

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS DISCUSSION PAPER

Initiative Under Australia's Human Rights Framework

DONNELLY REPORT

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BACKGROUND TO REPORT

1. This Report is in direct response to the Australian Government releasing the "Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper" ("the Discussion Paper") on 22 September 2011. It is understood the Australian Government launched the Discussion Paper to seek community views on consolidating Commonwealth anti-discrimination laws.
2. The author appreciates that the project to consolidate existing Commonwealth anti-discrimination laws into a single Act is a key component of Australia's Human Rights Framework. This paper seeks to set out a series of submissions, which are the personal views held by the author. It is hoped this Report will provide some guidance and assistance to the Australian Government in the difficult task of consolidating existing Commonwealth anti-discrimination laws.
3. This Report in no way comprehensively provides an analysis of the entirety of the Discussion Paper. The paper seeks to provide an analysis of various parts of the Discussion Paper, and where the author considers appropriate, provide an outline of various submissions in relation to the impugned area. Moreover, the author will also consider briefly several other areas of discrimination law that are not considered in the Discussion Paper. It is appreciated that this latter object is expressly permitted by paragraph [16] of the Discussion Paper.

DEFINING DISCRIMINATION

4. It is stated at paragraph [22] that "The definitions of direct and indirect discrimination currently used in Commonwealth anti-discrimination laws have been criticised as being inconsistent, complex and uncertain". Although the author accepts this proposition, it is submitted that the separate tests of "direct" and "indirect" discrimination should remain.
5. It is to be appreciated that the law of Australia, in both statute and the common law, is complex. The inconsistency between the relevant statutory tests for direct and indirect discrimination derives from the various statutory regimes regulating discrimination in the various States and Territories of Australia. To that extent, any unified test would unduly alter the jurisprudence which has developed in relation to the meaning of discrimination over many years in the various States and Territories of Australia.

6. It is submitted that a unified test would ironically promote further inconsistency and uncertainty. It is plain that a new statutory test of discrimination would require the imposition of interpretation at common law in the fullness of time. That situation would no doubt establish uncertainty in the interim and possibly into the future. Moreover, there is every reason that various judicial approaches may be taken to a "unified test" for discrimination - the net effect being inconsistency and complexity.
7. It is stated at paragraph [46] of the Discussion Paper that the adoption of a unified test would more closely "align Commonwealth anti-discrimination law with international law". It is submitted that this proposition should be rejected. In my view, the Discussion Paper fails to plainly demonstrate how the enactment of a unified test of discrimination is consistent with current international law principles.
8. The international human rights instruments do not expressly refer to any "test of discrimination" that could be of proper assistance in defining a "unified test". Rather, as paragraph [45] outlines, international human rights treaty bodies expressly refer to direct or indirect discrimination. In that context, in circumstances where Australia was to enact a "unified test" of discrimination, it is submitted, this would be inconsistent with the international jurisprudence in the area.
9. It is submitted that the comparator test is the appropriate test to be adopted in relation to direct discrimination. It is stated at paragraph [27] that "Cases regularly turn on a particular judge's view as to what the material circumstances were, and how the discriminator might have treated a hypothetical person without the protected attribute in those circumstances. Results are unpredictable and have created significant uncertainty".
10. It is submitted that with any objective test there is an element of unpredictability and uncertainty with how the court will rule. However, it is submitted that the current statutory comparator test is the best approach to defining discrimination. The detriment test, although absent in the comparator exercise, requires that the treatment to the victim must have been caused by the complainant's protected attribute. It is submitted that in considering that aspect of the statutory test, there is by implication the necessary consequence of considering whether the impugned treatment would have occurred

without the protected attribute. The net effect seems to be the comparator test in action in a more subtle form.

11. The comparator test appears to be favoured in the United Kingdom and in accordance with the *European Union Directive 2000/78/EC*, Article 2 (2)(a). It is submitted that the manner of dealing with discrimination in both Canada and the United States should not be followed. That is, not to define discrimination and leave it up to the case law. In any event, it is submitted that this latter approach seems to inherently suggest inconsistency and more importantly, uncertainty in defining discrimination.

Recommendation 1

- 1.1. The current statutory model of direct and indirect discrimination should remain.
- 1.2. The comparator test should be favoured in defining direct discrimination.
- 1.3. The unified test of fusing direct and indirect discrimination should be rejected.

BURDEN OF PROOF

12. It is submitted that the alleged victim should bear the onus of proof in establishing direct or indirect discrimination. It is submitted that the burden of proof should not shift at any time. It is submitted that there is no logical basis for shifting the burden of proof upon the respondent once the alleged victim has established the discriminatory impact of a condition, requirement or practice.
13. The various constituent elements of indirect discrimination should be satisfied by the complainant, with the burden not shifting at any time. The nature of allegations of unlawful discrimination are serious, and for that reason, the complainant should always bear the burden of proof.
14. It is disappointing that the *Fair Work Act* takes a different approach to the burden of proof in relation to direct discrimination. It seems difficult to reconcile that an allegation of discrimination automatically imposes a presumption that it occurred, subject to the respondent proving otherwise. Following this logic, an accused person in the criminal law would bear the burden of proving their innocence upon a presumption of guilt.

15. The analogy sought to be made here does not suffer from the fallacy of weak analogy. Given the seriousness of a claim for unlawful discrimination and the fact that there are criminal implications in relation to various forms of discrimination, it is submitted that the burden of proof adopted by the *Fair Work Act* model should be rejected.
16. The approach adopted in the United Kingdom should also be rejected. The suggestion that the complainant has established a *prima facie* case justifying the burden of proof shifting, appears to further complicate the area. A determination would need to be made that a *prima facie* case has been met before the shift in the burden of proof would take place. This approach would necessitate a further procedural step in a discrimination claim. It is submitted that the complainant shall bear the onus of proof, on the balance of probabilities, to make out the various constituent elements of the discrimination law claim. The logic of this approach is favoured in the many civil actions that people undertake in courts of Australia on a daily basis.

Recommendation 2

- 2.1. The burden of proving discrimination should be allocated entirely to the complainant.
- 2.2. The procedure adopted by the *Fair Work Act* in relation to the burden of proving discrimination should be rejected.

DUTY TO MAKE REASONABLE ADJUSTMENTS

17. Paragraph [58] of the Discussion Paper states that "The DDA is currently the only Commonwealth Act to contain an explicit duty to make reasonable adjustments". The Discrimination Law Experts' Roundtable has suggested that the explicit duty to make reasonable adjustments should be extended to all protected attributes in order to clarify legislation (see footnote 34 of Discussion Paper). It is submitted that this proposal should be accepted.
18. There do not seem to be any powerful policy considerations for limiting the express duty to make reasonable adjustments to disability discrimination at the expense of the other protected attributes. It is submitted that this approach, at least on one view, suggests by implication that the other protected attributes rank lower in priority of hierarchy in

protecting discrimination. For example, what logical basis is there for the provision of an explicit duty to make reasonable adjustments at the Commonwealth level in relation to disability but not the other protected attributes? There does not seem to be any rational explanation for the current position.

19. It is suggested at paragraph [60] of the Discussion Paper that "one option is to express the duty to make reasonable adjustments as a standalone (sic) positive duty". It is submitted that this approach should be rejected. The statutory effect of such a proposal would bring it outside the ambit of having to prove direct or indirect discrimination. There is no reason why a separate cause of action in this manner should be enacted. It is generally appreciated that discrimination law involves a negative criterion, whereby parties should not commit certain acts or undertake conduct that would unlawfully discriminate. The proposal of creating a separate duty to make reasonable adjustments seems inconsistent with this negative criterion; to the extent it establishes a positive criterion for certain steps to be taken to discharge the statutory duty.

Recommendation 3

- 3.1. The duty to make reasonable adjustments should be extended to all protected attributes at the Commonwealth level.
- 3.2. The proposal to make reasonable adjustments a stand alone positive duty should be rejected. There is no rational basis for extending such an approach beyond the current direct and indirect discrimination provisions.

PROHIBITION OF HARASSMENT

20. It is submitted that harassment should be defined in the new Act to be discrimination. This approach is consistent with Article 2(3) of the *European Union Directive 2000/78/EC*, and provides the easiest mechanism for characterising harassment as discrimination. It is submitted this approach would reduce complexity in drafting and remove uncertainty about the application of harassment to the various protected attributes.
21. Further, by clearly including attribute-based harassment within the meaning of discrimination, the proposal against harassment would cover all protected attributes. It is

submitted this is the best approach. First, such an approach ensures harassment is unlawful in relation to all of the protected attributes. Secondly, such an approach ensures the various protected attributes are treated equally, unlike the various Australian jurisdictions where harassment varies considerably in meaning.

Recommendation 4

4.1. The prohibition against harassment should cover all protected attributes.

4.2. Harassment should be defined as a form of discrimination.

SEXUAL ORIENTATION AND GENDER IDENTITY

22. Paragraph [74] of the Discussion Paper observes: "Each of the States and Territories cover sexual orientation as a protected attribute to some extent. Sexual orientation is generally defined as heterosexuality, homosexuality, lesbianism and bisexuality". It is submitted that sexual orientation should be defined by the use of a conceptual definition rather than the "apparent" described current labels of sexual orientation.

23. The author expressly adopts and approves the alternative proposal set out at paragraph [74] of the Discussion Paper - that is, sexual orientation should be defined as encapsulating the broad concept of a "person's sexual attraction to, and sexual activity with, people of a particular gender". The proposed definition clearly is more neutral in its approach in defining sexual orientation.

24. For the purposes of gender identity, it is submitted that a person of indeterminate sex who does not identify as male or female, should be characterised as falling within the scope of the gender identity provisions in any event. It is submitted that to not provide protection for persons of indeterminate sex who do not identify with the male or female sex is an unjustifiable form of discrimination that should not be accepted.

25. Elsewhere, the author has suggested that by construing the word "sex" in Victoria as exclusive of persons of indeterminate "sex" who do not identify with the male or female "sex", is potentially violating the statutory Bill of Rights in that State: see Jason Donnelly, "The Sex Conundrum", November 2011, 85(11) *Law Institute Journal*, p.52.

26. Importantly, it is submitted that the word "sex" should be defined in the new Act. It is submitted that the word "sex" should be defined as being either male, female or a person of indeterminate "sex". Such a construction of the word "sex" arguably is consistent with the best approach to protecting human rights, which apply to all "human beings".

27. A definition of the word "sex" which includes only persons who are either male or female implicitly discriminates against persons of indeterminate gender. It is submitted that in the 21st century where the jurisprudence on human rights are expanding, persons of indeterminate sex who do not identify as either male or female should also be protected. There is no logical reason to suggest otherwise. They are human beings who deserve the full dignity, rights and obligations that come with belonging to the human race.

Recommendation 5

- 5.1. Sexual orientation should be defined by using a conceptual definition, encompassing the broad concept of person's sexual attraction to, and sexual activity with, people of a particular gender.
- 5.2. A definition section of the term "sex" should be included in the new Act. The definition should define the term "sex" as persons who are male, female or of indeterminate gender.

ATTRIBUTES

28. It is submitted that the current protection against discrimination on the basis of the protected attributes are insufficient and inadequate. That is to say, the additional attributes of religion, political opinion, industrial activity, nationality, criminal record and medical record should all be protected attributes under the new Act.

29. Paragraph [83] of the Discussion Paper outlines that these additional attributes are limited to "employment only". It is submitted that these additional attributes should be prohibited in the whole range of areas, and not limited to the employment context. This proposal provides a more consistent approach for Australia to comply with its international obligations, particularly the *International Convention on Civil and Political Rights* by expanding the nature of protected attributes.

30. It is submitted that the recommendation outlined at paragraph [85] in relation to the establishment of a new protected attribute to protect victims of domestic violence is a good idea. There is no doubt that domestic violence is unacceptable. The proposal for the attribute of "domestic violence victim status" would further protect the rights of victims of domestic violence. To that extent, the author welcomes such a recommendation.

Recommendation 6

- 6.1. A "domestic violence victim status" attribute should be included in the new Act.
- 6.2. A person should be taken to have contravened the domestic violence victim status attribute in circumstances where they have treated the complainant less favourably because they have been the victim of domestic violence.
- 6.3. The additional attributes of religion, political opinion, industrial action, criminal record and medical record should be included in the new act as protected attributes. These additional attributes should have the same form of protection as the more traditional forms of protected attributes (i.e. sex, age, race etc).

INTERSECTIONAL DISCRIMINATION

31. Paragraph [86] of the Discussion Paper defines intersectional discrimination as discrimination experienced by a person because of two or more aspects of their identity. At Paragraph [87] it is suggested that "intersectional discrimination should be explicitly covered by the consolidation bill in order to provide better protection against discrimination based on multiple grounds". It is submitted this proposal should be rejected.

32. It is not entirely clear why the proposed intersectional discrimination attribute would need to be enacted. In circumstances where a person is discriminated against because of a protected attribute, they have been unlawfully discriminated against. Under the current regime, whether a person is discriminated based on multiple grounds or one protected ground, the effect is the same - the respondent would be found to have unlawfully discriminated against the victim.

33. Associate Professor Beth Gaze is cited at paragraph [87] as suggesting that "some victims of discrimination may be deterred from making complaints or litigating because their experience of discrimination does not clearly fit within one of the protected attributes". It is submitted that if the alleged victims make a complaint that does not squarely fall within the scope of the protected attribute, they should not otherwise be able to invoke the benefit of the new Act.

34. It is submitted that to enact the intersectional discrimination attribute would not provide a further form of protection in discrimination law. The current statutory regime throughout Australia permits a person to allege discrimination against the person on the basis of one or more of the protected attributes. Although the author accepts that intersectional discrimination unfortunately may occur, it is submitted that the current statutory regime adequately addresses this problem. In circumstances where a person is found to have discriminated against the victim on the basis of various protected attributes, this finding may be reflected in the nature of the remedy the victim receives.

Recommendation 7

7.1. The consolidation bill should not protect against intersectional discrimination. The current statutory regime adequately remedies this problem.

EQUALITY BEFORE THE LAW

35. It is plain that the fundamental principle of "equality before the law" is a paramount consideration in the Rule of Law in Australia. It is submitted that the right to equality before the law should be extended to all of the protected attributes. It seems inconceivable that one should suggest that the principle of "equality before the law" should be limited to the protected area of racial discrimination.

36. The other protected attributes should be treated equally in their application in seeking to protect persons from being unlawfully discriminated against. Such an approach is consistent in further ensuring Australia complies with its international obligations, particularly Article 15 of the *Convention on the Elimination of Discrimination against Women* and Article 5 of the *Convention on the Rights of Persons with Disabilities*.

Recommendation 8

8.1. The right to equality before the law should be extended to all of the protected attributes and not limited to racial discrimination.

AREAS OF PUBLIC LIFE

37. The most appropriate way to articulate areas of public life to which anti-discrimination law applies would be to adopt a modified version of section 9 of the *Racial Discrimination Act 1975* (Cth). Discrimination could be defined as occurring when the victim is discriminated against by reason of their protected attribute in the "political, economic, social, cultural or any other field of public life".
38. It is submitted that the current protected areas of public life recognised in the relevant discrimination statutes throughout Australia provide a limited form of protection in regulating discriminatory conduct. As paragraph [97] makes plain, the statutory effect of section 9(1) "would provide for coverage of areas where gaps currently exist under the other Commonwealth Acts including voluntary workers, small partnerships and member based organisations (including clubs)".
39. The suggested proposal provides a broader form of protection than the limited approach of suggesting an exhaustive list (i.e. provision of facilities, goods and services, accommodation and memberships and activities of clubs). The benefit of the broader approach allows the courts to consider extending the application of the protected areas of public life recognised in the discrimination law jurisprudence.

Recommendation 9

- 9.1. Areas of public life should be inclusive of political, economic, social, cultural or any other field of public life.
- 9.2. Areas of public life should not be limited by description of an exhaustive list. This unduly limits the application of the protected attributes from having operation in Australia.

VOLUNTARY WORKERS

40. Paragraph [101] of the Discussion Paper outlines that "Voluntary workers are not protected from discrimination in the workplace by the ADA, DDA and SDA as they do not fall within the statutory definition of 'employment'. Similarly, relevant protections under the Fair Work Act do not cover voluntary workers as they do not fall within the ordinary meaning of 'employee'". It is further observed at paragraph [101] of the Discussion Paper that in New South Wales and Western Australia voluntary workers are also not protected by the statutory regime in relation to discrimination.
41. It is submitted that the new Act should protect voluntary workers from discrimination and harassment. Voluntary workers provide a significant contribution to the economy in Australia. Voluntary workers provide charitable acts which should be rightly protected in discrimination law.
42. Paragraph [104] of the Discussion Paper provides that "concern has been raised that the protection of volunteer workers would place an unreasonable burden on organisations with a significant voluntary workforce". It is submitted that this point should be rejected. Voluntary workers require the same protection of the law as paid workers. Indeed, it is submitted that on one view, voluntary workers represent the disadvantaged and minority groups in society. It seems inconceivable that the discrimination laws of Australia would not adequately protect these persons. Voluntary workers, for example, could include elderly persons who have retired from professional life and want to give back to the community. They could include troubled young teens that are providing assistance to the wider community to get back on track with their lives. These are the very kind of people who should be protected to the full extent of the law.

Recommendation 10

10.1. Voluntary workers should be protected from discrimination and harassment in the new Act.

PARTNERSHIPS

43. Paragraph [117] of the Discussion Paper outlines that "Partnerships are one of the main areas of inconsistency under the current Commonwealth anti-discrimination laws. There

is also inconsistency between State and Territory laws in this area". It is submitted that all of the protected attributes should apply to partnerships regardless of their size. There does not seem to be any justifiable basis for only invoking a particular protected attribute depending upon the number of partners involved in the partnership.

44. The author completely agrees with what is stated in paragraph [120] of the Discussion Paper: "Excluding small partnerships from the coverage of the consolidation bill may create anomalies, in that a small partnership would be entitled to discriminate on the basis of a protected attribute in the choice of partners, but would not be entitled to discriminate in relation to its employees. It may also be inconsistent as a matter of policy to exclude coverage of small partnerships but cover other small business organisations".

Recommendation 11

11.1. The new Act should apply to all partnerships regardless of size.

EXCEPTIONS AND EXEMPTIONS

45. The new Act should adopt a general limitation clause. There are several reasons for this proposal. First, such a clause will allow the courts to determine whether the impugned conduct was the most appropriate method of achieving the suggested objective. This approach is flexible and allows a considered objective approach in dealing with the alleged discriminatory conduct. Secondly, such a proposal would undoubtedly expand the nature of exemptions permitted in the area of discrimination law in Australia. A broader application of exemptions may well be justified if they are necessary to achieve a legitimate objective and is a proportional means of achieving the objective that is not discrimination. Thirdly, although a general limitation clause will provide a more expansive range of exemptions, it is submitted this approach will allow the law to continually stay with the times - as opposed to waiting for legislative change to justify the impugned conduct in question.
46. The major drawback of adopting a general limitation clause is the lack of certainty in relation to when conduct will be considered unlawful discrimination. This is particularly the case because court decisions "would be dependent on the particular circumstances

of each case", as paragraph [148] outlines. However, it is submitted on balance, considering on the one hand the limited number of exemptions that currently have application, as opposed to the possibility of a more broad and flexible approach, the latter method should be adopted. Even with clear and limited identified statutory exemptions, there is always the possibility of judicial interpretation that is not expected.

47. The proposed approach is also consistent with several bill of rights methods, whereby a human rights violation will not be taken to have occurred if the impugned conduct met some "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society ". Such an approach seems to have been adopted in the *Canadian Charter of Rights And Freedoms* 1982, which gained constitutional status.

Recommendation 12

12.1. The new Act should adopt a general limitation clause.

12.2. The specific exceptions and exemptions should not be reflected in the new Act. A general limitation clause will provide a much more broader defence and allow a wider range of exemptions to have application in relation to what would otherwise be unlawful discriminatory conduct.

TEMPORARY EXEMPTIONS

48. The new Act should encapsulate a temporary exemptions provision that permits discriminatory conduct to be lawful, subject to an appropriate grant of the exemption. It is submitted that a temporary exemptions provision in the new Act could also assist in an indirect manner with respect to the proposed "general limitation clause" in the Act.
49. For example, in circumstances where a business proposes to undertake a particular course in relation to their business, and that course may be discriminatory, the party could approach the Australian Human Rights Commission to seek a temporary exemption provision. It may be the case that the Commission could give a ruling that the suggested conduct in fact does not amount to unlawful discrimination in contravention of the protected attribute(s) in the new Act. This approach would also allow the relevant party to know their position in advance of adopting the purported discriminatory procedure or process.

50. In any event, it is submitted that a temporary exemption clause, if it is to be reflected in the new Act, should be granted for no more than a maximum jurisdictional period of 3 years. It is submitted that a temporal jurisdictional limit of 5 years unduly undermines the objectives of discrimination law in a broad sense. The author supports the observation made at paragraph [168] of the Discussion Paper, to the effect that "the Commission must exercise its power to grant temporary exemptions in accordance with the objects of the relevant Act".

51. It is submitted that the Commission, when exercising their statutory power to consider the grant of a temporary exemption to the applicant, must undertake this process by having regard to an objective set of criteria. That criteria should include the following kind of considerations:

1. The purpose or object of the proposed exemption.
2. The protected attribute(s) that would otherwise be contravened subject to the grant of an exemption.
3. The time period for which the exemption is sought.
4. Any relevant former grants of exemption to the applicant.
5. The extent to which the proposed exemption will offend the objects and purposes of the new Act.
6. Any special measures, policies and educational apparatus the applicant has in place to deal with promoting equality and furthering the purposes of discrimination law.
7. Whether the applicant has previously contravened discrimination law.
8. Any other matter considered relevant by the Commission.

Recommendation 13

13.1. A temporary exemptions clause should be reflected in the new Act.

13.2. The temporary exemptions clause should provide an objective set of criteria by which the Australian Human Rights Commission or another appropriate Federal Commission can determine applications for a temporary exemption.

13.3. There should be a maximum temporal jurisdictional limit of 3 years for the grant of a temporary exemption.

13.4. The Australian Human Rights Commission or another appropriate Federal Commission

should have the statutory power to make rulings in advance of an application for a temporary exemption, about whether in fact the impugned conduct contravenes any of the protected attributes at all.

CONCILIATION PROCESS

52. At paragraph [189] of the Discussion Paper, it is observed that "it is timely to consider whether the current model of compulsory conciliation is the most appropriate model for discrimination complaints, as well as whether there is a role for additional alternative dispute resolution methods, such as arbitration or mediation". It is submitted that the conciliation process should be abolished under the new regime.
53. First, although discrimination law can be seen as a private wrong in the sense that the victim has been unlawfully discriminated against, the historical basis and nature of rights violated are in a sense a public wrong. For example, the initial focus on racial discrimination reflected the debate internationally in the late 1960s which was generated by the social volatility in the United States relating to the lack of equality for Afro-Americans. In the early 1970s the Australian public debate concerned the rights of recently arrived migrants, in particular those who spoke English as a second language: Chris Ronalds, *Discrimination Law and Practice*, the Federation Press, Third Edition, 2008, pg. 4.
54. Accordingly, it is submitted that the conciliation process seeks to undermine an aspect of discrimination law, by having the effect of not publicising the party who has committed the unlawful discriminatory act. The conciliation process along with the other proposed alternative dispute resolution procedures, such as arbitration and mediation, have this necessary effect because of their aspect of confidentiality, keeping the nature of the case outside the scope of the public purview. This is an unacceptable approach.
55. Secondly, alternative dispute resolution processes, it is submitted, inherently allow human rights to be dictated by a form of compromise and agreement. It is submitted this is an unacceptable approach. The protected attributes represent fundamental human rights that are rightly expressed in the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights* and in other international documents.

56. It is submitted that no alternative dispute resolution processes should ever be adopted in regulating and enforcing human rights. A party should never be permitted to compromise on a fundamental human right. It is submitted a more favourable approach is to permit statutory tribunals and the courts to decide discrimination matters. This process allows the public to observe the wrong committed by the defendant in the proceedings and ensure "equality of opportunity between all persons" is truly being achieved. It is difficult for the latter object to be achieved within the confines of a confidential and private process for enforcing discrimination laws.

57. Thirdly, the foregoing proposal certainly has some support overseas. As is observed at paragraph [192] of the Discussion Paper, "In the United Kingdom there is no conciliation process at all, with all complaints commencing in the relevant court or tribunal at first instance". It is submitted this approach should be adopted in Australia.

Recommendation 14

14.1. The conciliation process should be abolished under the new statutory regime.

14.2. The process for dealing with discrimination law complaints should be dealt with by statutory tribunals and the courts.

14.3. All other alternative dispute resolution procedures should not be adopted and implemented in the regulation and enforcement of discrimination law claims.

COURT PROCESS

58. At paragraph [199] of the Discussion Paper, it is stated that "it is often argued that the costs and formality of the federal courts present a significant barrier to the effectiveness of the complaints process". Further, at paragraph [204] of the Discussion Paper, it is stated that "The Productivity Commission Report recommended that each party to a discrimination case should bear their own costs". It is submitted that this recommendation should be rejected.

59. It is submitted that the approach adopted in civil proceedings generally should have application in relation to discrimination law cases. That is, costs should follow the event: *Laguillo v Haden Engineering Pty Ltd* [1978] 1 NSWLR 306. It is submitted there is no

proper basis for distinguishing a different costs regime in relation to discrimination law cases as opposed to other areas of law regulated by civil proceedings.

60. In the view of the author, there does not appear to be any sound policy reasons for rejecting the general position that a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and [134].
61. It is submitted that costs should be ordered at the discretion of the decision maker, consistent with the general approach throughout Australia. Such an approach allows a decision maker to depart from the general position in circumstances where the case requires such a conclusion. In this respect, the general principles at common law in relation to costs should have application in discrimination law cases on the issue of costs. For example, displacing the presumption that costs follow the event should only occur where there has been some sort disentitling conduct on the part of the successful party: *G R Vaughan (Holdings) Pty Ltd v Vogt* [2006] NSWCA 263; *Lollis v Loulatzis (No 2)* [2008] VSC 35 at [29]; *Keddie v Foxall* [1955] VLR 320 at [323]–[4].
62. The principle that each party to a discrimination case should bear their own costs completely ignores a proper appreciation of practical litigation. For example, following this logic, persons could bring unfounded and unmeritorious actions alleging unlawful discrimination and the defendant would still have to pay their own costs in successfully defending the action. This is a completely unjustified approach, contrary to the proper administration of the interests of justice.
63. It is observed at paragraph [204] of the Discussion Paper that "courts could be empowered to award costs only where they determine the party has acted unreasonably". This submission should be rejected. This submission, with respect, seems to ignore the commercial reality attached to practical litigation. A party who brings an action and is unsuccessful, as a general rule, should bear the costs of the successful party. If the unsuccessful party cannot meet the standard of proof on the balance of probabilities, although they may not have acted unreasonably, the practical reality is, in a very real way that the successful party should be compensated for the financial loss they may otherwise have in successfully defending the discrimination claim. It is to be

remembered that an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *All plastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34].

64. It is observed at paragraph [201] of the Discussion Paper that "giving representative organisations standing to pursue complaints in the federal courts on behalf of complainants will make the complaints process more efficient and user-friendly". The author agrees with this observation.

65. It is submitted that representative organisations, if given standing to pursue complaints on behalf of complainants, may well allow litigants who lawfully have a discrimination case to bring it to the courts. Without the assistance of a representative organisation, such litigants may never proceed to court and enforce their rights because of financial constraints or possible grievances in dealing with the court system in Australia. The author agrees and supports the following observation made at paragraph [201] of the Discussion Paper: "It may also assist in cases of systemic disadvantage which are more difficult to raise with individual complaints".

Recommendation 15

15.1. The new regime should adopt the traditional costs approach at common law that costs follow the event.

15.2. The relevant decision-maker of a discrimination law claim should have the statutory power to award costs at their discretion. The exercise of that such discretion should have regard to the common law principles in relation to an order for costs.

15.3. Representative organisations should have automatic standing to appear on behalf of litigants in discrimination law claims.

ROLE AND FUNCTION OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

66. It is observed at paragraph [223] of the Discussion Paper that "The individual complaints-based model has been criticised for its limited ability to affect discriminatory behaviour across society. A number of reports have recommended that the Commission, or the relevant specialist Commissioner, be empowered to investigate potential breaches

of Commonwealth anti-discrimination laws without an individual complaint being made". It is submitted that this recommendation should be accepted.

67. First, given that the protected attributes represent fundamental human rights, it is submitted that effective regulation and protection of those rights will be better served if the Commission is able to prosecute discrimination actions without the imposition of an individual complaint needing to be made by the purported victim. Such an approach provides a much more zealous and regulated method of enforcing human rights.
68. Secondly, given that the contraventions against the protected attributes may be viewed as a public wrong, a public institution such as the Commission should have the statutory power to enforce contraventions of those wrongs. To that extent, the author both acknowledges and adopts the recommendation suggested at paragraph [224] of the Discussion Paper: "... a number of inquiries have recommended the introduction of an enforcement role for the Commission by empowering it to bring actions for breaches of anti-discrimination laws in the federal courts".
69. Thirdly, it is observed at paragraph [226] of the Discussion Paper that the suggested proposal "would considerably alter the Commission's role in relation to unlawful discrimination complaints and could create a perceived conflict of interest with the Commission's function as neutral conciliators". It is submitted that this problem could be overcome by scrapping the conciliation function which the Commission currently undertakes.
70. The author considers that a much more important role for the Commission is to prosecute unlawful discrimination contraventions as opposed to act merely as a conciliator. It is submitted that the time has come for the Australian Government to more actively enforce and regulate human rights in this country. The Federal Government has already taken one step in this direction, by providing the Fair Work Ombudsman with the investigative and enforcement power to enforce anti-discrimination provisions in an employment context. There is no logic in merely limiting such a power to cases of discrimination occurring within the confines of employment.

Recommendation 16

- 16.1. The Commission should be granted the statutory power to both investigate and enforce contraventions of the protected discrimination attributes.
- 16.2. The function of the Commission should be shifted more towards prosecuting discrimination actions as a primary goal.

GROUPS OR ATTRIBUTES

71. Each State and Territory throughout Australia has enacted general anti-discrimination legislation. The grounds or attributes on which discrimination is made unlawful are not the same as the limited Commonwealth grounds and vary from State to State. By way of example, although none of the anti-discrimination legislation defines "sex", some of the legislation defines "woman" and "man" as being a member of the female or male sex, respectively, regardless of age: see *Sex Discrimination Act 1984* (Cth) s 4; *Discrimination Act 1991* (ACT) s 2, *Dictionary*; *Anti-Discrimination Act 1977* (NSW) s 23; *Anti-Discrimination Act 1992* (NT) s 4; *Equal Opportunity Act 1984* s 4 (WA). There are no equivalent provisions in the other jurisdictions.
72. Although the States and Territories of Australia follow the Commonwealth in defining race, there are differences between the respective jurisdictions. For example, Ancestry is added as a ground in the Northern Territory, Queensland, South Australia and Victoria: *Anti-Discrimination Act 1992* (NT) s 4; *Anti-Discrimination Act 1991* (QLD) s 4; *Equal Opportunity Act 1984* (SA) s 5; *Equal Opportunity Act 2010* (Vic) s 4.
73. The status of being, or having been, an immigrant is added as a ground in the Northern Territory and Tasmania: *Anti-Discrimination Act 1992* (NT) s 4; *Anti-Discrimination Act 1998* (TAS) s 3. There are no equivalent provisions in the other jurisdictions. In New South Wales and Tasmania, "ethno-religious origin" is included as a ground in the definition of race: *Anti-Discrimination Act 1977* (NSW) s 4(1); *Anti-Discrimination Act 1998* (TAS) s 3.
74. The Australian Capital Territory and New South Wales have legislated specifically to make it unlawful to vilify persons who are, or are thought to be, HIV or AIDS infected:

Anti-Discrimination Act 1977 (NSW) Part 4F; Discrimination Act 1991 (ACT) Part 6.

There are no express provisions to this effect in the other jurisdictions.

75. Some jurisdictions have legislated to make discrimination on the grounds of political or religious belief unlawful. In the Australian Capital Territory and Western Australia the proscribed ground is 'religious or political conviction': *Discrimination Act 1991 (ACT) s 7(1)(i), Pt 3*; see also *Human Rights Act 2004 (ACT) s 14* (freedom of thought, conscience and religion); *Equal Opportunity Act 1984 (WA) s 53, Pt IV*.
76. In Queensland, the attributes are 'religious belief or religious activity', 'political belief or activity' and 'trade union activity' while in Victoria the attributes are 'political belief or activity', and 'religious belief or activity': *Anti-Discrimination Act 1991 (QLD) ss 4, 7(i), 7(j), 7(k) Ch 2 Pt 3, Dictionary; Equal Opportunity Act 2010 (VIC) ss 4(1), 6(k), 6(n); Charter of Human Rights and Responsibilities Act 2006 (VIC) s 14*.
77. Victoria has also enacted separate legislation prohibiting vilification on the ground of religious belief or activity: *Racial and Religious Tolerance Act 2001 (Vic)*. In the Northern Territory, the relevant attributes are 'religious belief or activity', 'political opinion, affiliation or activity' and 'trade union or employer association activity': *Anti-Discrimination Act 1992 (NT) s (19)(1)(k), 19(1)(m), 19(1)(n)*.
78. South Australia renders unlawful discrimination on the ground of religious appearance or dress: *Equal Opportunity Act 1984 (SA) s 85T*. In Tasmania, the relevant attributes are 'political belief or affiliation', 'political activity', 'religious belief or affiliation' and 'religious activity': *Anti-Discrimination Act 1998 (TAS) ss 3, 16(m), 16(n), 16(o), 16(p)*.
79. There is no specific anti-discrimination protection in the New South Wales legislation for religious or political belief or activity, although the definition of 'race' includes 'ethno-religious origin' for the purposes of discrimination on the ground of race: *Anti-Discrimination Act 1977 (NSW) s 4*. However, in *A v Dept of School Education (2000) EOC ¶93-039*, the NSWADT considered that 'ethno-religious origin' operated to qualify certain ethno-religious groups as races rather than extend the scope of the legislation to discrimination on the ground of religion.

80. As the foregoing discussion highlights, there are various inconsistencies in relation to the application and enforcement of discrimination in Australia. It is submitted that the new Commonwealth statutory regime should adopt an approach which seeks to "cover the field" in relation to the various grounds or attributes that are to be protected at law. In that context, the Commonwealth Government should adopt a broad approach in protecting all of the attributes that are covered in Article 2 of the *International Covenant on Civil and Political Rights*: "all persons within the jurisdiction are to be guaranteed enjoyment of the rights recognised in the ICCPR 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'" (see *International Covenant on Civil and Political Rights* (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) Art 2).
81. It is submitted that the approach suggested will provide jurisdictional conformity in relation to the protected attributes or grounds throughout the relevant States and Territories of Australia. It is an unacceptable position that there are jurisdictions around Australia that regulate discrimination law in different forms. Fundamental human rights should not be dictated by differences in the exercise of the jurisdictional sovereignty of respective States within a country. All citizens in Australia should have their human rights protected in the same form regardless of where they may reside.
82. The current approach of the various States and Territories throughout Australia adopting differences in the regulation of discrimination, creates by implication a sense of jurisprudential isolation in the application and development of discrimination law. This is an unacceptable position which needs to change. It is to be remembered that unlike the United States, Australia has "a unified common law which applies in each state but is not the creature of each state": *Kable v DPP (NSW)* (1996) 70 ALJR 814 at [845]; BC9604181 per McHugh J; *Lipohar v R* (1999) 200 CLR 485 at [505]-[508] per Gaudron, Gummow, and Hayne JJ.
83. As the High Court observed at paragraph [99] in *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), "There is but one common law of Australia". The proposed approach whereby the new statutory regime seeks to "cover the field" in relation to the various grounds or attributes which are recognised as being

protected, will promote less jurisdictional isolation of jurisprudence on discrimination laws throughout the relevant States and Territories and provide more clarity in the area.

84. Further, the suggested approach will have the effect of ensuring Australia more successfully complies with its international obligations in accordance with Article 26 of the *International Covenant on Civil and the Rights*: "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law; the law must prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Recommendation 17

- 17.1. The new Commonwealth statutory regime should adopt an approach by "covering the field" in a constitutional sense in enacting the relevant grounds or attributes to be protected.
- 17.2. The grounds or attributes to be covered at the Commonwealth level under the new Act should be expansive, encapsulating as a minimum those rights set out to be protected in Articles 2 and 26 of the *International Covenant on Civil and Political Rights*.

DEFINITION OF CLUBS

85. Some anti-discrimination legislation defines "clubs" by reference to the licensing or gaming legislation or by reference to selling or supplying liquor: *Sex Discrimination Act* 1984 (Cth) s 4(1) (and maintains facilities from club funds); *Discrimination Act* 1991 (ACT) s 2; *Liquor Act* 2010 (ACT) s 20 (for example, a club that holds a club licence); *Anti-Discrimination Act* 1992 (NT) s 4(1) (and maintains facilities wholly or partly from club funds); *Anti-Discrimination Act* 1977 (NSW) s 4(1); *Registered Clubs Act* 1976 (NSW) ('registered club'); *Anti-Discrimination Act* 1998 (TAS) s 3 (and maintains facilities wholly or partly from club funds); *Equal Opportunity Act* 1984 (WA) s 4(1) (and maintains facilities wholly or partly from club funds).
86. Other jurisdictions appear to adopt a broader approach that refers to an association of members, with various riders being added, for example, that it carries out its activities for the purpose of making a profit or with State assistance: *Disability Discrimination Act*

1992 (Cth) s 4(1) (facilities maintained from club funds); *Anti-Discrimination Act 1991* (QLD) s 4 (association established to make a profit); *Equal Opportunity Act 1984* (SA) (*Equal Opportunity Act 1984* (no provisions defining 'association', but provisions addressing discrimination by 'associations' are set out in ss 35, 57, 72, 85G, 85ZB); *Equal Opportunity Act 2010* (Vic) s 4(1) (and operates its facilities wholly or partly from its own funds).

87. In light of the various approaches, it is submitted that a broader approach to defining "clubs" should be adopted. To that extent, any definition of "clubs" should not be limited to the selling or supplying of liquor. The broader approach has the added advantage of ensuring unlawful discrimination in clubs is more broadly regulated.

Recommendation 18

18.1. The new Act should define the word "clubs" broadly, encapsulating, for example, the association of members that are established to make a profit.

CRIMINAL IMPLICATIONS

88. The Commonwealth has legislated to proscribe offensive behaviour based on racial hatred subject to certain exemptions: *Racial Discrimination Act 1975* (Cth) Pt IIA, ss 18B-18F. All other jurisdictions except the Northern Territory have enacted legislation that makes public incitement to acts of racial hatred, added to in some cases by radical and contempt of, varying degrees of severity either an unlawful act or a criminal offence or both:

- *Anti-Discrimination Act 1977* (NSW) s 20C(1) (includes hatred, serious contempt and severe ridicule: unlawful act).
- *Discrimination Act 1991* (ACT) s 66(1) (includes hatred, serious contempt or severe ridicule: unlawful act).
- *Anti-Discrimination Act 1991* (QLD) s 124A (includes hatred, serious contempt and severe ridicule).
- *Racial Vilification Act 1996* (SA) s 4 (the act of racial vilification includes inciting hatred, serious contempt or severe ridicule but is confined to threatening physical harm to the person, or members of the group, or to their property; criminal but specific provision is made for damages).

- *Anti-Discrimination Act 1998* (TAS) s 19(a) (includes serious contempt or severe ridicule: unlawful act).
- *Racial and Religious Tolerance Act 2001* (VIC) s 7(1) (includes serious contempt, revulsion or severe ridicule: unlawful act).
- *Criminal Code* (WA) ss 76-78 (racial hatred and racial harassment in the form of intending or likely to create, promote or increase animosity towards, harassment of, a racial group: criminal offences).

89. Further, various jurisdictions in Australia have enacted statutory provisions dealing with serious racial vilification. The nub of the offence in the Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria is that there is incitement to threaten physical harm towards the property or persons of a racial group and in Western Australia, to create, promote or increase animosity towards, or harassment of, a racial group: *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1977* (NSW) s 20D; *Anti-Discrimination Act 1991* (QLD) s 131A(1); *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (VIC) s 24(1); *Criminal Code* (WA) ss 77, 78, 79.

90. In New South Wales, South Australia and Victoria the consent of the Attorney-General or the Director of Public Prosecutions is required for the prosecution of an offence, and in Queensland a written consent from the Crown Law Office: *Anti-Discrimination Act 1977* (NSW) s 20D(2) (the consent of the Attorney-General is required for prosecution); *Racial Vilification Act 1996* (SA) s 5 (the written consent of the Director of Public Prosecutions is required for prosecution); *Racial and Religious Tolerance Act 2001* (VIC) s 24(4) (the written consent of the Director of Public Prosecutions is required for prosecution); *Anti-Discrimination Act 1991* (QLD) s 131A(2).

91. Importantly, this discussion highlights the criminal implications that can occur when serious racial vilification or racial hatred has been made out. Importantly, there is a lack of coverage in the enactment of criminal implications for serious vilification or hatred in relation to the other protected attributes. For example, sexual vilification or sexual hatred is not a criminal offence throughout all of the respective jurisdictions in Australia.

92. It is submitted that the new Act should expressly make plain that contravention of any of the protected attributes is a civil wrong and not a criminal offence. The author takes the

view that it is unacceptable that the "racial attribute" seems to have been provided with more heavy regulation throughout Australia than the other attributes. This position implicitly suggests there is a hierarchy of rights. The commission of racial vilification and racial hatred provide significant criminal penalties, whereas vilification or hatred committed in relation to all the other protected attributes have no criminal sanctions.

93. It is submitted that all of the protected attributes should be treated equally. That is to say, in circumstances where the Commonwealth Government wants to maintain a standard of criminal implications for the commission of racial hatred and racial vilification, it follows that the Government should consider criminal penalties in relation to conduct that is characterised as vilification or hatred because of *one or more* of the protected attributes.

Recommendation 19

19.1. A contravention of any of the protected attributes should only be a *civil wrong* and not a *criminal offence*.

19.2. An alternative approach would be to criminalise hatred and vilification when it occurs in relation to any of the protected attributes or grounds.

DEFINITION OF "PUBLIC"

94. The Australian Capital Territory and Queensland have legislated to make vilification unlawful on the grounds of sexuality, and in New South Wales on the grounds of homosexuality. Vilification relating to sexuality or homosexuality, HIV or AIDS, and transgender status is constituted by a "public act" inciting hatred, serious contempt or severe ridicule of a person or group: *Discrimination Act 1991* (ACT) s 65; *Anti-Discrimination Act 1977* (NSW) ss 38R, 49ZS, 49ZX A; *Anti-Discrimination Act 1991* (QLD) s 4A.

95. The author is concerned that the current statutory regime in the relevant States and Territories of Australia does not provide enough clarity in defining the term "public act". Although the common law in this area has provided some guidance, there appears to be some ambiguity in construing the term "public act" as a matter of law. This is especially the case in relation to online social networking sites, such as *Facebook* and *Twitter*. For

example, if a person publishes a comment online to their friends on *Facebook*, is this a public act? There appears to be conflicting authority in answering this question.

96. In *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74 at [14]-[15], Finkelstein J made some helpful comments about what *Facebook* actually is:

"[14] Facebook is a social networking application. Facebook's website states that "people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet".

[15] Most Facebook users have a "profile". A user's profile is the page that third parties see when they look up the user on Facebook. A user's profile is divided into several parts. One prominent part is the user's "wall", which is a space that allows people to post messages for the user. Facebook's website describes the wall as "a place to post and share contents with your friends". Only those people who the user has accepted as a friend can post on the user's wall. A user is able to delete messages posted by friends on the user's wall. A Facebook user can choose who can see particular parts of his/her Facebook page. For example, the user may choose to only allow only persons who s/he accepts as friends to see their photos, wall, etc while those who are not friends may only be able to see limited parts of a user's profile".

97. On one view, a person who publishes content online to their friends on *Facebook* is committing a "public act". The following authority appears to support this position either expressly or arguably by implication.

98. First, in *R v Marinkovic* (1996) EOC 92-841, it was held that posting of an abusive written communication on the front door of the complainant's apartment was a "public act". The reasoning in *Marinkovic* appears to suggest that because the abusive written communication could be viewed by members of the public, the conduct constituted a public act. Posting on *Facebook* could be construed in similar terms, to the extent that the publication can be viewed by other members of the public online.

99. Secondly, in *Miss Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design* (U2010/6688), Commissioner Bissett said in the context of an unfair dismissal case (Melbourne, 24 September 2010) that posting content on *Facebook* fell within the scope of a public act:

"[50] Postings on Facebook and the general use of social networking sites by individuals to display their displeasure with their employer or a co-worker are becoming more common. What might previously have been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be

seen by an unlimited number of people. Posting comments about an employer on a website (Facebook) that can be seen by an uncontrollable number of people is no longer a private matter but a public comment.

[52] A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see. A Facebook posting comes within the scope of a *Rose v Telstra* consideration but may go further. It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.

[56] Whilst the comments were silly in the context of them being made on a public forum I do not consider they were such to damage Ms Smith's business".

100. Thirdly, in a decision in Canada, *Leduc v Roman*, 2009 CanLII 6838 (ON S.C.) at [31], the Court appears to have suggested that posting content on *Facebook* is not a private matter, which arguably suggest by implication that such publication is public: "Facebook is not used as a means by which account holders carry on monologues with themselves".

101. Fourthly, Giancaspro appears to suggest that posting content on *Facebook* would be characterised as a "public act", based on the terms and conditions of the website which warn users of the public implications of posting content:

"It is abundantly clear that by utilising sites such as Facebook, we are not only threatening our legal rights but also sacrificing our privacy, the breath of which, under the law of nearly all Australian jurisdictions, is not remediable through a suit in tort...

By far the greatest threat posed by the use of social networking websites is the infringement of users' privacy. Despite customisable privacy settings, one only needs to peruse Facebook's 'Privacy Policy' to realise that the information (including pictures, videos etc.) that users post on their personal site profiles is not impervious to unauthorised viewing and use. It states that you as the user posts content on the site 'at your own risk' and continues:

"Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable... Therefore, we cannot and do not guarantee that User Content you post on the Site will not be viewed by unauthorised persons. We are not responsible for circumvention of any privacy settings or security measures contained on the Site. You understand and acknowledge that, even after removal, copies of User Content may remain viewable in cached and archived pages or if other Users have copied or stored your User Content".

An equally disturbing aspect of Facebook's operations is found in its 'Terms of Use'. The relevant clause states:

By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company an

irrevocable, perpetual, non-exhaustive, transferable, fully paid, worldwide licence (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicences of the foregoing".

(see Mark Giancaspro, "Facing the unseen truth: the legal implications of using social networking site 'Facebook'" (2009) 31(4) *Bulletin Law Society of South Australia* 26).

102. Fifthly, although not expressly deciding the point, Wallbridge appears to provide one reason why posting content on *Facebook* may not be considered private:

"Once information is placed on public domains users can easily lose control over who sees it and who may use it. While privacy settings are there to protect users, in practice this is not always the case, whether it is because of slack web design or through lack of knowledge or care by the user".

(see R Wallbridge, "How safe is Your Facebook Profile? Privacy issues of online social networks" (2009) 1 *ANU Undergraduate Research Journal*).

103. Finally, Oboler expressly argues that publication of hate messages on applications such as *Facebook* and *Twitter* is a public act, given that it is a public wrong:

"Applications like Facebook, YouTube, Twitter, and MySpace, have given the online public a means of mass communication....

"The publication and spread of hate messages is a public wrong, not simply a matter for reconciliation between private persons. A broadly targeted wrong deserves a public response, including through education and law enforcement".

(see Andre Oboler, "Time to Regulate Internet Hate with a New Approach" (2010) 13(6) *Internet Law Bulletin (Newsletter)* October 2010).

104. On another view, posting content on networking sites such as *Facebook* does not automatically or necessarily suggest the uploaded material is public. Indeed, there are authorities which appear to suggest posting content on *Facebook* is private. However, this position seems to gain more support from the academic world than elsewhere.

105. First, Kennedy states that posting on *Facebook* to colleagues is private conduct: see Amanda Kennedy, "More Sinned Against Than Sinning"? *Telstra Corporation Ltd v Streeter*" (2008) 21 *AJLL* 59.

106. Secondly, without deciding the point, Weaver indicates an objective of social media networking sites was to allow teenagers to communicate in their own private space:

"Facebook is wildly successful mainly because its founder matched new social media technology to deep, Western cultural longing the adolescent desire for connection to other adolescents in their own private space".

(see Anne Weaver, "Facebook and other Pandora's boxes" (2010) 24(4) *Practically Speaking* 24).

107. Thirdly, in the District of California in the case of *Buckley H. Crispin v Christian Audigier, Inc*, (C.D. Cal., No 09-9509, 5/26/10), it was ruled that private postings on social networking sites such as *Myspace* and *Facebook* would be protected against third party subpoenas in civil cases under the privacy provisions of the *Stored Communications Act* of 1986. The Court made a number of points:

- *Media Temple, Facebook* and *MySpace* all provide some form of private messaging, thus such services constituted ECS.
- *Facebook* wall postings and *MySpace* comments are not "strictly public" but only accessible to the users that the plaintiff selects.
- The case law suggested that SCA's definition of an ECS provider extends only to a private BBS, that is, a completely public BBS does not merit protection under the SCA. Given that the postings/comments were not completely public, it was sufficient for the companies to be considered ECS providers.

(see further Allison Stanfield & Nhi-Y Pham E, "Discovery of Content on Social Networking Sites: are private sites protected by privacy?" (2010) 13(5) *Internet Law Bulletin* September edition).

108. Fourthly, it is arguable that the statutory effect of section 12 of the *Racial and Religious Tolerance Act* 2001 (Vic) provides a test of "private conduct" which may be used to argue that posting content on *Facebook* is a private act. The Victorian Act entirely excludes private conduct from unlawful racial vilification. In accordance with section 12 of that Act, private conduct occurs in "circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves", provided the circumstances are such that it is reasonable to expect it would not be "heard or seen by someone else".

109. Applying the test outlined in section 12 of the Act, it may be argued that parties who publish content on *Facebook* with their friends intend that it is to be perceived as private, because it can only be heard or seen by the "friends" of the person who uploaded the post. Putting it another way, the parties to the post appreciate that if they are not friends on *Facebook*, it follows they cannot view the publication as a public member. Following this logic, it would be reasonable to expect that the post would not be "heard or seen by someone else", because they are not friends with the author of the publication.

110. Fifthly, without deciding the point, Molony P (Judicial Member) in *OS v Mudgee Shire Council* [2009] NSW ADT 315 at [48], a decision before the Administrative Decisions Tribunal, showed reluctance and did not accept the submission by Counsel that a publication on the Internet was to be reconciled with a public act, concerned that such a finding would have implications for social networking sites such as *Facebook*:

"I add that, if I accepted the Agency's contention in this regard, I am in any case reluctant to draw the conclusion urged by the Agency that publication on the internet satisfies the requirements for the exemption in s 4(3)(b) i.e. 'information about an individual that is contained in a publicly available publication.' The proposition put by [the] Agency, if accepted, has much wider implications such as, for example, information 'published' on social networking sites not being personal information. These factors lead me to approach this question with great caution and to decide not to determine it on the papers alone".

111. Given the foregoing, it is plain that there are competing arguments in relation to the question of whether posting of content on *Facebook* or similar social media networks is a private or public act. Accordingly, the new Act should encapsulate an express definition of "public act", so as to provide more guidance on what is actually meant by that term.

112. Without limiting the proposed criteria set out directly below, the following considerations may provide some guidance as to whether a publication on a website such as *Facebook* is a "public act". The following criteria has been developed by use of the general principles outlined in the authorities that have examined the question of whether posting content on *Facebook* is public:

- Whether it is reasonable to expect the publication or material would not be heard or seen by a member of the public.

- Whether there are any terms and conditions on the internet website that may assist in determining the nature of the material uploaded.
- Whether the author of the publication or material easily loses control over who can view and use the content.
- The objective and purpose of the platform in which the material is published.
- The intention of the author who published or uploaded the material.

113. Given that social media networking sites such as *Facebook* and *Twitter* are beginning to play a part in the lives of arguably many human beings in Australia, it is submitted that the new statutory regime should adequately address some of the problems at law associated with this new technology. There is no doubt that websites such as *Facebook* and *Twitter* provide a platform in which persons may seek to discriminate against others. The Australian Government, in accordance with Australia's Human Rights Framework Initiative, has an opportunity to adequately address the legal implications in a discrimination law context, the issues associated with these social media networking sites.

Recommendation 20

20.1. The new Act should consider providing an express definition of the term "public act".

20.2. The new statutory regime at the federal level should consider providing more guidance on whether posting content or material on social networking websites such as *Facebook* and *Twitter* is a public act.

APPENDIX 1 (RECOMMENDATIONS)

Recommendation 1

- 1.1. The current statutory model of direct and indirect discrimination should remain.
- 1.2. The comparator test should be favoured in defining direct discrimination.
- 1.3. The unified test of fusing direct and indirect discrimination should be rejected.

Recommendation 2

- 2.1. The burden of proving discrimination should be allocated entirely to the complainant.
- 2.2. The procedure adopted by the *Fair Work Act* in relation to the burden of proving discrimination should be rejected.

Recommendation 3

- 3.1. The duty to make reasonable adjustments should be extended to all protected attributes at the Commonwealth level.
- 3.2. The proposal to make reasonable adjustments a stand alone positive duty should be rejected. There is no rational basis for extending such an approach beyond the current direct and indirect discrimination provisions.

Recommendation 4

- 4.1. The prohibition against harassment should cover all protected attributes.
- 4.2. Harassment should be defined as a form of discrimination.

Recommendation 5

- 5.1. Sexual orientation should be defined by using a conceptual definition, encompassing the broad concept of person's sexual attraction to, and sexual activity with, people of a particular gender.
- 5.2. A definition section of the term "sex" should be included in the new Act. The definition should define the term "sex" as persons who are male, female or of indeterminate gender.

Recommendation 6

- 6.1. A "domestic violence victim status" attribute should be included in the new Act.
- 6.2. A person should be taken to have contravened the domestic violence victim status attribute in circumstances where they have treated the complainant less favourably because they have been the victim of domestic violence.
- 6.3. The additional attributes of religion, political opinion, industrial action, criminal record and

medical record should be included in the new Act as protected attributes. These additional attributes should have the same form of protection as the more traditional forms of protected attributes (i.e. sex, age, race etc).

Recommendation 7

7.1. The consolidation bill should not protect against intersectional discrimination. The current statutory regime adequately remedies this problem.

Recommendation 8

8.1. The right to equality before the law should be extended to all of the protected attributes and not limited to racial discrimination.

Recommendation 9

9.1. Areas of public life should be inclusive of political, economic, social, cultural or any other field of public life.

9.2. Areas of public life should not be limited by description of an exhaustive list. This unduly limits the application of the protected attributes from having operation in Australia.

Recommendation 10

10.1. Voluntary workers should be protected from discrimination and harassment in the new Act.

Recommendation 11

11.1. The new Act should apply to all partnerships regardless of size.

Recommendation 12

12.1. The new Act should adopt a general limitation clause.

12.2. The specific exceptions and exemptions should not be reflected in the new Act. A general limitation clause will provide a much more broader defence and allow a wider range of exemptions to have application in relation to what would otherwise be unlawful discriminatory conduct.

Recommendation 13

13.1. A temporary exemptions clause should be reflected in the new Act.

13.2. The temporary exemptions clause should provide an objective set of criteria by which the Australian Human Rights Commission or another appropriate Federal Commission can determine applications for a temporary exemption.

13.3. There should be a maximum temporal jurisdictional limit of 3 years for the grant of a temporary exemption.

13.4. The Australian Human Rights Commission or another appropriate Federal Commission

should have the statutory power to make rulings in advance of an application for a temporary exemption, about whether in fact the impugned conduct contravenes any of the protected attributes at all.

Recommendation 14

- 14.1. The conciliation process should be abolished under the new statutory regime.
- 14.2. The process for dealing with discrimination law complaints should be dealt with by statutory tribunals and the courts.
- 14.3. All other alternative dispute resolution procedures should not be adopted and implemented in the regulation and enforcement of discrimination law claims.

Recommendation 15

- 15.1. The new regime should adopt the traditional costs approach at common law that costs follow the event.
- 15.2. The relevant decision-maker of a discrimination law claim should have the statutory power to award costs at their discretion. The exercise of that such discretion should have regard to the common law principles in relation to an order for costs.
- 15.3. Representative organisations should have automatic standing to appear on behalf of litigants in discrimination law claims.

Recommendation 16

- 16.1. The Commission should be granted the statutory power to both investigate and enforce contraventions of the protected discrimination attributes.
- 16.2. The function of the Commission should be shifted more towards prosecuting discrimination actions as a primary goal.

Recommendation 17

- 17.1. The new Commonwealth statutory regime should adopt an approach by "covering the field" in a constitutional sense in enacting the relevant grounds or attributes to be protected.
- 17.2. The grounds or attributes to be covered at the Commonwealth level under the new Act should be expansive, encapsulating as a minimum those rights set out to be protected in Articles 2 and 26 of the *International Covenant on Civil and Political Rights*.

Recommendation 18

- 18.1. The new Act should define the word "clubs" broadly, encapsulating, for example, the association of members that are established to make a profit.

Recommendation 19

- 19.1. A contravention of any of the protected attributes should only be a *civil wrong* and not a *criminal offence*.
- 19.2. An alternative approach would be to criminalise hatred and vilification when it occurs in relation to any of the protected attributes or grounds.

Recommendation 20

- 20.1. The new Act should consider providing an express definition of the term "public act".
- 20.2. The new statutory regime at the federal level should consider providing more guidance on whether posting content or material on social networking websites such as *Facebook* and *Twitter* is a public act.

APPENDIX 2 (ABOUT THE AUTHOR)

1. JASON DONNELLY ("the author") is a graduate of the Bachelor of Arts degree from Macquarie University (2005), Bachelor of Laws (Honours 1) degree from the University of Western Sydney (UWS) (2008), University Medalist in the Bachelor of Laws degree at UWS (2008), holds a Graduate Diploma of Legal Practice from the College of Law (2009), and successfully completed the New South Wales Bar Association Barrister Examinations and Bar Course (2011). The author was admitted as a Lawyer to the Supreme Court of New South Wales on 3 July 2009.
2. The author has worked in a short capacity as a Researcher to the Honourable Michael Kirby AC CMG, former Justice of the High Court of Australia (Nov 2009 - Feb 2010), Tipstaff to the Honourable Justice Peter McClellan AM, Chief Judge at Common Law of the Supreme Court of New South Wales (2010), and currently holds a casual lecturing position with the School of Law at the University of Western Sydney (2009-).
3. The author has lectured in Administrative Law, Anti-Discrimination Law and Law Foundation with the School of Law at UWS since 2009. The author is currently the Unit Coordinator and Lecturer of Anti-Discrimination Law at UWS, having taught in that area since 2010.
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