5. COMPLAINTS & COMPLIANCE FRAMEWORK

Australia's anti-discrimination framework is structured around an individualised fault-based approach. To achieve redress for discrimination, a woman who has experienced discrimination is required to lodge a complaint at the AHRC which will attempt to resolve the complaint through conciliation and if that is unsuccessful, the woman can pursue her complaint through the Federal Court or Federal Magistrates Court. In Parts 1-4 of this submission we outlined a number of problems with the law which make such cases difficult (such as definitions, compounded discrimination and proof) and made recommendations for how the law could be improved. However, this would not change the law's structure; it would remain individualised and fault-based. The model itself is inherently limited in how effectively it can achieve equality.[47]

Our submission has recommended three mechanisms which would move the law away from a fault-based approach towards a capacity-based model[48] - extending the use of reasonable adjustments to employees with family or caring responsibilities; reformulating special measures as measures aimed at achieving substantive equality across the protected attributes; and introducing a positive duty to promote equality. These mechanisms move the obligation for addressing discrimination away from the person at fault to the person best placed to bring about change proactively, rather than once a woman has experienced discrimination. In relation to positive duties, as we noted above, the AHRC would play a role in reviewing equality schemes developed to meet obligations arising from the positive duty and monitoring compliance with the positive duty, ultimately through court enforcement. This would strengthen the AHRC's ability to tackle discrimination. In this section, we make further recommendations for bolstering the AHRC's role and for improving the individual complaints-based model.

24. New Mechanisms to Provide Guidance for Duty Holders

We support the introduction of additional mechanisms which would provide guidance for duty holders (employers, educators and service providers) about how to comply with the Act. We recommend that the consolidated Act include a provision for developing action plans and standards, like the model in the the Disability Discrimination Act 1992 (Cth) ('DDA'). Under such a mechanism, organisations can develop an action plan for achieving gender equality and lodge it with the AHRC or the Sex Discrimination Commissioner. This may provide an incentive for action, especially if compliance with the plan then became a relevant factor for the court to consider in any subsequent discrimination claims.

[47] See also the Senate's reservations about the model for this reason: Senate SDA Inquiry, from 159.
[48] Smith and Allen have used this terminology used in relation to anti-discrimination frameworks: Belinda Smith, Dominique Allen, 'Whose Fault is it? Asking the Right Questions when Trying to Address Discrimination' (Working Paper, 24 August 2011 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914844).

Victoria has introduced a range of mechanisms to assist duty holders with compliance. The Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') can issue practice guidelines on any matter relating to the EOAVIC. The guidelines are not legally binding but they can be considered as evidence of compliance if they are relevant to a matter before the court.[49] Organisations can develop an action plan which specified steps necessary to improve their compliance with the Act. The action plan is not legally binding but the court may consider it in relation to a matter brought under the Act. The VEOHRC can provide advice on the action plan or set minimum requirements for action plans and the VEOHRC can register the plan and publish it as it sees fit.[50] On request, the VEOHRC can review an organisation's practices and programs to determine whether they are compliant with the Act. A review will not affect the person's liability under the Act or create a defence.[51]

Recommendation 22
Under the consolidated Act, organisations should be required to develop action plans and the AHRC should be empowered to issue practice guidelines and standards to improve compliance.

The vast majority of discrimination complaints are settled confidentiality, largely using the AHRC's processes. Yet there is very little publicly available information about the type of detriments alleged in complaints, the type of respondents against which they are made (including on repeat respondents) or on individual outcomes.

The publication and use of de-identified data on the complaint process and outcomes would enable proactive steps to reduce sex discrimination and promote gender equality to be taken and it would educate both potential complainants and respondents.

Such data would include:

- The types of detriment alleged by complaints: socio-demographic data on complainants by each jurisdiction, instead of aggregated under all federal anti-discrimination legislation as is currently the case in the AHRC's annual reports;
- Legal and other representation of complainants and respondents: The industries and sectors in which complaints are made as the basis of taking action to address issues in particular industries or sectors;
- Settlements reached, both monetary and other.

Recommendation 23
The AHRC should receive increased funding to enable the collection, publication and use of de-identified complaint data for research purposes as an education mechanism for both potential complainants and respondents.

25. Changes to the Conciliation Process
As we noted above, anti-discrimination legislation, such as the SDA, establishes a limited framework within which individuals have the right to lodge a complaint in certain circumstances. The enforcement process places the burden on the person discriminated against to take action, and

[49] EOAVIC ss 148, 149.
[50] Ibid ss 152-3.
[51] Ibid s 151.

the conciliation process, which has become increasingly legalised under the SDA, have emerged as particular structural problems.[52] While in recent years the AHRC has improved the responsiveness of the complaint handling process, including under the SDA, it remains a relatively slow and non-transparent process.

To improve the practical accessibility of the complaint process and the speedy resolution of complaints, it is useful to consider the New Zealand Human Rights Commission's (NZHRC) dispute resolution process, which focuses on resolving complaints in the most effective, informal and efficient manner at the earliest possible opportunity.[53] The main steps in this process are as follows:

Triage of complaints

- Step one: Assessment as to whether the Commission is the right agency and/or whether information can help the parties clarify or resolve their complaint.
- Step two: Assessment as to whether it may be within the unlawful discrimination provisions or whether it relates to broader human rights issues. Complaints that relate to unlawful discrimination are either passed to the duty mediator (to start to deal with on the day); or acknowledged and assessed further (if the nature of the complaint suggests that immediate intervention will not be productive).
- Step three: After assessment, complaints are assigned to mediators. Mediation depends on the engagement of all parties. Mediators give and receive expectations from parties against timeframes, follow them up and keep all parties informed as to progress or reasons for delay
- Step four: Where matters are unresolved after mediation, they are referred to the Human Rights Review Tribunal. At this stage the Office of Human Rights Proceedings, an independent part of the Human Rights Commission, may also be involved in providing legal representation to complainants.

The flexible dispute resolution process allows a range of interventions. Some complaints are resolved through the provision of information which can enable self help. In 2007, the NZHRC managed to close 90 percent of complaints within three months of receipt. This compares to an average of 20 percent of complaints under the SDA in the same period (55 percent of complaints lodged under the SDA were finalised in 6 months, with 80 percent of complaints within 9 months).

We note that Victoria introduced a model focused on early resolution this year which is based on the New Zealand model. In Victoria, a person who has experienced discrimination has the option of lodging a case at the civil tribunal or trying to resolve it using the VEOHRC's dispute resolution processes, which is voluntary and either party can withdraw at any time. The VEOHRC is required to provide dispute resolution services as early as possible, in a manner appropriate to the nature of the dispute, which are consistent with the Act's objectives.[54]

Recommendation 24

[52] Beth Gaze, 'The Sex Discrimination Act After 20 years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 UNSWLJ Forum 914-921.
[53] New Zealand Human Rights Commission Annual Report 2007, 32. http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/19-Nov-2007_11-42-32_HRC_ANNUAL_REPORT_07.pdf .
[54] EOAVIC, s 112.

Introduce a quicker complaint resolution process using a 'triage' procedure so that complainants have access to dispute resolution at the earliest opportunity. Dispute resolution services should be provided in a manner which is consistent with the Act's objects.

26. Improvements to Court Processes

Except in a few exceptional cases, remedies granted under the SDA have been very low, and arguably do not fully compensate women for their loss, especially where discrimination or harassment leads to termination of employment. This leads to a situation where there is little incentive for individuals to bring enforcement actions as they may end up with little gain after paying their solicitor client costs. Secondly, the remedies provided in the SDA and awarded by courts do not address systemic issues such as requiring employers to change their systems, to prevent similar discrimination occurring in future. In cases of unequal pay, an effective remedy must be systemic. When one has regard to analogous areas of law, such as defamation, it is notable that damages awards are not confined to compensation. As a result, awards are far higher. What is needed in discrimination matters is sufficient incentive for individuals to enforce the law, and for remedies that will ensure systemic change to avoid future discrimination. We note that the Senate Report recommended the introduction of corrective and preventative orders when discrimination is proven.[55]

Where complaints are brought, it is only in rare cases that large damages awards are made. Damages awards must begin to properly value the loss that is suffered in sex discrimination matters. While awards for back pay are common, awards for pain and suffering, and for front pay are often not given, or are unjustifiably low. Pain and suffering awards are often only several thousand dollars, which is quite inadequate in a matter where a complainant has had to persist with litigation in which her competence, personality and motives may have been subject to attack and where she has had to risk the possibility of paying the respondents costs if she lost. This is particularly an issue in cases against government and large corporations where the respondents are not affected in their litigation decisions by resource limitations. For example, in Hickie v Hunt and Hunt, the compensation awarded was a very small sum for loss of a career as a law firm partner. A woman who has brought a successful and well publicised claim of discrimination in one of Australia's professions may have a very reduced chance of getting another such position, and under-compensation in that situation is a strong deterrent to challenging discriminatory practices. Where cases appear likely to result in large damages awards (Thomson v Orica, Christina Rich v PricewaterhouseCoopers Australia), they are usually settled so that the amounts paid out do not become public knowledge.

Women are less likely to have the necessary resources to pursue a discrimination matter through the courts. There should therefore be a no costs jurisdiction in discrimination law matters, with the exception of vexatious complaints. As it currently stands, there is a powerful disincentive in the federal jurisdiction for a complainant to take a discrimination matter to court due to the risk of an adverse costs order if the complainant is unsuccessful.

Recommendation 25

The consolidated Act should ensure that the provision of compensation properly values the loss suffered in sex discrimination cases – including future loss of pay and career

[55] Senate SDA Inquiry, Recommendation 23.

advancement. Damages should not be limited to compensation. The nature of the loss may establish the basis for punitive damages which will contribute to the systemic change required to avoid future discrimination. The jurisdiction should be no-costs, with the exception of vexatious complaints.

Recommendation 26
The consolidated Act should contain civil penalty provisions, similar to those in the Fair Work Act's General Protections provisions, to assist a complainant with mitigating their costs by way of complainants applying for the penalty to be payable to themselves when filling out forms to refer the matter to hearing.

Recommendation 27
Systemic remedies should be explicitly part of the court's powers and courts should be directed in awarding remedies to do what is necessary not only to compensate the particular complainant but to ensure that any discriminatory practices identified are changed so that others will not be similarly affected.

There is a strong argument for public support of strategic litigation to ensure the development of an effective set of precedents in Australian discrimination law. This would require provision of a litigation fund to an organisation with responsibility and expertise to resource selected cases to provide clear guidance to all parties on what the law requires. The minimal provision of legal aid in Australia for discrimination claims means that enforcement is restricted, and the resource and consequent power imbalance in many litigated matters impacts undesirably on the development of precedent.

The Senate Report recommended that working women's centres, community legal centres, specialist low cost legal services and legal aid receive increased funding so they have the resources to provide advice about matters under the SDA[56] and we urge the government to act on this recommendation. In addition, effective representative complaints provisions are required to improve the accessibility and efficacy of the individual complaints process.

Recommendation 28
The consolidated Act should include effective representative complaints provisions to enable organisations to engage in strategic litigation on behalf of complainants.

Recommendation 29
Working women's centres, community legal centres, specialist low cost legal services and legal aid should receive increased funding so they have the resources to provide advice about matters under the consolidated Act.

27. Changes to the Role and Functions of the AHRC

In our view, the expertise of the specialist commissioners, such as the Sex Discrimination Commissioner within the AHRC, are crucial to the effectiveness of the SDA, and essential if complex areas of compounding and systemic discrimination are adequately to be addressed. However, if she is to be effective, her capacity to address issues of systemic discrimination needs

[56] Senate SDA Inquiry, Recommendation 24.

to be further strengthened, particularly through a broadened power of intervention and a power to initiate non-complaint-based inquiries.

We support the inclusion of a power that enables the AHRC and/or the Sex Discrimination Commissioner to initiate inquiries into systemic discrimination in the consolidated Act without requiring an individual to make a complaint.[57]

As discrimination is woven into the historic fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails. Moreover, the complaints-based model relies upon victims identifying and standing up for their rights and prompting social change through individual litigation and its subsequent ripple effect. It assumes that victims have the time, security and resources to pursue such litigation, despite the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent. The latter is likely to have deep pockets and can either pass the costs onto consumers or, in the case of a government respondent, have recourse to the public purse. The individualisation of complaints may mean that a woman who lodges a complaint of sex discrimination becomes very visible, not only within an organisation, but within an industry. This is particularly the case with women occupying high-profile and senior positions, whose careers may be ruined as a result, as happened in Dunn-Dyer v ANZ.

Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. As we discussed earlier in this submission, the courts lack power to order systemic corrective orders, such as a change in policy, the introduction of a compliance program that might prevent further discrimination, an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant or to set reform standards. In this way, the laws are more focused on redressing, not preventing harm or promoting equality. Having settled a complaint of discrimination, an employer may not even see a connection between the individual complaint and other equality issues in the workplace.

These problems would be met to some extent if the consolidated Act contained a power that enabled the AHRC and/or the Sex Discrimination Commissioner to initiate inquiries into systemic sex discrimination, such as within the legal profession, an industry or a workplace. The SDA contains a power of initiation but it is limited to laws; it does not extend to the sites of discrimination.[58] This power of initiation should not be contingent on the lodgement of a complaint. The Senate Report also recommended that the AHRC should have an expanded formal inquiries power including the ability to conduct inquiries which examine matters within a state or under state law.[59]

In Victoria, the VEOHRC can conduct an investigation about matters which raise a serious issue and relate to a group or class, which cannot be expected to be resolved by dispute resolution or by the court, and where there are reasonable grounds for suspecting that multiple contraventions of the Act have occurred.[60] At the conclusion of an investigation, the VEOHRC may take any action

[57] See also Senate SDA Inquiry, Recommendations 27 and 37.
[58] SDA, ss 48(1)(f) and (g).
[59] Senate SDA Inquiry, Recommendation 29.
[60] EOAVIC, s 127.

it thinks fit including entering into an agreement to require compliance, referring the matter to the court and reporting the matter to the Attorney-General or the Parliament.[61]

Recommendation 30
The AHRC and/or the Sex Discrimination Commissioner should have the power to initiate inquiries into systemic discrimination in the consolidated Act and exercising this power should not rely on the lodgement of an individual complaint.

A key element in achieving any kind of equity goal is the establishment of effective monitoring mechanisms. For the integrity of such mechanisms to be maintained they need to be at arm's length from government and able to undertake independent analysis and evaluation of evidence.

The federal government currently lacks effective mechanisms for monitoring progress towards gender equality. In the past there were units within government with specific responsibilities for monitoring aspects of gender equality such as equal pay. These included the Women's Bureau within the employment portfolio (1963-97) and the Equal Pay Unit within the Department of Employment and Workplace Relations (1991-98). The fact that these units no longer exist suggests the vulnerability of such monitoring mechanisms when they are located within government.

In order to ensure renewed progress towards gender equality new agendas are needed and new monitoring mechanisms to ensure that attention is paid to any shortfalls. The independence of the AHRC as Australia's national human rights institution makes it the appropriate location for monitoring progress towards gender equality. The Sex Discrimination Commissioner should be given a new statutory responsibility to monitor and report annually to parliament on progress towards gender equality. This was also recommended in the Senate Report which was in favour of the Sex Discrimination Commissioner reporting to Parliament on this issue every four years[62] although we recommend that the Sex Discrimination Commissioner reports annually, like the Social Justice Commissioner.

In order to measure progress in overcoming major sources of gender inequality the annual reports should focus on key performance indicators. As a minimum, these should include:

- the overall gender pay gap for ordinary hours full-time work, as well as other forms of pay disparity across industries, occupations and types of work;
- the impact of caring responsibilities on income security, as measured by the gender ratio of those living in poverty;
- access to quality childcare;
- access to paid maternity and parental leave;
- the level of gender-based violence;
- representation of women in public decision-making, including parliaments and local government.

The information in such annual reports should be presented graphically where possible and in a highly visual, accessible and economic way, to assist in the goal of raising public awareness of persistent obstacles to gender equality. To ensure that such reports are not lost on being tabled in

[61] Ibid s 139.
[62] Senate SDA Inquiry, Recommendation 33.

Parliament, there should be a statutory responsibility for government to respond to them within one month.

Recommendation 31
The Sex Discrimination Commissioner should be given the statutory duty to monitor and report to Parliament annually on progress towards gender equality. Government should be required to respond within one month to such reports, which should focus on key performance indicators.

In order to move beyond the limitations of the individualised complaints-based model, the powers we have described above are crucial. We stress that the Sex Discrimination Commissioner and the AHRC must be adequately funded in order to conduct these inquiries in addition to her other functions. Otherwise, in the context of efficiency dividends, the urgent will always drive out the important. Past experience suggests that such monitoring and reporting functions must be allocated discrete resources so that they are not competing with the other functions of the Commission. A dedicated unit is required for the new monitoring unit, with a minimum staffing level of five researchers - the equivalent of previous monitoring bodies such as the Women and Statistics Unit within government.[63]

Recommendation 32
A discrete unit should be established within the AHRC to undertake the research required for the monitoring and reporting role and the AHRC should receive increased funding to enable it to effectively perform its additional monitoring and enforcement roles under the consolidated Act.

As the Discussion Paper outlines, the amicus curiae role of the specialist Commissioners, including the Sex Discrimination Commissioner, is confined to intervention in the Federal Court and the Federal Magistrates Court. Formally, they cannot appear in appeals from decisions made by these courts, although they often do. The SDA Report recommended clarifying this in the legislation.[64] In our view, the Sex Discrimination Commissioner should not be so constrained to sex discrimination matters. She should also be able to apply to make representations before State courts and tribunals where there is provision to intervene.

Victoria has reformed its law in such a way. The VEOHRC in Victoria can appear as an amicus curiae in proceedings where the orders sought may significantly affect the right to protection against discrimination of people who are not parties to the proceedings; proceedings that the VEOHRC considers will have significant implications for administration of the EOAVIC; and proceedings where the VEOHRC is satisfied that it would be in the public interest for it to assist the court.[65] The VEOHRC can also intervene and be joined as a party to proceedings which involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.[66]

Recommendation 33

[63] See also Senate SDA Inquiry, Recommendation 34.
[64] Senate SDA Inquiry, Recommendation 31.
[65] EOAVIC, s 160.
[66] Ibid s 159.

The Sex Discrimination Commissioner should be able to appear as an amicus curiae in appeals from decisions made by the Federal Court and the Federal Magistrates Court about the consolidated Act.

Recommendation 34
The Sex Discrimination Commissioner should be able to exercise her amicus curiae function and intervene in matters beyond the Federal Court and the Federal Magistrates Court which involve sex discrimination, pay equity or relate to gender equity.

PART 6. INTERACTION WITH OTHER LAWS

30. Application to State and Territory Governments and Instrumentalities

The SDA is narrower than the RDA and DDA. The latter Acts apply to the Crown in right of the States and Territories, while the SDA only applies to the Crown in right of the States and Territories in some areas of public life. There is no good reason why the SDA should not also apply without exception and the Senate Report recommended that the SDA should apply to the Crown in right of the States and State instrumentalities.[67]

Recommendation 35
The consolidated Act should apply to the Crown in right of the States and Territories without exception.

[67] Senate SDA Report, Recommendation 11.

Equality Rights Alliance
Women's Voices for Gender Equality

The following organisations and individuals endorse, in full or part thereof, this submission:

1. 2020 Women
2. Associate Professor Sarah Charlesworth, University of South Australia
3. Australia Federation of Graduate Women
4. Australian Centre for Leadership for Women
5. Australian Council of Trade Unions
6. Australian Domestic and Family Violence Clearinghouse
7. Australian Immigrant and Refugee Women's Alliance
8. Australian National Committee for UN Women
9. Caroline Gowan
10. Centre for Work + Life, Hawke Research Institute for Sustainable Societies
11. Children by Choice
12. International Women's Development Agency
13. Jessie Street National Women's Library
14. Maritime Union of Australia
15. National Association of Community Legal Centres
16. National Association of Services Against Sexual Violence
17. National Tertiary Education Union
18. Professor Margaret Thornton, ANU
19. Top End Women's Legal Service
20. SA Unions and the Young Workers' Legal Service
21. Sisters Inside
22. Union of Australian Women
23. United Nations Association of Australia Status of Women Network
24. United Voice
25. Villamanta Disability Rights Legal Service
26. Women With Disabilities ACT
27. Women With Disabilities Australia
28. Women's Centre for Health Matters
29. Women's Economic Think Tank
30. Women's Electoral Lobby
31. Women's International League for Peace and Freedom
32. Women's Legal Centre (ACT and Region)
33. Women's Legal Services Australia
34. Women's Legal Services NSW
35. Work and Family Policy Roundtable
36. YWCA Australia
37. Zonta International District 24 Inc