UNIVERSITY OF
CAMBRIDGE

Cambridge Pro Bono Project
Faculty of Law, University of Cambridge

Equality for all

Submission on Australia's proposed reform of anti-discrimination legislation

January 2012

Cambridge Pro Bono Project
Faculty of Law, University of Cambridge
e: cpp@law.cam.ac.uk

Assistant Secretary
Human Rights Policy Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

29 January 2012

Dear Assistant Secretary,

In March 2011 a team of postgraduate law students and Law Faculty members from the University of Cambridge, under the auspices of the Cambridge Pro Bono Project ("**CPP**"), prepared a report entitled "Equality for all: Submission on Australia's proposed reform of anti-discrimination legislation". The report was provided to the Attorney-General's Department in advance of the publication of the Discussion Paper, "Consolidation of Commonwealth Anti-Discrimination Laws" in September 2011. We are now re-submitting that report in the event that it will be of use in preparing the exposure draft legislation.

The CPP was established in 2010 to provide postgraduate law students with opportunities to contribute to the practice of public interest law in a pro bono capacity. The three core objectives of the Project are:

(a) to provide postgraduate students with an opportunity to engage with the law in a practical way, and to develop the skills and values central to the provision of pro bono legal work;
(b) to provide an avenue for the Cambridge Faculty of Law to make a meaningful and practical contribution to public interest law; and
(c) to facilitate collaboration between the Cambridge Faculty of Law and legal practitioners and organisations undertaking legal work in a pro bono capacity.

This submission is made by the CPP in its own capacity. The submission arises out of a desire on the part of the members of the CPP to engage in the current debate in relation to the advancement of equality in Australia and to ensure that debate is informed by the British experience in its recent, comprehensive reform of anti-discrimination law.

In total, a team of twelve postgraduate students worked on this project, comprising five Ph.D. students and seven LL.M. students. The research team was advised by Professor David Feldman. Research volunteers participating in this project have lived, worked or studied in Australia, and/or the United Kingdom. The project thus provided an opportunity for the CPP to develop a comparative analysis of the anti-discrimination frameworks in Australia and the United Kingdom, identifying the strengths and weaknesses of both.

The report is separated into seven sections which outline various aspects of Australian and British anti-discrimination laws, identifying issues which surfaced during the consideration and passage of the British *Equality Act* 2010. This enactment was drafted to consolidate and harmonise British anti-discrimination laws and may have a number of implications for the

Australian government's efforts to introduce legislation that addresses inconsistencies across different anti-discrimination laws and render the legal system more user-friendly to individuals who experience unequal treatment.

We hope that this submission is of assistance to the Department in the preparation of exposure draft legislation. We would welcome the opportunity to provide any further information or assistance.

Yours sincerely,

Jason Pobjoy
Cambridge Pro Bono Project, Chair

Professor David Feldman
Cambridge Pro Bono Project Executive Committee

CONTRIBUTORS

Research co-ordinators:

Jason Pobjoy
Chair, CPP Executive Committee
Ph.D. candidate
University of Cambridge

Saleema Khimji
CPP Executive Committee
Ph.D. candidate
University of Cambridge

Amanda Marzullo
CPP Executive Committee
LL.M. candidate
University of Cambridge

Claire Nielsen
CPP Executive Committee
Ph.D. candidate
University of Cambridge

Kate Purcell
CPP Executive Committee
Ph.D. candidate
University of Cambridge

Researched and written by:

Carl-Philipp Eberlein
LL.M. candidate
University of Cambridge

Alice Lam
LL.M. candidate
University of Cambridge

Belinda McRae
LL.M. candidate
University of Cambridge

Gavin I. McLeod
LL. M. candidate
University of Cambridge

Elsa Peraldí Rodríguez

LL.M. candidate
University of Cambridge

Janaki Tampi
LL.M. candidate
University of Cambridge

Zelie Wood
LL.M. candidate
University of Cambridge

Faculty advisor:

Professor David Feldman QC (Hon.) FBA
CPP Executive Committee
Rouse Ball Professor of English Law
University of Cambridge

The CPP would like to thank **Sarah Spencer CBE**, Chair of the Equality and Diversity Forum, for contributing to a workshop during the development of this submission.

TABLE OF CONTENTS

INTRODUCTION

In November 2010, Theresa May MP, the Minister for Women and Equality in the United Kingdom, articulated the benefits of equality:

> Morally, everyone would agree that people have a right to be treated equally and to live their lives free from discrimination. Anyone who has ever been on the receiving end of discrimination knows how painful, hurtful and damaging it can be and why we should seek to eliminate it from our society. And anyone who has ever witnessed discrimination would want to stamp it out.
>
> So equality is not just important to us as individuals. It is also essential to our wellbeing as a society. Strong communities are ones where everyone feels like they have got a voice and can make a difference.
>
> And those people within communities who are allowed to fall too far behind are more likely to get caught up in social problems like crime, addiction and unemployment.
>
> That brings me on to the third reason why equality matters. Economically, equality of opportunity is vital to our prosperity. It is central to building a strong, modern economy that benefits from the talents of all of its members.
> ...
> So equality is not just an add on or an optional extra that we should only care about when money is plentiful – it matters morally, it is important to our well-being as a society and it is crucial to our economy.[1]

Recognising the moral, social and economic benefits of equality, the Cambridge Pro Bono Project ('CPP') welcomes the Attorney-General's announcement on 21 April 2010 of the Australian government's intention to harmonise Australia's anti-discrimination legislation, 'to address current inconsistencies and make the system more user-friendly by clarifying relevant rights and responsibilities.'[2] Moreover, the CPP applauds the Attorney-General's commitment to review the complaints handling process, and the role and functions of the Australian Human Rights Commission.

The Attorney-General's Department is no doubt well-aware that the United Kingdom ('UK') Parliament recently adopted a comprehensive reform of equality legislation, driven by very similar goals. At its core, the two key aims of the reform process – found in the long title to the *Equality Act 2010* – were 'to reform and harmonise equality law' and 'to increase equality of opportunity'.

The *Equality Act 2010* 'is the product of the UK Government's efforts to simplify and modernise the nation's anti-discrimination laws.[3] In February 2005, the Discrimination Law Review was launched with a mandate to consider methods for harmonising, simplifying and rendering more effective laws contained in nine different instruments:

- *Equal Pay Act 1970*;
- *Sex Discrimination Act 1975*;
- *Race Relations Act 1976*;

---

[1] Theresa May, 'Equality Strategy Speech' (17 November 2010) <http://www.homeoffice.gov.uk/media-centre/speeches/equality-vision>.

[2] Hon Robert McClelland MP and Hon Lindsay Tanner MP, 'Reform of Anti-Discrimination Legislation: Joint media Release' (21 April 2010).

[3] Department for Communities and Local Government, *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, A Consultation Paper* (2007), 11 <http://www.communities.gov.uk/documents/corporate/pdf/325332.pdf>(hereinafter '*DLR Consultation Paper*').

- *Disability Discrimination Act 1995*;
- *Employment Equality (Religion or Belief) Regulations 2003*;
- *Employment Equality (Sexual Orientation) Regulations 2003*;
- *Employment Equality (Age) Regulations 2006*;
- *Equality Act 2006*; and
- *Equality Act (Sexual Orientation) Regulations 2007*. [4]

The Discrimination Law Review drew on the work of the Equalities Review, also launched in February 2005, which was carried out by an independent committee tasked with investigating the long-term and underlying causes of disadvantage in Britain.[5]

In June 2007, the Discrimination Law Review published a consultation paper, which included the government's proposed features for the new Equality Bill. The consultation ran for three months and received over 4000 submissions. In June 2008, the government released a paper entitled *Framework for a Fairer Future – The Equality Bill* which set out priorities for the reform of anti-discrimination law and set out the next steps in the development of the Bill.[6] In July 2008, the Government published its response to the Discrimination Law Review's consultation.[7]

The Government released another paper in May 2009 entitled *A Fairer Future: The Equality Bill and other action to make equality a reality*.[8] It explained in more detail what the Equality Bill would look like and explained what the Bill would mean for different groups of people including women, people from ethnic minorities, persons with disability, people of different religions or beliefs, older people, lesbian, gay and bisexual people and transsexual people. It also outlined what the Bill would mean for the public and private sector.

The Bill was passed on 6 April 2010 before the dissolution of Parliament.

In circumstances where the UK has just concluded a similar reform process, the CPP believes that the strengths and weaknesses of the UK experience may offer the Australian government some valuable lessons. The main purpose of this submission is thus to provide a thoroughly researched brief on the UK experience, and specifically the lessons that Australia might draw from that experience.

Of course, in a single submission, it has not been possible to provide a comprehensive analysis of the reform process or *Equality Act 2010* itself (that Act comprises 218 sections, and 28 schedules). We have instead focused on seven areas that we considered would be particularly useful in the Australian context: a purpose clause; the protected characteristics; compound or multiple discrimination; the tests for direct and indirect discrimination; advancing equality of opportunity; complaint mechanisms and exemptions. Within each section we have provided a brief overview of the Australian position, an outline of the UK experience and some brief lessons for Australia, concluding with a set of recommendations, summarised in the section immediately following this introduction.

---

[4] Ibid.

[5] *Fairness and Freedom: The Final Report of the Equalities Review* (2007) <http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf>.

[6] Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (June 2008) <http://www.equalities.gov.uk/PDF/FrameworkforaFairerFuture.pdf>.

[7] The Lord Privy Seal, Leader of the House of Commons and Minister for Women and Equality *The Equality Bill – Government response to the Consultation* (July 2008) <http://www.equalities.gov.uk/pdf/EqBillGovResponse.pdf≥ (hereinafter '*Government Response to DLR Consultation*').

[8] Government Equalities Office, *A Fairer Future: The Equality Bill and other action to make equality a reality* (2009) < http://www.ic.nhs.uk/webfiles/HR/Equality_bill_a_fairer_future.pdf >.

Before turning to the substance of the submission, it is helpful to make two preliminary observations relating to the UK experience. First, as the brief summary above indicates, the British government undertook an extensive consultation process over a five-year period. There was comprehensive consultation with national stakeholders and it is very clear that this collaboration shaped the final outcome. The CPP recommends that the Attorney-General's Department engage in a similarly comprehensive consultation.

Second, in order to make this submission relevant to the current work of the Attorney-General's Department, we have attempted to focus on the extent to which the UK experience might speak to the Australian government's stated aims – the harmonisation and simplification of anti-discrimination law.

However, as noted above, the British government was also committed to increasing equality of opportunity. We are aware that many Australian civil society actors, including for example the Human Rights Law Resource Centre, are critical of Australia's complaints-based, remedial model of anti-discrimination laws, and the explicit focus on protected *formal* equality. We take the view that that the current reform provides a unique opportunity to develop a legislative model that promotes substantive equality; both *equality of results* and *equality of opportunity*.

In the context of this submission, we have limited our comments to the lessons that the Australian government might draw from the UK's attempts to promote substantive equality (see, in particular, section 6). We consider, however, that the Australian government should, as part of its reform package, consider a more comprehensive and progressive model focused on celebrating difference and promoting equality of opportunity.

We hope that this submission is of assistance to the Department in the preparation of exposure draft legislation. We would welcome the opportunity to provide any further information or assistance.

SUMMARY OF RECOMMENDATIONS

Recommendation 1:

Any proposed Australian equality legislation should contain an objects clause.

The objects clause should clearly outline out the equality principles underpinning anti-discrimination law in Australia. This should extend beyond the protection of formal equality, to the promotion of substantive equality.

The objects clause should avoid qualifiers such as 'as far as possible' or 'to the greatest possible extent'.

Recommendation 2:

Any proposed Australian equality legislation should include a stand-alone provision listing the protected characteristics covered by the legislation.

Recommendation 3:

Any proposed Australian equality legislation should expand protection to cover, at the very least, discrimination on the basis of sexual orientation and religion.

The Attorney-General should also consider the possibility of including a non-exhaustive list of protected grounds.

Recommendation 4:

Any proposed Australian equality legislation should include a cause of action for multiple or compound discrimination.

Recommendation 5:

In the context of direct discrimination, the Attorney-General should consider:

(a) the removal of the comparator element in the test for direct discrimination and the adoption of a test akin to s 8(1)(a) of the *Discrimination Act 1991* (ACT); or

(b) specifying that behaviour which arises from, relates to or is a direct result of a protected characteristic should not be attributed to the comparator; or

(c) adopting a test akin to that under s 15 of the *Equality Act 2010*, expanded to include all protected characteristics.

Recommendation 6:

In the context of indirect discrimination, the Attorney-General should consider:

(a) removing the 'inability to comply' requirement from the tests for indirect discrimination;

(b) replacing the justification of 'reasonableness' with the justification that the requirement or condition was 'a proportionate means of achieving a legitimate aim'; and

(c) replacing the words 'requirement or condition' with 'provision, criterion or practice'.

Recommendation 7:

In the context of reasonable adjustments, the Attorney-General should consider:

(a) removing the duty to make reasonable adjustments from the tests for direct and indirect discrimination and imposing it as a stand-alone duty;

(b) giving further detail as to how the duty might be met in certain situations; and

(c) explicitly stating the principle underlying the concept of reasonable adjustments.

Recommendation 8:

The Attorney-General should consider adopting a 'shifting' burden of proof akin to that under s 136 of the *Equality Act 2010*.

Recommendation 9:

The Attorney-General should consider introducing a positive equality duty on public agencies, and potentially also private and not for profit bodies.

That duty might require bodies to take such proactive steps as are necessary and proportionate to eliminate discrimination, with the aim of achieving the progressive realisation of substantive equality.

That duty might also require public, private and not for profit agencies to be transparent about compliance with obligations under the equality duty.

Recommendation 10:

The Attorney-General should consider introducing a positive duty on public bodies to consider the need to reduce inequalities resulting from socio-economic disadvantage when making decisions of a strategic nature about how to exercise their functions.

Recommendation 11:

Any proposed Australian equality legislation should streamline extant provisions on 'special measures'.

Where special measures are allowed, they should be justifiable as required to remedy a particular disadvantage for persons who share a protected characteristic, and be reasonable and

proportionate to the advantage which they are designed to address.

Recommendation 12:

The Attorney-General should consider providing for the direct access of complainants to the courts for the litigation of individual and representative complaints, in a manner similar to the *Equal Opportunity Act 2010* (Vic).

Recommendation 13:

The Attorney-General should consider conferring on the Australian Human Rights Commission the right to intervene in relevant legal proceedings and institute representative complaints, in addition to its present conciliatory and investigative functions. It should also consider conferring on the Australian Human Rights Commission greater powers for monitoring compliance if a public sector equality duty is introduced.

Recommendation 14:

Exceptions and exemptions contained in any proposed Australian equality legislation should be reasonable and objective, pursue a legitimate aim and be framed in a manner proportionate to achieving that aim. Throughout the consultation process the Attorney-General should explicitly the rationale underpinning any exception, and the evidence that rationale is based on.

Existing exceptions and exemptions should be reconsidered in light of Australia's human rights obligations.

1. A PURPOSE CLAUSE

1.1 THE AUSTRALIAN POSITION

'Purpose clauses' – generally referred to as 'objects clauses' in the Australian context – have been used in Australia to provide guidance to courts and tribunals interpreting legislation. The role of these provisions is to set out the goals and underlying aims of the legislation. Courts and tribunals have an obligation under s 15AA of the *Acts Interpretation Act 1901* (Cth) to prefer 'a construction that would promote the purpose or object underlying the Act … to a construction that would not promote that purpose or object'.[9] Objects clauses, unlike preambles, are thus operative parts of legislation, and, 'unlike the purpose rule of construction at common law,…do not require an ambiguity before they apply, but can be considered in determining whether alternative constructions of a provision are open.'[10]

However, the objects clauses in existing federal anti-discrimination legislation have been criticised as unsatisfactory. For example, Beth Gaze notes that objects clauses frequently repeat commitments to equality and the elimination of discrimination on prohibited grounds, but do not address the more difficult issue of the degree to which this commitment is to be enforced, or permissible ways in which it is to be enforced.[11] The mere statement that anti-discrimination legislation has the goal of prohibiting unfair discrimination gives little guidance to courts and tribunals applying this principle. Moreover, this aim is qualified: three of the four federal anti-discrimination laws include objects clauses which mention the aim to eliminate 'as far as possible' discrimination against persons on the grounds covered by the laws and to promote recognition and acceptance within the community of equality between those people and others.[12]

The 2008 Senate Committee's inquiry into the effectiveness of the *Sex Discrimination Act 1984* received a number of submissions criticising the objects clause of that Act, which is phrased in highly equivocal terms. Section 3(a) states that it will give effect only to 'certain provisions' of *Convention on the Elimination of All Forms of Discrimination Against Women*. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in ss3 (b), (ba) and (c), confirms the impression that the Act is ambivalent about its aims. In its submission, the Human Rights and Equal Opportunity Commission (HREOC) noted that this qualification is not consistent with *Convention on the Elimination of All Forms of Discrimination Against Women*, and that the use of the term 'so far as is possible' results 'in a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the [*Sex Discrimination Act 1984*]'.[13] HREOC therefore recommended its removal.[14] The Senate Committee concluded that the Act should set out an unequivocal commitment to the elimination of sex discrimination and sexual harassment and remove the phrase 'so far as is possible', as well as referring to other international conventions which create obligations in relation to gender

---

[9] s 15AA *Acts Interpretation Act 1901* (Cth).

[10] See Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 331 citing Pearce and Geddes comment that 'the task of the court under s 15AA and its equivalents is to seek to discover the underlying purpose or object of the provision in question and, if possible, to adopt the interpretation of that provision that furthers the purpose or object.': *Statutory Interpretation in Australia* (Butterworths, 5th edn, 2001) 27.

[11] Ibid 330.

[12] See *Age Discrimination Act 2004* (Cth) s 3; *Disability Discrimination Act 1992* (Cth) s 3; *Sex Discrimination Act 1984* (Cth) s 3. The exception is the *Racial Discrimination Act 1975* (Cth) enacted before the fashion for legislative statements of objectives began.

[13] Human Rights and Equal Opportunity Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the effectiveness of the* Commonwealth Sex Discrimination Act (2008) [102].

[14] Human Rights and Equal Opportunity Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the effectiveness of the* Commonwealth Sex Discrimination Act (2008) [102].

equality.[15] The government's response to the Senate Committee report noted that it would consider these issues as part of the consolidation project.[16]

The equivocal nature of the objects clauses is compounded by the technical and formalist approach taken by the Australian judiciary to the beneficial aims of human rights legislation.[17] As Gaze has noted, 'Australian judges have generally approached the interpretation of anti-discrimination statutes as being similar in kind to other statutes: a matter of giving effect to the words.'[18] In addition, 'it is rare for judges to consider the policy or concepts underlying these laws'.[19] While the High Court has explicitly stated that the purpose of anti-discrimination laws is remedial and should receive a beneficial construction, it has adopted a literal or narrow reading of specific terms in the legislation, using only textual methods to reach a decision.[20] As a result, some very narrow and technical distinctions have been introduced, making successful claims more difficult for complainants and discouraging the bringing of actions.[21] 'Even if no special status is accorded to the legislation, an adequate approach to interpreting anti-discrimination law requires special attention to its purpose and underlying concepts, both to pursue the purposive approach, and because the concepts are quite different from the normal sphere of the common law'.[22] This propensity to prefer a narrow interpretation limits the impact of the legislation.

1.2 THE UK EXPERIENCE

The same problems of uncertainty, narrow interpretation and inconsistency affect the way UK courts apply equality standards, and in the lead up to the *Equality Act 2010* the possibility of including a strong purpose clause was considered. Various submissions to the Discrimination Law Review called for the insertion of a purpose clause in any revised legislation. For example, the Equal Opportunities Commission submission noted both its desirability and its possible content:

> To ensure that the vision and purpose of the law is positive and clear, the EOC suggests that the new legislation should contain a strong and clearly worded 'purpose clause' or preamble, which makes specific reference to the need to tackle the structural disadvantage suffered by particular groups. This might be similar to the clause in Part One of the 2006 Equality Act that sets out the fundamental purpose of the CEHR. In a new equality law, such a clause would encapsulate the essential vision behind the law. It would also provide the judiciary with guidance on the meaning of equality and give them an important purposive tool with which to ensure its protection.[23]

In their submission to the Discrimination Law Review, Sandra Fredman and Sarah Spencer attempted to indicate some general principles, drawing upon capabilities theory to set out four central aims of equality, which could be included in a purpose clause. These are:

---

[15] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, tabled 12 December 2008.

[16] Government Response to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Recommendation 2.

[17] Simon Rice, 'Is an Equality Act the Next Best Step ? (Paper given at the Sex Discrimination Act Silver Anniversary Conference, ANU College of Law Canberra, 1-2 October 2009).

[18] Gaze, above n 10, 332.

[19] Ibid.

[20] *IW v City of Perth* (1997) 191 CLR 1, 52 (Kirby J.); *X v Commonwealth* (1999) 200 CLR 177, 211 (Kirby J.); Gaze, above n 10, 332-333.

[21] Simon Rice, 'And Which "Equality Act" Would that Be?' in Margaret Thornton (ed.), *Sex Discrimination In Uncertain Times* (2010).

[22] Gaze, above n 10, 332.

[23] Cited in Colm O'Cinneide, 'Purpose Clauses – Giving Coherence And Direction To Anti-Discrimination Law' (2007) *Discrimination Law Association Briefings* 456-467.

> **Equal life chances:** Equality duties should aim to break the cycle of disadvantage associated with discrimination, aiming at fair representation, such as in employment or in parliament, and pursuit of equality of outcomes for groups, such as parity in exam results.
> **Equal dignity and worth:** Equality duties should address stigma, harassment, humiliation, degrading treatment and violence.
> **Accommodation and affirmation:** Equality duties should go beyond identical treatment in meeting needs, and should accommodate and affirm different identities, aspirations and needs.
> **Equal participation in society:** an equality goal in its own right, as well as a pre-requisite of good relations.[24]

While overall there was strong support for having a general 'purpose clause' for the *Equality Act 2010*, this was rejected by the Discrimination Law Review in 2007, primarily citing the historical avoidance of use of purpose clauses in parliamentary drafting in the UK.[25] The government, in its response to the consultation draft of the Equality Bill, also considered it inappropriate to include such a clause, focusing on the belief that a purpose provision would not assist in clarifying the legislation and would lead to a tension within the text of the provisions themselves.[26] It also considered that proposals for a constitutional equality provision, which was to be explored in consideration of a Bill of Rights and Responsibilities for the UK, would present a better mode of anchoring the central place of equality in UK society.[27]

There was also a proposal to include a 'statement of purpose' for the equality duty in the Act in order to clarify the aims of the duty to 'advance equality of opportunity', which focused on four different 'dimensions' of equality: addressing disadvantage; promoting respect and fostering good relations; meeting different needs while promoting shared values; and promoting equal participation. However, the government also rejected this proposal in favour of strengthening the terms of the equality duty itself.[28] Ultimately, the Act as passed contains a preamble summarising the substantive content of the operative parts of the Act, but does not set out the aims and objectives of the Act as a whole.[29]

1.3 LESSONS FOR AUSTRALIA

In both the UK and Australia the lack of clear underpinning principles has often meant that the interpretation of anti-discrimination legislation can vary considerably, producing inconsistent results and generating uncertainty. In addition, narrow and excessively technical interpretations of anti-discrimination legislation by courts and tribunals have tended to reduce its impact. Because it can be unclear how equality and anti-discrimination values should be balanced against other principles and legal rules when they come into tension, courts and tribunals tend to be unduly tentative, limiting the effectiveness of legislative protections.

---

[24] Ibid 3.
[25] *DLR Consultation Paper,* above n 3, [9].
[26] *Government response to DLR Consultation,* above n 7, [14.2]ff.
[27] Ibid, [14.6].
[28] Ibid, [2.16]ff, [14.4].
[29] The preamble states: 'An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes.'

In light of the above concerns, the current Australian position and the arguments raised by the UK experience, it is submitted that any proposed Australian equality legislation should contain a purpose clause. The importance and historical acceptance of objects provisions in Australian legislative drafting as guidance to the courts on interpretation, in contrast to the UK position, are further strong reasons for the inclusion of such a provision..

If a purpose clause is to be included, significant attention should be focused on its form and content. While some commentators have suggested that because of the Australian judiciary's formalist approach to the beneficial aims of discrimination legislation, the court's interpretive role should be limited, we do not believe that this is necessary or desirable.[30] As Belinda Smith has argued, less prescriptive legislation may result in a less technical approach by the courts more inclined to give effect to the beneficial aims of anti-discrimination legislation.[31] Furthermore, the limitations of an unduly formalist approach may be overcome by better guidance for interpretation through the inclusion of a richer purpose provision in any consolidated anti-discrimination legislation. Many dissenting judgments in cases that have taken a conservative line in relation to objects of the extant anti-discrimination laws illustrate that alternative, progressive interpretations were available.[32] If a purpose clause makes clear the progressive aims of Australian equality laws, judicial interpretation may be both more consistent and ensure a higher standard of protection from discrimination.

A purpose clause must set out the underlying equality principles underpinning anti-discrimination law. This will provide more guidance as to how specific legislative provisions should be interpreted, and ensure greater clarity in terms of the substantial values informing the application of such legislation by courts, tribunals and other actors. Any purpose clause should contain strong statements of its substantive aims. Rather than merely stating that the legislation is aimed at eliminating discrimination on prohibited grounds, it is important that the legislation should be drafted in a way which makes clear the specific results it is intended to achieve and how it intends to do so.[33] Anticipating the substantive discussion that follows in this submission, it should state that it confers positive rights and imposes positive duties on public and private bodies, and is aimed at not only regulating dispute resolution in individual complaints, but also at addressing structural causes of discrimination and ensuring the progressive realisation of substantive equality.

A purpose provision should also encapsulate the full range of the various concepts of equality that underpin the legislative framework, including (as per Fredman and Spencer's analysis referred to above) the promotion of equal life chances, equal dignity and worth, and the accommodation and affirmation of difference together with the fundamental principle of equal participation in society. A purpose clause should refer to all of these aspects of equality, emphasizing their interdependence and clarifying how they might be collectively applied.

An existing legislative provision which attempts to do precisely this is the objects clause in the Victorian *Equal Opportunity Act 2010*. That provision states that that the Victorian Act aims to 'further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities'; 'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation'; and 'to promote and facilitate the progressive realisation of equality, as far as reasonably practicable' by recognising that —

(i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
(ii) equal application of a rule to different groups can have unequal results or

[30] Rice, above n 21.
[31] Belinda Smith, 'Models of Anti-Discrimination Laws – Does Canada offer any Lessons for the Reform of Australia's Laws?' in Deirdre Howard-Wagner (ed.), 'W(h)ither Human Rights?' *Proceedings of the 25th Annual Conference of the Law and Society Association of Australia and New Zealand* (2008) 1.
[32] See, eg. New South Wales v Amery (2006) 230 CLR 174, 200 (Kirby J.).
[33] *DLR Consultation Paper,* above n 3, [9].

outcomes;

(iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.

This almost exemplary provision recognises a commitment to a notion of equality that extends beyond formal equality to the need for reasonable accommodation and adjustments, attends to the contextual relevance of socio-economic disadvantage which perpetuates structural inequality, and clearly upholds the importance of advancing equality of opportunity, and the ultimate aim of the progressive achievement of substantive equality.

The primary drawback of the Victorian Act's objects clause is, however, its retention of the qualifier 'to the greatest possible extent' in respect of its aim to eliminate discrimination, sexual harassment and victimisation. We do not believe that this phrase differs substantially from the phrase used in the Commonwealth anti-discrimination legislation 'as far as possible'. Such qualifiers may dramatically dilute the protections offered by anti-discrimination law and should not appear in the purpose provision of the proposed legislation.

Recommendation 1:

Any proposed Australian equality legislation should contain an objects clause.

The objects clause should clearly outline out the equality principles underpinning anti-discrimination law in Australia. This should extend beyond the protection of formal equality, to the promotion of substantive equality.

The objects clause should avoid qualifiers such as 'as far as possible' or 'to the greatest possible extent'.

2. THE PROTECTED CHARACTERISTICS

2.1 THE AUSTRALIAN POSITION

Australia's federal anti-discrimination laws collectively proscribe discrimination on the basis of: 'race,[34] colour, descent or national or ethnic origin';[35] 'sex;[36] marital status;[37] pregnancy or potential pregnancy;[38] family responsibilities';[39] 'disability;[40] people with disabilities in possession of palliative or therapeutic devices or auxiliary aids';[41] 'people with disabilities accompanied by an interpreter, reader, assistant or carer';[42] a person with a disability accompanied by a guide dog or an 'assistance animal';[43] and age.'[44]

The level and nature of the statutory safeguards for each category of discrimination vary greatly. This is addressed in detail in section 4.

Australia's anti-discrimination legislative scheme as it stands does not protect residents from discrimination of certain key characteristics which are protected under international human rights treaties to which Australia is, as a nation, party and therefore legally bound. Of particular concern, federal laws do not shield individuals from unequal treatment on the basis of religion and sexual orientation. This is clearly at odds with Australia's obligation to prohibit discrimination on these grounds under the *International Covenant on Civil and Political Rights*[45] and the *International Covenant on Economic and Social Rights*.[46]

Although the *Sex Discrimination Act 1984* prohibits discrimination on the basis of 'marital status',[47] the legislation expressly excludes same-sex relationships as benefitting from such protection. The term 'marital status' encompasses both married and *de facto* couples. However, the term 'de facto spouse' is defined in terms of being in a relationship with a person of the opposite sex[48] and the term 'marriage' is similarly defined in relation to two persons of the opposite sex.[49]

There are, moreover, no express legislative provisions under the federal anti-discrimination laws that protect against discrimination on the grounds of sexuality, gender identity or same-sex relationship status -- although some protection is found in state and territory legislation and distinct pieces of federal legislation.[50] It is insufficient to rely on state and territory legislation because federal statutory agencies, as well as their employees, are not protected by state and

---

[34] *Racial Discrimination Act 1975* (Cth) s 9.
[35] Ibid.
[36] *Sex Discrimination Act 1984* (Cth) ss 5, 14-48.
[37] Ibid ss 6, 14-48.
[38] Ibid ss 7, 14-48.
[39] Ibid ss 4A,14-48.
[40] *Disability Discrimination Act 1992* (Cth) ss 5, 15-29.
[41] Ibid ss 8, 15-29.
[42] Ibid.
[43] Ibid ss 9, 15-29.
[44] *Age Discrimination Act 2004* (Cth) part 4.
[45] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2(1), 26 (entered into force 23 March 1976).
[46] *International Covenant on Economic and Social Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 2(2) (entered into force 23 March 1976).
[47] *Sex Discrimination Act* (Cth) ss 6, 14-48.
[48] *Ibid* ss 4 & 6.
[49] Ibid s 6; *Marriage Act 1961* (Cth) s 5.
[50] For example, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth). For a comprehensive analysis of state and territory legislative protection for LGBTI, see Anna Chapman, *Protection from discrimination on the basis of sexual orientation or sex and/or gender identity in Australia*, (2008) 4.2.

territory anti-discrimination law.[51] The Australian Human Rights Commission has the power to inquire into, and attempt to conciliate claims of discrimination on the ground of 'sexual preference' in employment or occupation. However, discrimination on these grounds is not justiciable in a tribunal or court.[52]

2.2 THE UK EXPERIENCE

Part 2 (Clauses 4 to 12) of the *Equality Act 2010* specifies eight protected characteristics (age, race, religion, gender reassignment, marriage/civil partnership, disability, religion, sexual orientation), which may not serve as the basis for unequal treatment of individuals.[53] This list is comprehensive and exclusive of other potential grounds for discrimination. Courts do not hold discretion to identify additional characteristics that warrant protection.

Although this provision is a crucial element of the *Equality Act 2010*'s anti-discrimination framework, it was not subject to extensive debate during the consultation and drafting process due to the enactment's design to streamline rather than change pre-existing law. Each of the characteristics listed in Part 2 (Clauses 4 to 12) were protected under British law at the time of the 2010 enactment. However, their consolidation into a single section creates a system of uniform protection that is both broad and flexible.

Parts 3 and 4 of the *Equality Act 2010* prohibit discrimination that is based on any of the factors listed in Part 2 (Clauses 4 to 12), while subsequent sections of the Act explicitly permit discrimination on the basis of one or more of these characteristics in specific circumstances. Under this structure, each of the protected characteristics is subject to the same level of protection across various sectors, which include: public services, employment, education and association contexts.

The benefits of this structure are best demonstrated by the *Equality Act 2010*'s provisions pertaining to age discrimination. Prior to the Bill's passage, age (along with disability, and marriage and civil partnership status) did not receive comprehensive protection. By-and-large, age-related discrimination was prohibited only in the context of employment. Its inclusion as a protected characteristic in Part 2 of the *Equality Act 2010*, expanded into other arenas, including, the provision of public services and access to housing, while subsequent claw-back provisions ensure that public agencies are able to target certain age demographics in order to ensure that they receive goods and services that fit their needs.

2.3 LESSONS FOR AUSTRALIA

In general, Australian anti-discrimination framework suffers from fragmentation and underdevelopment in certain areas. The consolidation of all provisions extending to various attributes will provide equal and consistent protection for vulnerable persons and resolve inconsistencies between jurisdictions. The absence of a list of attributes protected under the Australian anti-discrimination regime has been identified as a key issue on repeated occasions by various UN institutions. For example, the UN Human Rights Committee in 2009 held that it was 'concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law' and recommended that Australia 'adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection for the rights to equality and non-discrimination.'[54] In addition the UN Committee on Economic, Social

[51] *Commonwealth v Anti-Discrimination Tribunal* (Tas) (2008) 248 ALR 494; *Dao v Australian Postal Commission* (1987) 162 CLR 317.
[52] *Australian Human Rights Commission Regulations 1989* (Cth) Regulation 4(a)(ix).
[53] With respect to sex, Sections 17 and 18 of the *Equality Act 2010* provide specific protections for pregnant women and mothers.
[54] *Concluding Observations: Australia*, UN CCPR, 59th sess, 12 CCPR/C/AUS/CO/5 (2009).

and Cultural Rights, recommended that Australia 'enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds'.[55]

In addition to consolidating a list of attributes, protection should be extended to cover those attributes not currently protected under Australian federal anti-discrimination laws, but protected under international human rights law. In particular, Australia should codify its obligations under the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* and protect against discrimination on the basis of religion and sexual orientation.

Finally, although not implemented in the UK context, Australia should also consider the possibility of a non-exhaustive list of attributes to ensure greater flexibility in the application of non-discrimination law. In this respect, it should be noted that a wider range of characteristics are protected in the UK context due to the umbrella protection provided by the European Convention on Human Rights, specifically Article 14 which includes in the grounds of discrimination 'other status'. A similar non-exhaustive ground – 'other status'—is of course also included in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*. Australia might also look to other jurisdictions which have developed non-exhaustive statutory grounds, for example, South Africa which extends safeguards to individuals who are subject to discrimination on the basis of enumerated characteristics as well as any other grounds, which 'cause or perpetuate systemic disadvantage . . . or cause unequal enjoyment of fundamental rights.'[56]

Recommendation 2:

Any proposed Australian equality legislation should include a stand-alone provision listing the protected characteristics covered by the legislation.

Recommendation 3:

Any proposed Australian equality legislation should expand protection to cover, at the very least, discrimination on the basis of sexual orientation and religion.

The Attorney-General should also consider the possibility of including a non-exhaustive list of protected grounds.

[55] *Concluding Observations: Australia,* UN CESCR, 42nd sess, [14], E/C.12/AUS/CO/ (2009).
[56] *Equality and Prevention of Unfair Discrimination Act 2000* (Act No. 4 of. 2000) (South Africa).

3. COMPOUND OR MULTIPLE DISCRIMINATION

3.1 THE AUSTRALIAN POSITION

Australian anti-discrimination legislation does not provide relief for most victims of multiple or compound discrimination. The *Australian Human Rights Commission Act 1986* (Cth) only provides for claims which are based on a single attribute. Other enactments provide only a limited expansion of this right of redress. Individuals who meet certain statutory criteria may receive protection for the compounding affect of their situation in isolated instances. For example, a female parent who is dismissed due to the combination of these attributes (being a woman and a parent) may seek redress under the *Sexual Discrimination Act*. However, this cause of action is limited to mothers, and the enactment does not provide for the protection of multiple or compound discrimination horizontally across the three other statutes.

3.2 THE UK EXPERIENCE

To date, the UK has not created a cause of action for compound or dual discrimination, however, the *Equality Act 2010* contains a provision that provides a cause of action for such unequal treatment. If implemented, it will be one of the *Equality Act 2010's* greatest advances over pre-existing domestic law. Compound discrimination occurs when an individual receives unequal treatment due to his/her possession of two protected characteristics, compounding or aggravating the inequity he/she experiences. For example, a black, Muslim, gay man may experience disparate treatment from persons who are merely black, Muslim, gay or men.

Currently, British anti-discrimination laws pose procedural barriers to claims from individuals who possess two or more protected traits. In general, a plaintiff in a discrimination suit must demonstrate that "but for" the attribute that gave rise to his/her unequal treatment, he or she would not have suffered.[57] This causal relationship is established through the identification of a comparator who is substantially similar to the plaintiff, but does not bear the protected characteristic.[58] A female doctor alleging wrongful termination on the basis of her sex is compared to male doctors of similar seniority. Although plaintiffs may plead multiple grounds of discrimination in a cause of action,[59] courts evaluate each of a plaintiff's grounds for discrimination separately rather than in conjunction with each other, and as a result, do not consider the compounding effect that possessing two or more protected traits would have on an individual's treatment.

In *Law Society v. Bahl*,[60] the Court of Appeal upheld the Employment Tribunal's denial of the plaintiff's, an Asian female Vice President, claim of wrongful termination, but stated that the Employment Tribunal erred in that it did not consider each of her discrimination allegations separately. The proper analysis of her claim was not whether she was treated differently from white male Vice Presidents but whether her treatment would have been the same "if she had been a white and/or male Vice-President."[61] Thus, a plaintiff must establish that he or she received substantially less favourable treatment than persons who lack just one rather than all of his or her protected characteristics.

---

[57] S. Hannet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies* 65-86.

44 *Law Society v. Bahl*, [2004] EWCA Civ 1070.

[58] Ibid.

[59] *O'Reilly v. BBC* (2011) Case No 2200423/2010 Employment Tribunal (awarding damages for discrimination on the basis of age but denying the plaintiff's claim on the basis of sex due to a lack of supporting evidence).

[60] *Law Society v. Bahl*, [2004] EWCA Civ 1070.

[61] Ibid.

This parallel analysis is blind to the fact that many individuals confront several forms of discrimination simultaneously, and is particularly inadequate in addressing the needs of minority women who are frequently marginalised on multiple fronts. According to the findings of a United Nation's expert panel:

> Raciali[s]ed women may encounter compound discrimination because women are hired typically for clerical positions; while male members of racial or ethnic minorities are hired for manual work. In such instances, raciali[s]ed women experience discrimination on the basis of race because the designated women's work is not perceived as appropriate for raciali[s]ed women. They also experience discrimination on the basis of sex because the work designated for raciali[s]ed men is deemed inappropriate for women.[62]

Reports gathered in the process of drafting the *Equality Act 2010* indicate that similar trends leave minority women in the UK without judicial recourse for their discrimination. According to one presentation to Parliament, civil society groups informed the government of over 100 instances of compound discrimination, many of which pertained to black women, which were unviable in court under the then-existing standard of review.[63]

In order to address the needs of minority women and other persons who experience various forms of compound discrimination, the *Equality Act 2010* was drafted to explicitly grant a cause of action on the grounds of unequal treatment due to the possession of two protected characteristics. Section 14 provides that '(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.' The words 'either of those characteristics' now indicate that plaintiffs in multiple discrimination cases will be evaluated in comparison to a neutral comparator who is not otherwise disadvantaged as well. A black female doctor's claim of discrimination will be evaluated in a single instance with reference to white male doctors rather than in a piecemeal fashion which divides and weakens her claim.

3.3 LESSONS FOR AUSTRALIA

The creation of a cause of action for compound or multiple discrimination will allow individuals who are subjected to disparate treatment on the basis of two characteristics access to appropriate redress. Frequently, individuals are treated differently due to the interaction of more than one trait, the discriminatory character of such differentiation only becoming apparent when the interaction between these factors is taken into account.

Australia's failure to provide protections against multiple or compound discrimination is in breach of its international obligations. In its concluding observations on Australia's combined fourth and fifth Periodic Report made under the *Convention on the Elimination of All Forms of Discrimination Against Women* noted its:

> …concern that immigrant, refugee and minority women and girls, based on their ethnic background, may be subject to multiple forms of discrimination with respect to women belonging to these groups seem to be particularly vulnerable to violence.[64]

---

[62] United Nations Division for the Advancement of Women, Office of the High Commissioner of Human Rights, United Nations Development Fund for Women, Gender and Racial Discrimination, *Report of the Expert Meeting* (2000) United Nations Women Watch <http://www.un.org/womenwatch/daw/csw/genrac/report.htm> at 4 March 2011.

[63] *Government response to DLR Consultation*, above n 7, 78.

[64] *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, CEDAW, 34th sess, 28,UN Doc /C/AUL/CO/5 (2006).

and further urged Australia:

> …to take more effective measures to eliminate discrimination against refugee, migrant and minority women and girls and to strengthen its efforts to combat and eliminate xenophobia and racism in Australia, particularly its impact on women and girls. It also encourages the State party to be more proactive in its measures to prevent and eliminate discrimination against these women and girls within their communities and in society at large and to report on the steps taken in this regard in its next report.[65]

The current reform process provides an opportunity to remedy this current gap in protection.

Recommendation 4:

Any proposed Australian equality legislation should include a cause of action for multiple or compound discrimination.

[65] Ibid 29.

4. SIMPLIFYING THE TESTS FOR DIRECT AND INDIRECT DISCRIMINATION

This section will address the tests for direct and indirect discrimination, including the obligation to make reasonable adjustments and the burden of proof. The key provisions in the *Equality Act 2010* are s 13 (direct discrimination), s 15 (discrimination arising from a disability), s 19 (indirect discrimination), s 20 (reasonable adjustments) and s 136 (burden of proof). Section 3 has already dealt with s 14 (compound or multiple discrimination).

4.1 DIRECT DISCRIMINATION

4.1.1 The Australian position

The tests for direct discrimination are set out in s 9(1) of the *Racial Discrimination Act 1975*, s 5(1) of the *Sex Discrimination Act 1984*, s 5 of the *Disability Discrimination Act 1992* and s 14 of the *Age Discrimination Act 2004*. Despite some differences in wording, the tests in the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004* are broadly similar. They provide that discrimination occurs where the discriminator, by reason of[66] a protected characteristic,[67] treats[68] the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator would treat[69] a person who does not possess the protected characteristic.[70]

This test contains two central elements: 1) *Causation*: the treatment must be 'by reason of' the protected characteristic; 2) *the Comparator*: the treatment must be less favourable than, in circumstances that are the same or not materially different, the discriminator would treat a person who does not possess the protected characteristic.

The test in the *Racial Discrimination Act 1975* is framed differently. While, like the other tests, it contains the causation element, it does not contain the comparator element:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

4.1.2 The UK experience

The *Equality Act 2010* contains one test for direct discrimination, found in s 13. The test is broadly similar to those found in the *Sex Discrimination Act*, *Disability Discrimination Act* and *Age*

---

[66] The *Sex Discrimination Act 1984* (Cth) uses the language 'by reason of', whereas the *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) use 'because of'.

[67] Under the *Disability Discrimination Act 1992* (Cth), the protected characteristic is 'disability', defined in s 4. Under the *Sex Discrimination Act 1984* (Cth), the protected characteristic includes the 'sex of the aggrieved person', 'a characteristic that appertains generally to persons of the sex of the aggrieved person' and 'a characteristic that is generally imputed to persons of the sex of the aggrieved person'. The *Age Discrimination Act* is framed in similar terms, replacing the word 'sex' with 'age'.

[68] Under the *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth), the language is 'treats or proposes to treat'.

[69] Under the *Sex Discrimination Act 1984*(Cth) and *Age Discrimination Act 2004* (Cth), the language is 'treat or would treat'.

[70] Under the Sex Discrimination Act *1984(Cth)*, the comparator is described as 'a person of the opposite sex', in the *Disability Discrimination Act 1992* (Cth) as 'a person without the disability', and in the *Age Discrimination Act 2004* (Cth), 'a person of a different age'.

Discrimination Act. Section 13(1) provides that '[a] person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

Like the tests under the *Sex Discrimination Act*, *Disability Discrimination Act* and *Age Discrimination Act*, the UK test includes a causation element and a comparator element. The comparator, however, is less specific under the *Equality Act 2010*: the comparison is to 'others' rather than to 'a person of the opposite sex', 'a person without the disability' or 'a person of a different age'. Also of note is that, unlike any of the tests for direct discrimination in Australia, s 13(2) provides that, where the protected characteristic is age, 'A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'.

While the Australian tests for direct discrimination provide that the comparator must be in circumstances that are 'the same or are not materially different', the *Equality Act 2010* includes this in a separate provision. Section 23(1) provides that '[o]n a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case'. Section 23(2) specifies that '[t]he circumstances relating to a case include a person's abilities' if, for the purposes of s 13 or 14, the protected characteristic is disability. Section 23(3) also provides that, if the protected characteristic is sexual orientation, 'the fact that one person…is a civil partner while another is married is not a material difference between the circumstances relating to each case'.

The *Equality Act 2010* also contains a separate test for discrimination 'arising from a disability' in s 15. Section 15(1) provides that (A) discriminates against a disabled person (B) if '(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim'. Section 15(2) provides that this does not apply if 'A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'.

The test for direct discrimination was given some consideration during the Discrimination Law Review. The central issue during the consultation was whether the test in the *Equality Act 2010* should retain the comparator element. The government's consultation paper noted concerns that 'whether a direct discrimination claim succeeds or fails depends too much on choosing the right comparator'.[71] It observed that if the comparator were removed then people could bring claims 'on the basis that they have simply been treated badly rather than having to prove they have been treated worse than someone in the same situation who does not share their protected characteristic'.[72] It proposed, however, that the comparator element be retained to reflect the fact that 'discrimination law is by its nature generally about equal treatment rather than fair treatment' and noted that '[c]ourts and tribunals have considerable flexibility when considering comparators under the existing system'.[73]

The government's response to the consultation noted that, of the 200 submissions that addressed the issue, 75 per cent were in favour of retaining the comparator. Some submitted that there was no need to identify a specific comparator and that the comparison should merely be to 'other persons'. The government resolved to retain the comparator, citing the reasons given in the consultation paper,[74] although it did adopt the suggestion that the comparator be referred to as 'other persons'.

The government, however, recognised the particular problems caused by the comparator for persons with disability. These problems were demonstrated by the decision of the House of

[71] *DLR Consultation Paper,* above n 3, [1.14].
[72] Ibid [1.15].
[73] Ibid [1.16].
[74] *Government response to DLR Consultation,* above n 7 [7.10].

Lords in *Lewisham London Borough Council v Malcolm*.[75] In that case, the respondent landlord sought possession against the complainant tenant who had sub-let his apartment in breach of the tenancy agreement. There was evidence that the complainant's behaviour (i.e. the sub-letting) was a direct result of the complainant's schizophrenia. The complainant argued that the Court was precluded from making a possession order because in prosecuting the proceedings the landlord had unlawfully discriminated against him. The majority held that the appropriate comparator was someone without the disability who had sub-let his apartment, rather than someone without the disability who had not sub-let his apartment. Since the landlord would not have treated this comparator any differently, the discrimination claim failed. The government's response[76] to this problem was to include s 15 in the *Equality Act 2010* which, as noted above, provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability. Importantly, A can resist a discrimination claim by showing that the treatment was a 'proportionate means of achieving a legitimate aim' or that A 'did not know, and could not reasonably have been expected to know, that B had the disability'.

4.1.3 Lessons for Australia

The approach to direct discrimination under the *Equality Act 2010* bears some lessons for Australia, particularly with regard to the use of the comparator.

There have been repeated calls in Australia for the removal of the comparator in the tests for direct discrimination. It is argued that the courts often struggle to determine the appropriate characteristics of the comparator and that the way it has been interpreted and applied makes direct discrimination very difficult to prove.[77] The argument is best demonstrated through the decision of the High Court of Australia in *Purvis v New South Wales*.[78] The decision bears some similarities to the *Malcolm* case noted above, with the majority of the High Court holding that behaviour arising from a disability (in this case, violent behaviour arising from a brain injury) should be attributed to the comparator. The approach adopted by the High Court meant that the complainant had to show that the treatment was because of the protected characteristic itself (rather than any behaviour arising from it) or argue indirect discrimination (which has its own attendant difficulties, discussed below).

It is for these reasons that the Senate Standing Committee on Legal and Constitutional Affairs, in its 2009 review of the *Sex Discrimination Act*, concluded that the comparator element should be removed from the test for direct discrimination on the ground of sex.[79] It recommended the adoption of the test in s 8(1)(a) of the *Discrimination Act 1991* (ACT), which provides that a person discriminates against another person if 'the person treats or proposes to treat the other

---

[75] [2008] 1 AC 1399.

[76] See Government Equalities Office, *A Fairer Future: The Equality Bill and other action to make equality a reality* (2009) 23 <http://www.ic.nhs.uk/webfiles/HR/Equality_bill_a_fairer_future.pdf>; see also Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, House of Lords Paper No. 169, House of Commons Paper No. 736, Session 2008-09 (2009) 121.

[77] See the arguments canvassed in the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the* Sex Discrimination Act 1984 *in Eliminating Discrimination and Promoting Gender Equality,* (2008) [3.15]-[3.23] <http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/report.pdf>. (hereinafter '*SSCLCA SDA Report*'). See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 [Provisions]* (2009) [3.8]-[3.19] <http://www.aph.gov.au/senate/committee/legcon_ctte/disability_discrimination/report/report.pdf>. (hereinafter '*SSCLCA DDA Report*').

[78] (2003) 217 CLR 92.

[79] See *SSCLCA SDA Report,* above n 77, Recommendation 5.

person unfavourably because the other person has an attribute referred to in section 7'.[80] In its response to the inquiry the Australian Government indicated it would consider this recommendation as part of the consolidation project.[81] As noted above, the removal of the comparator element was rejected in the UK, as the comparator was thought to reflect the fact that anti-discrimination law is about equal rather than fair treatment. The comparative nature of equality law, however, is not necessarily denied by those who advocate for the comparator's removal. Some argue that the point of removing the comparator is not to prevent judges from engaging in a comparative exercise, but to prevent the courts from treating it as a rigid threshold requirement; claims should not be frustrated merely because an appropriate comparator cannot be identified.[82] As the Law Society of England and Wales argued in its submission to the Discrimination Law Review:

> Identifying a comparator is an evidential matter and should not be elevated to the status of a statutory requirement. In most cases identifying a comparator will be the most expedient way for a claimant to show that she or he has been discriminated against on a prohibited ground, but it is not the only way.
>
> Removing the need for a comparator will not open the door to allowing claimants to show only that they have been subjected to a detriment or to unfair treatment…Claimants will have to show that any detriment or unfair treatment was on a prohibited ground…[83]

There are a number of alternative options that could address at least some of the problems with the comparator. An Australian *Equality Act* could provide more detail on how the comparator is to be constructed. It could, for example, provide that behaviour arising from, relating to, or that is a direct result of a protected characteristic is not to be attributed to the comparator. Alternatively, a test similar to that under s 15 of the *Equality Act 2010* could be adopted and expanded to include all protected attributes. The protection afforded by the test is, however, diluted by the available defences.

Recommendation 5:

In the context of direct discrimination, the Attorney-General should consider:

(a) the removal of the comparator element in the test for direct discrimination and the adoption of a test akin to s 8(1)(a) of the *Discrimination Act 1991* (ACT); or

(b) specifying that behaviour which arises from, relates to or is a direct result of a protected characteristic should not be attributed to the comparator; or

(c) adopting a test akin to that under s 15 of the *Equality Act 2010*, expanded to include all protected characteristics.

---

[80] Note that in its review of the *Disability Discrimination Act 1992*(Cth) the Senate Standing Committee on Legal and Constitutional Affairs also recommended that the Government give further consideration to the removal of the comparator element in the *Disability Discrimination Act 1992* and the adoption of the ACT test for direct discrimination: *SSCLCA DDA Report*, above n 76, Recommendation 2.

[81] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality: Government Response* (2008) 4 <http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/gov_response.pdf> (hereinafter '*Government Response to SDA Inquiry*').

[82] See *SSCLCA DDA Report*, above n 77, [3.14].

[83] *DLR Consultation Paper,* above n 3, 1-2.

4.2 INDIRECT DISCRIMINATION

4.2.1 The Australian position

The tests for indirect discrimination are set out in s 9(1A) of the *Racial Discrimination Act*, s 5(2) of the *Sex Discrimination Act*, s 6 of the *Disability Discrimination Act* and s 15(1) of the *Age Discrimination Act*. The tests vary not only in terms of how they are phrased but also in terms of their substantive requirements. In general, the *Sex Discrimination Act* and *Age Discrimination Act* provide that discrimination occurs where the discriminator imposes, or proposes to impose, a condition, requirement or practice which is not reasonable[84] in the circumstances and which has, or is likely to have, the effect of disadvantaging persons of the same sex or age as the aggrieved person. Unlike the *Sex Discrimination Act* and *Age Discrimination Act*, the *Disability Discrimination Act* test contains an 'inability to comply' element. Section 6(1)(b) requires that 'because of the disability, the aggrieved person does not or would not comply, or is not able to comply, with the requirement or condition'. Section 9(1A) of the *Racial Discrimination Act* also contains an 'inability to comply' requirement. The test as a whole, however, is phrased in different terms from the others:

> (1A) Where:
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
> (b) the other person does not or cannot comply with the term, condition or requirement; and
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
> the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

4.2.2 The UK experience

Section 19 of the *Equality Act 2010* provides that a person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B. A provision, criterion or practice is discriminatory in relation to B's protected characteristic if:

> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Prior to the Discrimination Law Review, this test applied to most protected characteristics. However, for employment cases under the *Sex Discrimination Act 1975* (UK) and discrimination on the basis of colour or nationality under the *Race Relations Act 1976* (UK), the test was different. The test required the complainant to demonstrate that a 'requirement or condition' applied such that a considerably smaller proportion of his/her sex or racial group could comply with it than of the other sex or racial groups. The respondent could resist the claim by showing the requirement or condition was objectively justified.

---

[84] Note that under the *Sex Discrimination Act 1984* (Cth) the requirement that the 'condition, requirement or practice' be unreasonable is not found in the test for indirect discrimination but in a separate provision: s 7B.

The Discrimination Law Review proposed to extend the test in s 19 above to all protected characteristics, noting that this was the test contained in relevant European Directives.[85] The government's response to the consultation observed that, of the 200 submissions that addressed the issue, 94 per cent were in favour of standardising the test and 95 per cent were in favour of adopting the 'proportionality' justification.[86] The government resolved to standardise the test, arguing that the concept of 'particular disadvantage' was a more flexible test which 'opens up the possibility of expert or witness evidence being used rather than a detailed statistical analysis to show particular disadvantage to a particular group of people'.[87] The government also reasoned that the words 'provision, criterion or practice' were broader and could include 'less formal arrangements which alone, or in combination, disadvantage people from a particular group even though they might not remove an opportunity completely'.[88]

Section 19 differs in a number of respects from the Australian tests. First, unlike the Australian tests, s 19 contains a comparative element – the provision, criterion or practice must put a person with whom B shares the characteristic at a particular disadvantage 'when compared with persons with whom B does not share it'. Second, s 19 provides a justification for discrimination where the provision, criterion or practice is a 'proportionate means of achieving a legitimate aim'. The Australian tests provide a justification where the requirement or condition is 'reasonable in the circumstances'. Third, s 19 refers to a 'provision, criterion or practice' rather than a 'requirement or condition'. Fourth, s 19 provides that the provision, criterion or practice must be applied, or would apply, to persons with whom B does not share the characteristic. This is not a specific requirement of the Australian tests, though it does seem to be part of the context in which the Australian tests would be applied in any event.

Finally, there is a difference in wording in terms of the required impact of the provision, criterion or practice on persons with the protected characteristic. The *Sex Discrimination Act*, *Disability Discrimination Act* and *Age Discrimination Act* require that the requirement or condition have, or be likely to have, the effect of disadvantaging persons with the protected characteristic. It is unclear whether the words 'puts, or would put' in the *Equality Act 2010* impose the same standard. Arguably the word 'would' imposes a higher standard than the words 'is likely to'. Unlike the Australian tests, s 19 also specifies that the provision, criterion or practice 'puts, or would put, B at that disadvantage', although this again seems to be part of the context in which the Australian tests would apply.

4.2.3 Lessons for Australia

There are strengths and weaknesses in the *Equality Act 2010*'s test for indirect discrimination. First, given the problems with the comparator outlined above, it may be thought that its inclusion as part of the test for indirect discrimination is a weakness. Second, the requirement that the provision, criterion or practice 'put, or would put' at a particular disadvantage either the aggrieved person or persons with whom he/she shares a protected characteristic potentially imposes too high a standard compared to the Australian requirement that the requirement or condition 'have, or be likely to have the effect' of disadvantaging persons with the protected characteristic.

The UK test, however, has a number of strengths. The first may be in its reference to a 'provision, criterion or practice' rather than a 'requirement or condition' for the reasons noted above. The second is in the absence of any reference to the aggrieved person's 'inability to

---

[85] See *Council Directive 76/207/EEC of 9 February 1976* [1976] OJ L 039/40 as amended by *Directive 2002/73/EC of the European Parliament and of the Council* [2002] OJ L 269/15 (gender); *Council Directive 2000/43/EC of 29 June 2000* [2000] OJ L 180/22 (racial or ethnic origin); and *Council Directive 2000/78/EC of 27 November 2000* [2000] OJ L 303/16 (disability, religion or belief, sexual orientation and age).
[86] *Government Response to DLR Consultation,* above n 7 [7.17] and [7.24].
[87] Ibid [7.25].
[88] *DLR Consultation Paper,* above n 3 [1.37].

comply' with the provision, criterion or practice. In Australia, this is something that has caused considerable difficulty, in particular under the *Disability Discrimination Act*. The case of *Hinchcliffe v University of Sydney*[89] demonstrates the problem. In that case a vision-impaired student was provided with class notes on paper and had to scan the materials into electronic format to be able to read them. This involved a considerable amount of time spent by both the complainant and her family converting the materials. The Court held that the test for indirect discrimination under the *Disability Discrimination Act* was not satisfied because, while the complainant was inconvenienced, she was able to comply with the practice of distributing notes in paper form. The effect of this reasoning is that persons with disability will be punished for their resourcefulness: the harder they work to adapt to the conditions imposed, the less chance they have of satisfying the test for indirect discrimination.

The outcome of this case was somewhat ameliorated by the decision in *Hurst v Queensland*,[90] but problems remain. At first instance the Court found that the complainant could comply with the condition that she be taught in English without the assistance of an Auslan teacher or interpreter. This was despite evidence that her academic performance was being seriously hindered by the failure to provide an interpreter. On appeal the decision was overturned, with the Full Federal Court applying a test of 'serious disadvantage'. The complainant could satisfy the test by demonstrating she was seriously disadvantaged by the condition, even though she could in fact comply with it. However there remain difficulties in determining what constitutes a 'serious disadvantage' under this test. The Australian Human Rights Commission argues that the 'inability to comply' requirement be removed altogether, and notes that, in cases of 'trivial' disadvantage, it is always open to the respondent to argue that the requirement or condition was reasonable in the circumstances.[91] It may be that the UK government has concluded that the justification available under s 19(2)(d) is sufficient to counter the potentially harsh operation of the indirect discrimination test.

The third strength of the UK test is the way the justification for indirect discrimination has been framed. In its report on the *Sex Discrimination Act* the Senate Standing Committee on Legal and Constitutional Affairs recommended that the 'reasonableness' test in s 7B of the *Sex Discrimination Act* be replaced with a requirement that the condition, requirement or practice be legitimate and proportionate and the government indicated it would consider this recommendation as part of the consolidation project.[92] Arguably the UK test involves a more focused inquiry. As the Report of the Discrimination Law Experts' Roundtable notes, the UK test involves three elements: first, that the impugned conduct or condition be rationally connected to a legitimate end; second, that the discriminator acted on an honest and good faith belief that the conduct or condition was necessary to achieve that end; and third, that the conduct or condition was reasonably necessary to achieving that end.[93]

Recommendation 7:

In the context of indirect discrimination, the Attorney-General should consider:

(a) removing the 'inability to comply' requirement from the tests for indirect discrimination;

---

[89] (2004) 186 FLR 376.
[90] (2006) 151 FCR 562.
[91] Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *The Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (2009) [46] <http://www.aph.gov.au/senate/committee/legcon_ctte/disability_discrimination/submissions.htm> (hereinafter '*AHRC Submission to DDA Inquiry*').
[92] *Government Response to SDA Inquiry,* above n 81, 4 (response to Recommendation 6).
[93] Discrimination Law Experts' Roundtable, *Report on Recommendations* (2010), 9 <http://sydney.edu.au/law/about/staff/BelindaSmith/DiscrimExpertsRoundtableReport.pdf>.

(b) replacing the justification of 'reasonableness' with the justification that the requirement or condition was 'a proportionate means of achieving a legitimate aim'; and

(c) replacing the words 'requirement or condition' with 'provision, criterion or practice'.

4.3 REASONABLE ADJUSTMENTS

4.3.1 The Australian position

The tests for direct and indirect discrimination under the *Disability Discrimination Act* include a duty to make reasonable adjustments for persons with disability. The duty was inserted by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). Section 5(2) of the *Disability Discrimination Act* provides that a person discriminates against another person on the ground of disability if:

> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

Section 6(2) provides that a person engages in indirect discrimination where:

> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
> (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

Under s 4 of the *Disability Discrimination Act* an adjustment is reasonable 'unless making the adjustment would impose an unjustifiable hardship on the person'. Sections 21B and 29A make it clear that discrimination is not unlawful 'if avoiding the discrimination would impose an unjustifiable hardship on the discriminator'. Section 11 outlines the circumstances that are to be taken into account in making such an assessment.

4.3.2 The UK experience

The *Equality Act 2010* also contains an obligation to make reasonable adjustments. Unlike the *Disability Discrimination Act*, however, the obligation is not incorporated as part of the tests for direct or indirect discrimination. It is a free-standing obligation, but like the Australian test, it applies only to persons with disability.

The duty is imposed on certain persons in certain fields of activity, for example by s 29(7) in Part 3 (in relation to services and public functions), s 36(1) in Part 4 (in relation to premises)[94] and s 39(5) in Part 5 (in relation to work). Section 20 gives content to the duty. It comprises three requirements:

> …(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

[94] According to the website of the Government Equalities Office, the government is still considering when (and perhaps whether) these provisions will come into force. See Government Equalities Office, Equality Act 2010 (2011) <http://www.equalities.gov.uk/equality_act_2010.aspx> at 12 March 2011.

> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid…

The Schedules to the *Equality Act 2010* provide more detail about what the duty entails in certain areas of activity. Unlike the Australian Acts, the *Equality Act 2010* offers no defence of unjustifiable hardship – the respondent's recourse is simply to argue that a particular adjustment is not 'reasonable'.

The duty to make reasonable adjustments was considered during the Discrimination Law Review. Prior to the *Equality Act 2010*, the *Disability Discrimination Act 1995* (UK) imposed such a duty, but the threshold at which the duty arose differed according to the field of activity. For example, the duty in relation to goods, facilities and services was triggered when a policy, practice or procedure made it 'impossible or unreasonably difficult' for a person with disability to access the service in question. The duty in relation to employment was triggered when a provision, criterion or practice, or a physical feature of premises, placed a person with disability at a 'substantial disadvantage' in comparison to persons without disability. The Consultation Paper proposed that a single threshold of 'substantial disadvantage' be adopted across all fields, and noted that it was 'considering whether it should apply in relation to premises.'[95]

The Paper proposed not to extend the concept to other protected characteristics, arguing that many of the situations in which it would have effect – for example, in the case of pregnant women or people with caring responsibilities – were already addressed by targeted balancing measures. It also considered that it would be 'unduly burdensome and reduce clarity if employers and service providers were required to respond to extensive new duties in this way' and that increasing the burden of adjustments 'might also risk reducing the level of adjustments available to disabled people'.[96] Finally, it noted that it would not be possible to apply in full the reasonable adjustments approach followed in disability legislation because of the limits imposed by European law: '[t]he reasonable adjustments approach for disability has been characterised by the House of Lords as "necessarily entail[ing] a measure of positive discrimination" for the protected group which is not permissible in relation to the other protected grounds'.[97]

The government's response to the consultation observed that, of the 170 submissions that addressed the issue, 80 per cent were in favour of adopting the 'substantial disadvantage' threshold.[98] It resolved to adopt this test and rejected proposals that 'substantial' be replaced with 'particular' or 'more than minor or trivial', noting that the meaning of the word 'substantial' was already well established in case law.[99] It also decided to impose a new obligation on landlords and managers of premises to make disability-related adjustments to common parts of residential premises, where it is reasonable to do so and is requested by the tenant or occupier.[100] Finally, it observed that the 'great majority of respondents' were against extending reasonable adjustments to other protected characteristics and resolved to restrict the duty to cases of persons with disability.

4.3.3 Lessons for Australia

There has been substantial criticism in Australia of the way the duty to make reasonable adjustments was incorporated into the *Disability Discrimination Act* framework. In its 2004 review of the *Disability Discrimination Act*, the Productivity Commission recommended that the duty be inserted but that it be 'expressed as a stand-alone provision with examples of how it might be

---

[95] *DLR Consultation Paper,* above n 3 [1.58].
[96] Ibid [4.40].
[97] Ibid [4.41] citing *Archibald v Fife Council* [2004] UKHL 32; (2004) ICR 954.
[98] *Government Response to DLR Consultation,* above n 7 [11.35].
[99] Ibid [11.44].
[100] Ibid [11.69].

met in each substantive section' of the *Disability Discrimination Act*.[101] The government, however, chose to incorporate it as part of the tests for direct and indirect discrimination. It claimed that this approach reinforced the original intention of the Act and provided more clarity and certainty by not derogating too far from the current definitions of discrimination.[102] During the Senate Standing Committee on Legal and Constitutional Affairs' review of the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009*, submissions noted that the inclusion of the reasonable adjustments duty within the already complex definitions of direct and indirect discrimination merely added to the confusion.[103] It was also submitted that this approach missed an opportunity to make a clear positive statement as to the duty to make reasonable adjustments.[104]

The strength of the *Equality Act 2010* is that it imposes a stand alone duty to make reasonable adjustments and gives specific content to that duty. For example, Schedule 2 gives further detail on the duty in the context of the provision of services and public functions. Clause 3 makes special provision for transport and provides, for example, that it is 'never reasonable' to take a step which would 'involve the alteration or removal of a physical feature of a vehicle used in providing the service'; 'affect whether vehicles are provided'; 'affect what vehicles are provided' or 'affect what happens in the vehicle while someone is travelling in it'.

Another criticism made of the test in the *Disability Discrimination Act* during the Senate Standing Committee on Legal and Constitutional Affairs inquiry was that it gave no indication of the principle underlying the concept of reasonable adjustments. The Public Interest Advocacy Centre (PIAC) submitted that 'in relation to indirect discrimination, a reasonable adjustment is one that minimises to the greatest extent possible, the disadvantageous effects of the requirement or condition; or, in relation to direct discrimination, a reasonable adjustment is one that minimises the less favourable treatment experienced by the person with a disability'.[105] PIAC also submitted that measures be defined as a reasonable adjustment 'if the adjustment minimises to the greatest extent possible the discriminatory impact of an act or omission, requirement or condition'. Section 20 of the *Equality Act 2010* has done this to some extent by listing the 'three requirements' and specifying that their aim is to avoid disadvantaging persons with disability.

Recommendation 7:

In the context of reasonable adjustments, the Attorney-General should consider:

(a) removing the duty to make reasonable adjustments from the tests for direct and indirect discrimination and imposing it as a stand-alone duty;

(b) giving further detail as to how the duty might be met in certain situations; and

(c) explicitly stating the principle underlying the concept of reasonable adjustments.

---

[101] Productivity Commission, *Review of the* Disability Discrimination Act 1992, Report No. 30 (2004), 195 <http://www.pc.gov.au/projects/inquiry/dda/report>.
[102] *SSCLCA DDA Report*, above n 77, [3.39].
[103] Ibid [3.35].
[104] See *AHRC Submission to DDA Inquiry*, above n 91, [56].
[105] Public Interest Advocacy Centre, Submission to SSCLA, *Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (2008) 5 <http://www.aph.gov.au/senate/committee/legcon_ctte/disability_discrimination/submissions.htm>.

4.4 BURDEN OF PROOF

4.4.1 The Australian position

Under the current tests for direct discrimination, the burden of proof lies on the complainant. This means the complainant must demonstrate that the treatment was 'because of' a protected attribute and that it was less favourable than the treatment that would be accorded to the comparator. The exception to this is the 'defence' of 'unjustifiable hardship' under the *Disability Discrimination Act*, which applies to both direct and indirect discrimination. Section 11(2) specifies that 'the burden of proving that something would impose an unjustifiable hardship lies on the person claiming unjustifiable hardship'.

For indirect discrimination, the burden lies on the complainant to prove the elements of the test, except for the 'reasonableness' requirement. All of the Acts, except the *Racial Discrimination Act*, provide that the burden lies on the person who imposes the requirement or condition to demonstrate that it is reasonable.[106]

4.4.2 The UK experience

Section 136(2) of the *Equality Act 2010* provides that '[i]f there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred'. According to s 136(3), s 136(2) does not apply if A shows that A did not contravene the provision.

This means that the onus is on the complainant to establish an arguable case of discrimination, whereupon the onus shifts to the respondent to prove that the conduct was not discriminatory. This was the position under UK anti-discrimination law even before the *Equality Act 2010*, implementing the provisions of EU directives.[107]

4.4.3 Lessons for Australia

The current approach to the burden of proof under Australian anti-discrimination law has been repeatedly criticised. It is argued that placing the onus on the complainant fails to recognise the difficulty in establishing the reasons for the impugned conduct, given the respondent will have control over most of the evidence relating to the reasons for the decision.[108] Submissions were made to this effect during the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the *Sex Discrimination Act*, with the result that the Senate Standing Committee on Legal and Constitutional Affairs recommended that the *Sex Discrimination Act* adopt a 'shifting burden of proof' akin to that under UK law.[109] The government indicated that it would consider this issue as part of the consolidation project.[110]

---

[106] *Sex Discrimination Act 1984* (Cth) s 7C; *Disability Discrimination Act* 1992 (Cth) s 6(4); *Age Discrimination Act 2004* (Cth) s 15(2).

[107] *Council Directive 97/80/EC of 15 December 1997* [1998] OJ L 14/6 (burden of proof in sex discrimination), *Council Directive 2000/43/EC of 29 June 2000* [2000] OJ L 180/22 (racial or ethnic origin); and *Council Directive 2000/78/EC of 27 November 2000* [2000] OJ L 303/16 (disability, religion or belief, sexual orientation and age).

[108] See the arguments canvassed in the *SSCLCA SDA Report,* above n 77, [6.46]-[6.51].

[109] Ibid Recommendation 22.

[110] *Government Response to SDA Inquiry*, above n 81, 11 (response to Recommendation 22).

The UK approach better reflects the difficulties faced by complainants in litigating discrimination claims. In *Ingen Ltd v Wong*[111] the Court of Appeal noted that the law made 'good sense given that a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated'.

Recommendation 8:

The Attorney-General should consider adopting a 'shifting' burden of proof akin to that under s 136 of the *Equality Act 2010*.

[111] [2005] EWCA Civ 142.

5. ADVANCING EQUALITY OF OPPORTUNITY

In recent years, there has been a trend in a number of jurisdictions away from laws which merely prohibit discrimination towards imposing a positive burden on public and private sector organisations to promote equality and eliminate discrimination.

Rather than a 'fault-based model of existing discrimination law, where legal liability only rests on those individuals who can be shown to have actively discriminated', these laws represent a new generation of proactive anti-discrimination legislation, which recognises discrimination as a pervasive social problem.[112] While individual complaints and remedies can be an effective response to discrimination resulting from individual behaviour, discrimination often occurs because of the unintended and often unconscious consequences of a discriminatory system. Modern anti-discrimination laws aim not only to remedy individual prejudice and harassment, but also to systemically advance equality of opportunity through two primary innovations: (1) imposing positive duties on the public and private sector to supplement negative proscriptions; and (2) allowing for differential treatment of unequally situated subjects.

In relation to the first of these innovations, the advantage of positive duties is that they are preventive: while complaint-based anti-discrimination laws allow inequality to continue until it is called into question, a positive duty legislates for equality by requiring conduct.[113] And because the initiative lies with policy makers and implementers, service providers or employers, this relieves individual victims of the burden and expense of litigation and places the onus of redressing inequality on those who have the greatest power to achieve social change.[114] This also means that change is systematic rather than random or ad hoc, ensuring that all those with a right to equality are covered. The institutional and structural causes of inequality can be diagnosed and addressed collectively and institutionally.[115] There are also efficiency gains in moving away from a complaints-led model, avoiding the expenditure incurred in adversarial proceedings, in favour of directing funds towards effective, concrete change and results within an acceptable time-frame.[116]

Second, proactive models of equality legislation move beyond the equal treatment model, recognising that equal treatment of those with different levels of advantage can reinforce existing inequality. Achieving equality does not necessarily mean that all groups be treated identically. It might require affirmative action or positive discrimination to accommodate ethnic or cultural differences, disabilities or to redress past disadvantage.[117] The new generation of equality legislation gives greater consideration to special measures to achieve equality, although reverse discrimination is not permitted.

The following sections examine the Australian and UK experience in relation to both these innovations. It also individually addresses the issue of pay equality, on which there has been a particular focus in both jurisdictions.

---

[112] Sandra Fredman, 'Equality – A New Generation' (2001) 30(2) *Industrial Law Journal* 145, Part D.
[113] Rice, above n 17.
[114] Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975 Background Paper No. 1*, 2008, 67; Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada *Pay Equity: A New Approach to a Fundamental Right* (2004),147
[115] Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369.
[116] Ibid.
[117] Ibid.

5.1 POSITIVE DUTIES ON PUBLIC AND PRIVATE BODIES

5.1.1 The Australian position

Australian anti-discrimination law at the federal level and in the States and territories has traditionally followed the model of individual remedial measures for unlawful conduct, which is dependent on individuals challenging specific discriminatory measures. This regulatory framework has been widely critiqued as ineffective in addressing systemic and structural discrimination.[118]

The duty generally imposed by federal anti-discrimination laws is a broad proscription not to discriminate on particular grounds. However, positive duties for the promotion of equality do exist, albeit in discrete and isolated forms, in Australian anti-discrimination law and have garnered increasing support in recent years. Most notably, in 2009, the Federal Government enacted the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), which amended the *Disability Discrimination Act*, to impose a positive obligation to make reasonable adjustments for a person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability. A 'reasonable adjustment' is an adjustment that does not impose an unjustifiable hardship on the person making the adjustments. Employers are now required to prove that any conditions or requirements that they impose on employees with a disability are reasonable in the circumstances.[119] These amendments illustrate the recognition in Australia that there are particular circumstances where positive action in the form of reasonable accommodation or adjustment is needed to eliminate discrimination.

In 2008, the Senate Legal and Constitutional Affairs Committee's inquiry into the effectiveness of the *Sex Discrimination Act* supported the provision of a number of positive duties for employers, including 'a positive duty …not to unreasonably refuse requests for flexible working arrangements to accommodate family or carer responsibilities'.[120] Although the proposed amending Bill tabled in 2010 did not implement this recommendation, responses to the consultation draft have indicated continued support from stakeholders concerning this proposal.[121]

Positive duties to promote equality exist more broadly in the area of federal employment legislation. Both the *Public Service Act 1999* (Cth) and the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) (the EEOCA Act) require the agencies concerned to draw up 'employment opportunity programs' (under the EEOCA Act)[122] or 'workplace diversity programs' (under the *Public Service Act*)[123] which set out the agency's plan for eliminating discrimination and promoting equality of opportunity. The EEOCA Act is restricted by its application only to 'designated groups', including Aboriginal and Torres Strait Islanders and first and second-generation migrants from non-English speaking countries,[124] and both Acts apply only to the Commonwealth public sector. Positive duties are also imposed by the *Equal*

---

[118] See Belinda Smith, 'Australian Anti-Discrimination Laws – Framework, Developments and Issues' in Hiroya Nakakubo & Takashi Araki (eds), *New Developments in Employment Discrimination Law* (2008) 115-146.
[119] *Disability Discrimination Act 1992* (Cth), s 5.
[120] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) [11.32].
[121] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Sex and Age Discrimination Legislation Amendment Bill 2010* (2010).
[122] *Equal Employment Opportunity Act 1987* (Cth) s 5.
[123] *Public Service Act 1999* (Cth) s 18.
[124] *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s 6.

Opportunity for Women in the Workplace Act 1999 (Cth), which creates positive obligations for employers to develop and implement workplace programs to ensure women have equality of opportunity.[125] These programs must respond to priority issues identified in the analysis and evaluation of the effectiveness of various actions in achieving equal opportunity for women in the employer's workplace,[126] but this has been described as 'a very mild, soft process'.[127] The government has just announced that it is going to strengthen the positive duties under the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

It is at the state level that the most progress has been made towards a positive model of anti-discrimination law. The *Equal Opportunity Act 2010* (Vic), passed in April 2010 and commencing in August 2011, has strengthened and harmonised discrimination laws in Victoria by imposing an express positive obligation upon people and organisations who have a duty not to engage in discrimination, sexual harassment or victimisation to further 'take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible'.[128] The duty imposes a requirement to take measures, and ensure levels of compliance, that are reasonable and proportionate, taking into account the outcome that the duty seeks to achieve (to eliminate discrimination as far as possible), the size of the duty holder, their resources and service priorities and the practicability and cost of compliance.[129] The purpose of this provision is to provide for the taking of positive action to eliminate discrimination, sexual harassment and victimisation.[130] Under the Victorian scheme, in serious cases of systemic or widespread discrimination, the Human Rights Commission in Victoria may take enforcement action, which can include facilitating compliance with the Act by providing educational materials and compliance advice, accepting a formal written undertaking to comply with the Act, or issuing a compliance notice setting out the action required to remedy the breach.[131]

5.1.2 The UK experience

The new UK equality framework has moved further in the direction of a proactive model of equality than the current Australian position. One of the defining trends in UK equality law during the past decade has been the introduction of statutory duties on public authorities to pay 'due regard' to the promotion of equality of opportunity. A positive obligation has been imposed on a wide range of public authorities to have 'due regard' to the need to eliminate unlawful discrimination in relation to race, sex and disability discrimination.[132] The *Equality Act 2010* introduces a single equality duty for the public sector, which harmonises the existing race, disability and gender duties and also covers sexual orientation, age, religion or belief, pregnancy and maternity and gender reassignment.[133] Moreover, the Act includes an additional duty on certain public authorities to have due regard to reducing socio-economic inequality,[134] although it has subsequently been decided that this provision will not be brought into force.

The public sector equality duty

There are two facets of the public sector duty in the *Equality Act 2010*: a general duty and provision for specific duties to be prescribed by secondary legislation. Under s 149(1), public

---

[125] *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss 6 and 8.
[126] Ibid s 8(4).
[127] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, tabled 12 December 2008, 9.7.
[128] *Equal Opportunity Act 2010* (Vic) s15(2).
[129] Ibid s 15(6).
[130] Ibid s14.
[131] Ibid Part 9.
[132] *Race Relations Act 1976* (UK) c 74 s 71; *Sex Discrimination Act 1975* (UK) s 21A(2); Disability *Discrimination Act 1995* (UK) c 50, s 21B(2).
[133] *Equality Act 2010* (UK) s 149.
[134] Ibid s 1.

authorities are required to 'have due regard' when exercising their functions to the need to:

> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.[135]

Section 149(2) limits the application of the duty to 'public authorities', identified in a list within a Schedule to the Act,[136] or to a person who is not a public authority but who exercises 'public functions', where 'public function' is given the same meaning as it has in the *Human Rights Act 1998* (UK).[137]

Section 149 then expands on what it means to have due regard to the need to advance equality of opportunity and foster good relations. Subsection (3) states:

> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Subsection (4) provides that the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled 'include, in particular, steps to take account of disabled persons' disabilities'. Subsection (5) provides:

> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
> (a) tackle prejudice, and
> (b) promote understanding.

Subsection (6) recognises that a positive duty to promote equality requires more than merely formal equality, noting that 'compliance with the duties in this section may involve treating some persons more favourably than others', although it also warns 'that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act'.

The specific duties: transparency

Under s 153 of the *Equality Act 2010*, certain authorities in England, Scotland and Wales have the power to impose specific duties through regulations 'for the purpose of enabling the better performance by the authority of the duty imposed by section 149(1).'[138] These duties may include a requirement that consideration be given to certain matters and may include public procurement duties.[139] Specific duties may provide an opportunity to set out in more detail what a public

[135] *Equality Act 2010* (UK) s 149(1).
[136] Ibid ss 149(2), 150(1).
[137] Ibid ss 149(2), 150(5). See also Government Equalities Office, *Equality Act 2010: The public sector Equality Duty Promoting equality through transparency – A consultation* (2010) [7.3], [7.8].
[138] *Equality Act 2010* (UK) s 153.
[139] Ibid s 155(1)-(2).

authority is required to do to promote equality.

The Coalition government has indicated that its approach to specific duties marks a significant change in approach from that taken to equality duties in previous anti-discrimination legislation, and has focused on increasing transparency with regard to the achievements of public bodies in fulfilling the aims of the equality duty.[140] In its consultation document, the government contextualised the shift in approach to transparency as part of a broader effort to liberate 'public bodies from time-wasting bureaucracy…stripping out unnecessary prescription, processes and top down targets to free up resources for front-line services', as well as returning power to local communities.[141] An emphasis on transparency 'means that public bodies will be judged by citizens on the basis of clear information about the equality results they achieve, rather than on whether they have completed a tick-box list of processes.'[142]

In 2010, the government published its response to the consultation on the specific duties proposed for public bodies in England along with the draft *Equality Act 2010 (Statutory Duties) Regulations 2011*[143] which will shortly be debated in Parliament.[144] A similar draft applying to public bodies in Scotland was laid before the Scottish Parliament.[145] The English Draft Regulations require public authorities to publish, at least annually, sufficient information to demonstrate compliance with section 149(1) of the Act across the functions for which they are subject to the duty imposed by that section.[146] This information must include:[147]

> (a) information on the effect its policies and practices have had on persons who share a relevant protected characteristic who are—
> (i) its employees, or
> (ii) other persons affected by its policies and practices;
> for the purpose of demonstrating the extent to which it has furthered the aims set out in section 149(1) of the Act for those persons.
> (b) evidence of analysis it undertook to establish whether its policies and practices would further, or had furthered, the aims set out in section 149(1) of the Act;
> (c) details of the information it considered when it undertook the analysis referred to in sub-paragraph (b); and
> (d) details of engagement it undertook with persons whom it considered to have an interest in furthering the aims set out in section 149(1) of the Act.

It also requires public authorities subject to the general duty to prepare and publish (a) objectives which it thinks it should achieve in order to further one or more of the aims set out in section 149(1) of the Act; and (b) details of the engagement it undertook when developing its objectives with persons whom it considered to have an interest in furthering the aims set out in section 149(1) of the Act.[148] These objectives must themselves be specific and measurable and must further set out how progress towards these objectives should be measured.[149]

---

[140] Government Equalities Office, *Equality Act 2010: The public sector Equality Duty Promoting equality through transparency – A consultation* (2010) [5.1]ff.
[141] Ibid 1.1-1.2.
[142] Ibid 5.1.
[143] The Draft is available for download at <http://www.equalities.gov.uk/equality_act_2010/public_sector_equality_duty.aspx>.
[144] Minister for Equalities (Lynne Featherstone) (Written Ministerial Statement, 12 January 2011) <http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/110112.htm>.
[145] Draft Regulations have been laid the Scottish Parliament under s 210(2) of the Equality Act 2010, for approval by resolution of the Scottish Parliament. To date it has not been made into a statutory instrument. *Draft Equality Act 2010 (Statutory Duties)* (Scot) *Regulations 2011* <http://www.legislation.gov.uk/sdsi/2011/9780111012215>.
[146] Draft *Equality Act 2010 (Statutory Duties) Regulations 2011* (UK) r 2(1) attached to Government Equalities Office, *Equality Act 2010: The public sector Equality Duty Promoting equality through transparency Summary of responses to the consultation* (2011).
[147] Draft *Equality Act 2010 (Statutory Duties) Regulations 2011* (UK) r 2(4).
[148] Ibid r 3(1).
[149] Ibid.

The contemplated Scottish Draft Regulations go even further. They require certain listed authorities with 150 or more employees to publish annually their organisational employment data in relation to areas in which particularly longstanding inequalities persist–namely on the gender pay gap and the percentage within their workforce of people from ethnic minority groups and disabled people.[150]

A commitment to reduce unnecessary administrative burdens on public services could be taken to require that such duties should be limited to certain larger authorities. However, it should be noted that most public bodies already have the information required to publish such reports. Comparable information across the public sector is crucial to addressing systemic discrimination..

Enforcement

No express sanction is provided in respect of a breach of the public sector equality duty, but a duty imposed on a public authority is enforceable within the framework of administrative review.[151] Section 156 makes clear that a failure in respect of performance of the public sector duty does not confer a cause of action at private law. The Equality and Human Rights Commission UK also has a number of statutory powers that it is able to use in the enforcement of the specific duties,[152] when it identifies a problem with equality results in a particular sector, or wishes to improve performance on a particular equality issue.[153]

Socio-economic duty

The *Equality Act 2010* as passed also contains a duty on public bodies to reduce socio-economic inequalities. Section 1 provides that public bodies must 'when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'. This section only applies to limited public authorities named in s 1(3). However, the government announced on 17 November 2010 that the socio-economic duty will not be brought into force.[154]

5.1.3 Lessons for Australia

The introduction of an equality duty in Australia

The introduction of a single, overarching equality duty on Commonwealth public sector agencies and private sector organisations enforceable by the Human Rights Commission, modelled on the *Equal Opportunity Act 2010* (Vic), should, in our view, be considered in the context of the current reform process in Australia.[155]

An equality duty would simplify and streamline the range of positive obligations that already exist in federal anti-discrimination law. These include not only the explicit duties in the *Disability Discrimination Act* and employment legislation, but also those implicit in the duties not to

---

[150] Government Equalities Office, *Equality Bill: Making it work Policy proposals for specific duties – Policy Statement* (2010) 20.
[151] Explanatory Notes to the *Equality Act 2010* (UK) [521].
[152] Part 9 of the Equality Act deals with Enforcement, but does not affect the enforcement powers of the Equality and Human Rights Commission which are in Part 1 of the *Equality Act 2006*: Explanatory Notes to the *Equality Act 2010* (UK) c 15 [384-385].
[153] See Government Equalities Office, *Equality Act 2010: The public sector Equality Duty Promoting equality through transparency – A consultation* (2010) [6.5].
[154] Government Equalities Office, *FAQs on the Equality Act 2010: Socio-economic Duty* <http://www.equalities.gov.uk/equality_act_2010/faqs_on_the_equality_act_2010/socio-economic_duty.aspx> at 12 March 2011.
[155] Rice, above n 17.

discriminate imposed by all Commonwealth anti-discrimination legislation, as well as the vicarious liability provisions in some of those laws, which provide that an employer may be legally responsible for discrimination and harassment which occurs in the workplace or in connection with a person's employment unless it can be shown that '*all reasonable steps'* have been taken to reduce this liability.[156] These requirements, although ostensibly framed in negative or proscriptive terms, demand positive action by government and private bodies. The lack of an explicit positive duty and guidance as to how to implement it leads to compliance uncertainty; review of compliance with these obligations is only undertaken when a complaint is made. Stating the duty in a positive and explicit way that takes effect before a complaint is made will promote greater and more uniform compliance with equality law. A single, streamlined approach would assist public and private sector bodies to respond to the requirements of equality law more efficiently and effectively before the point of harm.[157]

The limitations of the remedial model of individual complaints are clear. In addition to the post-hoc and patchwork development of anti-discrimination law, there is no enforcement agency ensuring compliance with requirements under Australian equality law. The enforcement of compliance is largely private and limited to victims, as no power is given to the administering agency or other public prosecutor to investigate possible breaches, take action against apparent perpetrators, or even support individual claimants in their actions. Commencing with compulsory, confidential conciliation, beyond which few claims proceed, the process mostly keeps breaches out of the public view, limiting both the educative and deterrent effect of claims. Sanctions are limited to individual compensation, rather than punishment or preventative or corrective orders necessary for general deterrence.[158] Hence, the current model of anti-discrimination legislation does not live up to the stated objectives of each federal anti-discrimination statute which include the normative, public goal of eliminating discrimination.[159] An explicit equality duty applying to both public and private sectors will assist in overcoming the limitations of a complaint-based system. The Human Rights Commission will be able to directly encourage, facilitate and enforce compliance with the obligations under the proposed equality legislation without first receiving a complaint.

Form and content of an equality duty

Accepting that an equality duty is a positive thing, a number of issues arise in relation to the form and content of such a duty, if introduced.

First, a qualified duty that applies solely to enumerated public sector agencies, as was adopted in the *Equality Act 2010*, may not be the appropriate model for Australian law. At a general level the compliance of the private sector is important to ensure uniformity and consistency of equality standards. There was little discussion in the UK about whether the equality duty under the *Equality Act 2010* would operate in the private sphere, although, notably, the independent report in the UK did not limit the proposed positive duty to public authorities.[160] Discussion may have been so limited because previous incarnations of the equality duty had not applied to the private sphere. However, Australia, in introducing an equality duty, is not circumscribed by any such distinction in its legislative history. As Simon Rice has pointed out, there is an established history in Australia of anti-discrimination laws operating in both the public and private spheres which gives support to the uniform application of an equality duty should it be introduced.[161]

---

[156] See *Racial Discrimination Act 1975* (Cth) s 18A, 18E; *Sex Discrimination Act 1984* (Cth) s. 106.
[157] *DLR Consultation Paper,* above n 3, [5.22].
[158] Ibid.
[159] See the *Disability Discrimination Act 1992* (Cth) s 3, *Sex Discrimination Act 1984* (Cth) s 3, and *Age Discrimination Act 2004* (Cth) s 3. See also the preamble to the *Racial Discrimination Act* 1975 (Cth), which states that the Act makes provision for giving effect to the International Convention on the Elimination of all Forms of Racial Discrimination.
[160] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality, A New Framework: Report of the Independent Review of The Enforcement of UK Anti-Discrimination Legislation* (2000) Recommendation 7.
[161] Rice, above n 17.

Furthermore, a distinction between public and private sectors may overly complicate the legislative framework and create potential implementation problems. In particular, certain organisations, such as churches, are not 'public authorities' but do undertake duties of a public nature.[162] It is unclear whether they would be subject to the duty. Moreover, the rules in the *Equality Act 2010* concerning 'public function' cause confusion in cases of private sector organisations contracting with public sector bodies if one must clearly delineate between what may be public and private functions.[163]

Second, one of the key differences between the UK and Victorian equality duty is that the former requires only that public authorities 'have due regard' to the goals of eliminating discrimination, advancing equality of opportunity and fostering good relations, while the latter is a significantly more robust obligation to take 'reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible'.

A principal concern expressed by critics of the UK formulation is that the general duty imposed requires no real positive measures or steps to be taken. It is, therefore, questionable as to whether or not the success of the introduction of this duty can be measured in any meaningful manner. In *R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 concerning an alleged breach of the equivalent duty in the *Race Relations Act*, it was held that the duty to pay 'due regard' was only breached if there was a failure to properly consider whether there was any potential discrimination. In that case, there was no regard at all paid to the potentially racially discriminatory nature of the particular policy challenged. The extent of this duty could be set high or low. The UK Court of Appeal has described the burden of such a duty as follows:[164]

> … there is no statutory duty to carry out a formal impact assessment; … the duty is to have due regard, not to achieve results or to refer in terms to the duty; … due regard does not exclude paying regard to countervailing factors, but is 'the regard that is appropriate in all the circumstances'; … [but more positively] the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, … the duty must be performed with vigour and with an open mind …

As Sandra Fredman noted, if, after considering these matters, the authority adopts precisely the same scheme, it would have done so in compliance with the duty of having due regard to the obligations under the statute.[165] Nor is the duty breached if an authority forms the view on proper grounds that there is no issue of unlawful discrimination which could sensibly be said to arise. In light of how the obligation has been interpreted, it is questionable as to whether imposing a duty simply to have 'due regard' to various matters will actually have the desired effect of advancing equality of opportunity or fostering good relations between groups.

---

[162]See, eg, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

[163] This is particularly problematic in the context of outsourcing, both overseas and within the UK. In the UK context see *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 and *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363. In the overseas context, In the Public Bill Committee on the Bill for *Equality Act 2010* in the House of Commons the Solicitor-General (Vera Baird) said as follows: 'The duty will, of course, only impact on bodies carrying out public functions within Great Britain. The hon. Member for Daventry mentioned outsourcing to India, but back-office services are not a public function in any event, so any worries about that are without foundation. In such cases, we would have to ensure that public bodies used their procurement processes to ensure that anything outsourced abroad was subject to strict contractual terms that required the delivery of equalities, and that would be enforceable on a contractual basis, even though we are talking about things across the sea.': Hansard, HC Public Bill Committee, 15th Sitting, June 30, 2009, col. 550.

[164] *Domb, v London Borough of Hammersmith &Fulham* [2009] EWCA Civ 941, [52] (Rix LJ).

[165] Sandra Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law Journal* 193, 214.

The UK Equality and Human Rights Commission, in its formal response to the government's consultation on the specific duties, agreed with the call for the duty to be reframed in terms requiring a 'public body to take steps to eliminate discrimination and achieve equality, rather than just pay due regard to the need to do so'. It supported a greater focus on an 'action based, goal oriented general duty', noting that 'the public body does not need to achieve the goals immediately, but it must take immediate action to make progress towards the goals.'[166]

While the *Equality Act 2010* is laudable in combining negative provisions with positive duties, we do not support either the formulation of the positive duty in terms of a vague standard of 'having due regard' to certain matters, or the limitation to public sector authorities. In these two respects, the Victorian equality legislation provides a better model.

Third, in order to tackle inequality the legislator must first be able to see it. The *Equality Act 2010*, therefore, requires comprehensive collection of, and public access to, data related to potential discrimination and areas of inequality through the draft regulations on the specific duties involving the public sector. The government recognised in the legislative process leading to the *Equality Act 2010*, however, that collecting and publishing data by public bodies may be not sufficient. The important example of the gender pay gap is illustrative.

It has been claimed that the lack of accessible data from public-sector employers about employees' remuneration hides 'occupational segregation', i.e. the tendency for women to be clustered in a narrow range of jobs in the labour market. As a result, people do not realise their full potential, or are entirely excluded from employment.[167] This makes it difficult to address the pay gap between male and female employees effectively, and wastes talent and skills, often resulting in long-term costs and potentially damaging a country's overall competitiveness.[168]

In order to effectively address discrimination in equal payment and segregation in labour markets, it was held necessary to improve transparency, which in turn depends on encouraging larger employers to publish, in an accessible way, their gender pay gap.[169] Thus s 78 of the *Equality Act 2010* enables public bodies to make regulations requiring private and voluntary sector employers with at least 250 employees in the UK to publish information about the differences in pay between their male and female employees. The regulations may specify, among other things, the form and timing of the publication, which will be no more frequently than annually. The regulations may also specify penalties for non-compliance.[170] The purpose of the provision is to ensure that larger private and voluntary sector employers in the UK publish information on what they pay their male and female employees, so that their gender pay gap is in the public domain.[171]

Recent data shows that larger employers in the UK already collect the relevant data required.[172] Consequently, a statutory obligation to carry out an equal pay review would require only minor expenditure. However, some businesses may yet withhold detailed information available internally on gender equality because of concerns that it does not reflect well on the company and also because they have experienced little demand from the public for more information; they may also not want to be the first in the industry to publish data.[173] Publishing this data should nevertheless be encouraged by anti-discrimination laws. Such improved practice is expected to raise the stock of employers available, leading to improved productivity and better retention of talent. Employers who take these responsibilities seriously may also see an improvement in their

---

166 Equality and Human Rights Commission, *Specific Duties Consultation – Formal Response* (2009) 1.
167 UK Government Equalities Office, *Equality Act Impact Assessment* (2010) 140.(hereinafter '*Equality Impact Assessment*').
168 Ibid.
169 Ibid.
170 Ibid 64.
171 United Kingdom, *Equality Act Explanatory Notes* (2010) s 65. (hereinafter '*Equality Act Explanatory Notes*')
172 *Equality Impact Assessment*, above n 166, 141.
173 Ibid 143.

image to key external stakeholders – investors, clients and potential employees.[174]

Currently, the UK is aiming for employers to regularly publish such information on a voluntary basis until 2013. The power to compel such publication will then be used only if sufficient progress on reporting has not been made by that time.[175]

Another feature to promote transparency in the private sector – although not a positive duty – is s 77 of the *Equality Act 2010*. This provision deals with the problem that some employers impose formal or informal requirements on their employees not to discuss their pay with one another. According to the former British Equal Opportunities Commission, studies show that 22% of employers in the UK imposed secrecy of this kind. The British Equality and Human Rights Commission have since found, in 2009, that 19% of employers they surveyed still do so.[176] This acts as a barrier to transparency about pay and, therefore, reduces the chances (in particular for women) of employees knowing whether they are being paid for the full value of their work.[177]

This issue is now addressed by a provision deeming certain contractual provisions that are designed to ensure secrecy about payments unenforceable. This provision is intended to ensure that there is greater transparency and dialogue within workplaces about pay.[178] Section 77 of the *Equality Act 2010* makes terms of employment, appointment or service that prevent or restrict people from disclosing or seeking to disclose their pay to others, or terms that seek to prevent people from asking colleagues about their pay, unenforceable where the purpose of any disclosure is to find out whether there is a connection between any difference in pay and a protected characteristic.[179] Further, it provides that any action taken against an employee by the employer as a result of conduct protected by this section is treated as victimisation.[180] This mechanism makes it easier to find out whether one is being paid what his or her work is worth and reduces effectively the difficulty in identifying real comparators on which to base an equal pay claim.[181]

The UK Equality and Human Rights Commission expressed its disappointment with the proposed content of the specific duties, which it believed should be focused on demonstrating the achievement of outcomes, rather than mere fulfilment of specific actions.[182] However, increased transparency should be complementary to the broader duty to take proactive steps towards eliminating discrimination. Because systemic discrimination is often not caused by single acts of harassment or individual prejudice, but is a result of a lack of information regarding the particular needs of minorities in our society, publishing the relevant data can raise a society's awareness of structural inequalities. The formulation of an equality duty in Australia should emphasise the concomitant duty on public and private bodies to publish information concerning compliance, including publishing information on the effect its policies and practices have had on persons who share a relevant protected characteristic, and developing and publishing objectives and policies regarding its plans to achieve its equality obligations.

Finally, although the duty in s 1 of the *Equality Act 2010* to 'have due regard to the desirability of exercising [its public functions] in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage' will not be brought into force in the UK, this does not mean that it is not an option for the Australian equality framework. As former Prime Minister Rudd has noted, inequality contributes to 'poorer educational results, lower productivity,

---

[174] Ibid 140.
[175] *Equality Impact Assessment*, above n 170, s 65.
[176] *Equality Impact Assessment*', above n 166*,* 138.
[177] Ibid 136.
[178] *Equality Impact Assessment*, above n 170, s 64.
[179] Ibid.
[180] Ibid.
[181] *Equality Impact Assessment*', above n 166*,* 136.
[182] Equality and Human Rights Commission, *Specific Duties Consultation – Formal Response* (2009) 2.

worse health outcomes, shorter working lives, and lower workforce participation'.[183] Hence the socio-economic dimensions of disadvantage cannot be divorced from a general approach to targeting systemic inequality.[184] The introduction of such a duty will not expose public authorities to excessive liability. It is important to note that under section 3 of the *Equality Act 2010* the socio-economic duty does not entail a right to private action in case of a failure to respect that duty. The major thrust of the duty, as Sandra Fredman has suggested, is 'to ensure that the need to address entrenched inequalities is considered in a systematic way by all government departments and key public bodies.'[185] Departing from the unduly conservative approach taken by the UK will be in accordance with values of substantive equality.

Recommendation 9:

The Attorney-General should consider introducing a positive equality duty on public agencies, and potentially also private and not for profit bodies.

That duty might require bodies to take such proactive steps as are necessary and proportionate to eliminate discrimination, with the aim of achieving the progressive realisation of substantive equality.

That duty might also require public, private and not for profit agencies to be transparent about compliance with obligations under the equality duty.

Recommendation 10:

The Attorney-General should consider introducing a positive duty on public bodies to consider the need to reduce inequalities resulting from socio-economic disadvantage when making decisions of a strategic nature about how to exercise their functions.

[183] Prime Minister Rudd, 'One year on from the crisis: economic and social challenges of Australia' (Sambell Oration address to Brotherhood of St Laurence, Melbourne, 15 October 2009).
[184] Ibid.
[185] Sandra Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto equality agenda' (2010) *European Human Rights Law Review* 290, 295.

5.2 POSITIVE ACTION OR SPECIAL MEASURES

5.2.1 The Australian position

In many jurisdictions, including Australia, and in international conventions on discrimination,[186] allowance is made for 'positive action' or 'special measures' to be taken for the benefit of a particular group to achieve equality of outcome and address structural inequities. A special measure is generally not unlawful discrimination, as distinct from being excepted or exempt conduct. In the words of Fredman the right to equality 'maintains that the State has a duty to act positively to correct the results of discrimination.'[187]

All four Australian federal anti-discrimination statutes permit 'special measures'. However, in all but the *Sex Discrimination Act 1984*, 'special measures' are treated as excepted or exempt conduct, which is unsatisfactory as it has resulted in narrow interpretations by the courts.[188] A second problem is that the language used in each statute is not uniform; each has unique substantive requirements specifying which activities are permissible. In some of the legislation, such as s 45 of the *Disability Discrimination Act*,[189] the key issue when determining whether a particular activity is a special measure is whether it is 'reasonably intended' to achieve a particular result. In other statutes, purpose and intention to achieve a particular result is sufficient, without any element of reasonableness, as in s 7D of the *Sex Discrimination Act,*[190] and s 33 of the *Age Discrimination Act*.[191] Other differences include the extent to which a beneficial purpose may be the sole or dominating purpose of the measure. In the *Racial Discrimination Act*, which provides an exemption for special measures to which paragraph 4 of Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* applies, special measures are limited only to those which are

---

[186] See, eg *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 15 December 1965, 660 UNTS 195, art 1(4) (entered into force 4 January 1969).

[187] Sandra Fredman 'Reversing discrimination' (1997) 113 *Law Quarterly Review* 575.

[188] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999), [6.97].

[189] In which special measures are permitted only if it is 'reasonably intended to':
(a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or
(b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
(i) employment, education, accommodation, clubs or sport; or
(ii) the provision of goods, services, facilities or land; or
(iii) the making available of facilities; or
(iv) the administration of Commonwealth laws and programs; or
(v) their capacity to live independently; or
(c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
(i) employment, education, accommodation, clubs or sport; or
(ii) the provision of goods, services, facilities or land; or
(iii) the making available of facilities; or
(iv) the administration of Commonwealth laws and programs; or
(v) their capacity to live independently.

[190] s 7D(1) of the *Sex Discrimination Act* limits special measures to those 'for the purpose of achieving substantive equality between':
(a) men and women; or
(b) people of different marital status; or
(c) women who are pregnant and people who are not pregnant; or
(d) women who are potentially pregnant and people who are not potentially pregnant

[191] In the *Age Discrimination Act,* positive discrimination under s 33 is only lawful if:
(a) the act provides a bona fide benefit to persons of a particular age; or
(b) the act is intended to meet a need that arises out of the age of persons of a particular age; or
(c) the act is intended to reduce a disadvantage experienced by people of a particular age.

> taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms

In other statutes, this is not a requirement, either expressly (see s 7D(3) of the *Sex Discrimination Act*) or impliedly (s 33 of the *Age Discrimination Act*). These differences add to uncertainty about the precise nature of the obligations imposed on businesses and public bodies.

5.2.2 The UK experience

In the UK, special measures are referred to as 'positive action' measures, which similarly permit targeted measures to prevent or compensate for disadvantage or to meet special needs arising from membership of a protected group. In the *Equality Act 2010*, the validity of positive actions are measured by their reasonableness and proportionality to the aim of redressing disadvantage or encouraging increased participation of persons with a protected characteristic in an activity. Section 158 provides:

> 158 Positive action: general
>
> (1) This section applies if a person (P) reasonably thinks that—
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
> (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
> (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
>
> (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
> (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
> (b) meeting those needs, or
> (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.
>
> (3) Regulations may specify action, or descriptions of action, to which subsection (2) does not apply.
>
> ...
>
> (6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.

5.2.3 Lessons for Australia

The various provisions in existing anti-discrimination law on special measures need to be consolidated in any proposed legislation. Firstly, the consolidated legislation should contain a provision clearly stating that special measures do not fall within the behaviour prohibited by the legislation. However, some of the limitations in extant anti-discrimination law on special measures should be streamlined. There is no reason why the 'sole purpose' test in the *Racial Discrimination Act* ought to be maintained. A more reasonable limitation is that contained in s 12 of the *Equal Opportunity Act 2010* (Vic), and s 158 of the *Equality Act 2010*, which require that special measures should be justifiable as required to remedy a particular disadvantage for persons who share a protected characteristic, and reasonable and proportionate to the advantage which they are designed to address.

Recommendation 11:

Any proposed Australian equality legislation should streamline extant provisions on 'special measures'.

Where special measures are allowed, they should be justifiable as required to remedy a particular disadvantage for persons who share a protected characteristic, and be reasonable and proportionate to the advantage which they are designed to address.

6. COMPLAINT MECHANISMS

6.1 THE AUSTRALIAN POSITION

The present enforcement system does not contemplate the direct access of complainants to the courts, but instead consists of a two-stage model. Though there are some variances at the state level, the federal model requires the lodgment of a complaint with the Australian Human Rights Commission prior to the commencement of legal proceedings.

6.1.1 Federal legislation

The claims for redress under the four existing federal anti-discrimination statutes are the responsibility of the Australian Human Rights Commission and are governed by its establishing Act, the *Australian Human Rights Commission Act 1986*. The two-stage process of the resolution of complaints is delineated in Part IIB of the Act, though Part IIC provides specific procedures for certain categories of complaints.[192] Both stages of the complaint process will be briefly outlined.

In order for the Australian Human Rights Commission to discharge its conciliatory function, a complaint must be made under section 46P within twelve months of the allegedly unlawful discrimination taking place.[193] A complaint may be made by a person or persons 'aggrieved by the alleged unlawful discrimination' on their own behalf, or on the behalf of others in certain circumstances.[194] The subject-matter of a complaint may encompass allegedly unlawfully discriminatory acts carried out by or on behalf of the Commonwealth or a Commonwealth authority, or done under Commonwealth legislation.[195] Once a complaint is lodged, the President of the Australian Human Rights Commission is obliged to inquire into the complaint and attempt to conciliate it,[196] though he or she may discontinue an investigation if the complaint has been settled or resolved, or the complainant does not want the inquiry to occur.[197] The President has the power to terminate the complaint on numerous grounds, including where it appears that the acts or omissions in question do not constitute unlawful discrimination,[198] as well as to require the parties to attend a compulsory conference to facilitate the handling of the complaint.[199]

Once a complaint has been terminated and the relevant persons have received notification of the termination from the President, the second stage of the complaints process may be commenced by the complainant. Any 'affected person in relation to the complaint'[200] may lodge an application against one or more of the respondents to the terminated complaint in either the

---

[192] For the referral of discriminatory industrial instruments to Fair Work Australia, see s 46PW; for the referral of discriminatory determinations to the Remuneration Tribunal, see s 46PX; for the referral of discriminatory determinations to the Defence Force Remuneration Tribunal, see s 46PY.
[193] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).
[194] See, *inter alia*, *Australian Human Rights Commission Act 1986* (Cth) ss 46P(2), 46PB(1).
[195] For further explanation, see the cumulative operation of the definitions of 'act', 'authority', 'enactment', 'Commonwealth enactment' and 'Territory' in s 3 of the Act. An act will be considered to amount to unlawful discrimination if it constitutes an act, omission, conduct or practice that is unlawful pursuant to the nominated parts of the relevant Act, pursuant to s 3 of the Act. The relevant parts of the Federal Acts are as follows: Part 4 and Division 2, Part 5 of the *Age Discrimination Act 2004* (Cth) (other than s 52); Part 2 of the *Disability Discrimination Act 1992* (Cth); Part II or IIA and s27(2) of the *Racial Discrimination Act 1975* (Cth); and Part II and s 94 of the *Sex Discrimination Act 1984* (Cth).
[196] *Australian Human Rights Commission Act 1986* (Cth) s 46PF.
[197] Ibid s 46PF(5).
[198] Ibid s 46PH(1)(a).
[199] Ibid s 46PJ.
[200] 'Affected person' is defined in s3 of the Act as follows: '*affected person*, in relation to a complaint, means a person on whose behalf the complaint was lodged'.

Federal Court or the Federal Magistrates Court.[201] It is also possible to make a representative claim in the Federal Court[202] though this procedure has been seldom used in relation to alleged violations of federal anti-discrimination legislation. In terms of the subject of the claim, the unlawful discrimination alleged in the original complaint must effectively mirror the unlawful discrimination alleged in the application to the Court, both in terms of the facts underlying it and the type of discrimination alleged.[203] The Court then has the power to make a range of orders if it finds unlawful discrimination to have been occasioned by the respondent, including the issuance of a declaration of right.[204]

6.1.2 State legislation

Each state and territory has anti-discrimination legislation that provides for specific complaint procedures.[205] In essence, the Acts generally allow a person subject to a contravention of the anti-discrimination standards described in the respective Act, or their agent, to make a complaint to the head of the relevant statutory body, in a manner similar to procedures provided for in federal legislation.[206] While most of the Acts require recourse to conciliation where the Commissioner deems it appropriate,[207] they also provide for the referral of the complaint to a specialised tribunal if it has not been successfully resolved.[208] Most Acts also contemplate representative complaints.[209] It should be noted, however, that the recent Victorian legislation is at variance with the federal model and provides for direct access to the courts.[210]

In terms of the concurrent operation of state and territory legislation and the federal legislation, it should be noted that the *Australian Human Rights Commission Act 1986* is not intended to exclude state or territory legislation capable of operating concurrently with it. If an act or omission is considered to constitute an offence against state or territory law and the Act simultaneously, a person may be prosecuted and convicted under either law.[211]

6.2 THE UK EXPERIENCE

The complaints model existing subsequent to the passage of the *Equality Act 2010* is limited to individual complaints. Unlike the Australian enforcement system, it allows complainants direct access to the courts in certain circumstances. It, too, features a statutory body, the Equality and Human Rights Commission, which is empowered in respect of enforcement. Although the 2009-2010 reforms sought to consolidate UK anti-discrimination legislation, the *Equality Act 2006* still exists alongside its 2010 counterpart, and it contains provisions relevant to the question of enforcement. Prior to addressing the content of complaint mechanisms in the UK, their relevance to the UK reform process will be discussed.

---

[201] *Australian Human Rights Commission Act 1986* (Cth) s 46PO.
[202] *Federal Court of Australia Act 1976* (Cth) s 33C(1). See Part IVA more broadly for procedure in representative proceedings.
[203] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(3).
[204] Ibid s 46PO(4).
[205] *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT).
[206] See, eg, *Anti-Discrimination Act 1977* (NSW) ss 87A, 87B; *Anti-Discrimination Act 1991* (Qld), s 134.
[207] See, eg, *Anti-Discrimination Act 1977* (NSW) s 91A; *Anti-Discrimination Act 1991* (Qld) ss 158-164AA; cf *Equal Opportunity Act 2010* (Vic) s 122.
[208] See, eg, *Anti-Discrimination Act 1977* (NSW) s 93A; *Anti-Discrimination Act 1991* (Qld) s 164A; *Equal Opportunity Act 2010* (Vic) s 123.
[209] See, eg, *Anti-Discrimination Act 1977* (NSW) s 87C; *Anti-Discrimination Act 1991* (Qld) ss 146-152; *Equal Opportunity Act 2010* (Vic) ss 114, 124.
[210] *Equal Opportunity Act 2010* (Vic), s 122.
[211] *Australian Human Rights Commission Act 1986* (Cth) s 4.

6.2.1 Equality reform process

Reform of complaint mechanisms was not the focus of the reform proposals considered in 2009-2010. Although the *Equality Bill 2009* was tabled 'to harmonise discrimination law, and to strengthen the law to support progress on equality',[212] this was done primarily through the strengthening of substantive rights, rather than enforcement mechanisms. This is despite the fact that several suggestions for reform of the existing complaints mechanisms, including the conferral of responsibility on the Commission for Equality and Human Rights (now the Equality and Human Rights Commission) to monitor compliance and oversee enforcement, were made.[213] In its response to the Consultation, the government indicated that it was unwilling to adopt several suggested proposals, including the introduction of equality tribunals, the designation of specific courts for discrimination cases and the introduction of representative claims.[214] Given its potential relevance to the Australian consolidation, the history of this latter proposal warrants further elucidation.

A number of respondents to the consultation on the *Equality Bill 2009* called for collective redress mechanisms to be established in employment tribunals,[215] although the Discrimination Law Review itself did not support the introduction of representative actions.[216] In fact, as early as 2000, the Hepple Report had recommended that a Commission be empowered to commence proceedings itself, or jointly with complainants, where there is a common question of fact or law affecting several individuals.[217] Being of the view that representative actions have 'the possibility of ensuring swifter justice for litigants and employers alike',[218] the Joint Committee on Human Rights approached the Solicitor-General regarding the potential for the inclusion of representative actions in the Bill. Given the Minister of Justice's focus on the issue at that time and several practical concerns that the Solicitor-General had with the practical operation of representative claims, she indicated that an amendment to the Bill could be tabled at the conclusion of the Minister's Consultation. The Ministry of Justice's July 2009 response to the Civil Justice Council's Report, whilst rejecting the idea of a generic right to representative actions, suggested that such actions could be introduced in certain 'sectors'.[219] The government ultimately decided not to make any provision for representative actions in the Bill, but vowed to continue consultation with a view to future reform, as suggested by the Minister of Justice.[220]

6.2.3 Individual complaints under the Equality Act 2010

Part 9 of the *Equality Act 2010* deals with the enforcement of the anti-discrimination standards set out by the Act and largely reflects the preexisting position.[221] In essence, this Part was 'designed to replicate the effect of provisions in previous legislation'[222] and contemplates claims being made in two forums: county courts (or by the sheriff in Scotland) and employment tribunals. Indeed, the main changes relate to the power to transfer cases between the county courts and employment tribunals and the conferral of power on employment tribunals to issue

---

[212] House of Commons, *Explanatory Notes to the Equality Bill [No 5]* (2009) [10]; United Kingdom, *Equality Act Explanatory Notes* (2010) [10].
[213] The Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review*, (2007) 121.
[214] *Government response to DLR Consultation,* above n 7, 70-71.
[215] House of Commons Library, *Equality Bill Research Paper 09/42*, (2009) 86.
[216] *DLR Consultation Paper,* above n 3 [7.30].
[217] Bob Hepple QC, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, (2000) Recommendation 44, 96.
[218] Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, House of Lords Paper No. 169, House of Commons Paper No. 736, Session 2008-09 (2009) 84.
[219] Ministry of Justice, *The Government's Response to the Civil Justice Council's Report: Improving Access to Justice Through Collective Actions* (2009) [9-13].
[220] *Government response to DLR Consultation,* above n 7, 70, 82.
[221] John Wadham, Anthony Robinson, David Ruebain and Susie Uppal, *Blackstone's Guide to the* Equality Act 2010 (2010), 189.
[222] United Kingdom, *Equality Act Explanatory Notes* (2010) [377], [380], [401], [412], [417] and [450].

recommendations.[223] It attempts to cover the field on enforcement, allowing proceedings only to be brought in accordance with it.[224] However, it permits the continuation of enforcement proceedings established under Part 1 of the *Equality Act 2006*, which deals with the powers of the Equality and Human Rights Commission, as well as claims for judicial review, certain immigration-related proceedings, and applications to the supervisory jurisdiction of the Court of Session in Scotland.[225] Proceedings for offences under the Act also fall outside the scope of Part 9.[226]

As to the division of claims between the county court (or sheriff) and the employment tribunal, the former deals with contraventions of Parts of the Act relating to services and public functions, premises, education and associations.[227] Unsurprisingly, an employment tribunal has jurisdiction to deal with contraventions of Part 5 (work). Interestingly, it also has jurisdiction to deal with complaints concerning alleged breaches of an equality clause or rule, which are encompassed in the words 'contravention of the Act'[228] and relate to provisions such as the sex equality clause and rules featured in sections 66 to 68. However, the enforcement of certain contraventions is reserved to the Equality and Human Rights Commission.[229] Importantly, the public sector equality duty does not fall within the scope of Part 9.[230] It is clearly stated in section 156 of the Act that '[a] failure in respect of a performance of a duty imposed by or under this Chapter does not confer a cause of action at private law'. This is also the case for the public sector duty for socio-economic equalities, though it is now unlikely that this duty will be brought into effect.[231]

In terms of the powers of these bodies in dealing with complaints, a county court (or sheriff) has powers to grant a wide range of remedies that could be ordered by the High Court (or Court of Session) in a claim for judicial review or proceedings in tort (or for reparation).[232] An employment tribunal, on the other hand, has powers to make a declaration as to the rights of the parties, order compensation and make an appropriate recommendation.[233] The courts and tribunals also enjoy the ability to refer proceedings to each other as appropriate.[234] A claimant must also be mindful of the fact that claims must be made to the county court (or sheriff) within six months, whereas claims to the employment tribunal must generally be made within three months, with some exceptions.[235]

6.2.3 Individual complaints under the Equality Act 2006

As noted above, the enforcement mechanisms presided over by the Equality and Human Rights Commission are still operational. Aside from the Equality and Human Rights Commission's broad functions and powers designed to promote equality and human rights, including its function to monitor the effectiveness of equality enactments and its ability to conduct inquiries, issue codes of practice and publish information,[236] the Equality and Human Rights Commission has a specific complaint process. It is empowered to investigate a person for the suspected

---

[223] John Wadham, Anthony Robinson, David Ruebain and Susie Uppal, *Blackstone's Guide to the* Equality Act 2010 (2010), 189.
[224] *Equality Act 2010* (UK) s 113(1). See separate procedures for education and immigration disputes.
[225] Ibid s 113(2)-(3).
[226] Ibid s 113(7).
[227] Ibid s 114(1). See Parts 3, 4, 6 and 7 of the Act.
[228] Ibid s 113(5).
[229] See, eg, Ibid s 60(2) (Enquiries about disability and health).
[230] Ibid ss 149, 153, 154, 156.
[231] Ibid ss 1, 3.
[232] Ibid s 119(2)-(3).
[233] Ibid ss 124(2), 132(2).
[234] Ibid ss 122, 128, 140.
[235] Ibid, ss 118, 123, 129.
[236] *Equality Act 2006* (UK) ss 11, 13, 16.

commission of 'an unlawful act',[237] that is, acts or omissions contrary to the provisions of the *Equality Act 2010*.[238] It can require a person to prepare an action plan,[239] enter into an undertaking agreement with the Equality and Human Rights Commission,[240] and prevent the likely commission of unlawful acts by injunction.[241] It is empowered to make arrangements for the conciliation of disputes in respect of which proceedings have been or could be determined under section 114 of the *Equality Act 2010*.[242] It also has the capacity to institute or intervene in legal proceedings which are related to a matter in connection with which the Equality and Human Rights Commission has a function.[243]

Importantly, the Equality and Human Rights Commission is empowered to assess the compliance of persons with their duties, including the public sector equality duty under sections 149, 153 and 154 of the *Equality Act 2010* (although not the public sector duty for socio-economic inequalities), and issue compliance notices requiring the person to comply with the duty and report to the Equality and Human Rights Commission.[244] It must publish a report following an inquiry, investigation or assessment, and also has the discretion to make recommendations, which may be addressed to any class of person.[245] If the EHRC considers that a person has failed or is likely to fail to comply with its notice, it may apply to a county court (or sheriff) for an order for compliance.[246] A person may be deemed to have committed an offence for failing to comply with a notice or a court order.[247]

6.3 LESSONS FOR AUSTRALIA

Although the modification of the complaints system was not the focus of the 2009-2010 reforms, the UK model remains valuable for the Australian legislative consolidation as an example of the successful enforcement of equality clauses in a comparable jurisdiction. The main lesson to be taken from the UK complaints mechanism is its continued provision for direct access of complainants to the courts and specialised tribunals. The way in which the UK system allows the Equality and Human Rights Commission to support discrimination-related litigation through conciliation, as well as through direct intervention in and the institution of proceedings could also be instructive in conceiving of the Australian Human Rights Commission's role in a new Australian anti-discrimination framework. The Equality and Human Rights Commission prominent function in relation to monitoring compliance with the public sector equality duty also offers a sensible means by which to secure the compliance of public bodies, if an equivalent duty were imposed in Australia. Whilst a direct transplant of the UK complaints model would be clearly ineffective given the different legal and institutional frameworks, the level of integration between the UK courts and the Equality and Human Rights Commission, as well as the complementarity of their respective complaints procedures, should be mirrored in the Australian consolidation. The reformed UK enforcement system represents an achievable and measured method of enhancing complainants' ability to seek redress in a manner which is largely compatible with the present Australian framework and the operational capacity of the Australian Human Rights Commission.

---

[237] Ibid s 20.
[238] Ibid s 34; *Equality Act 2010* (UK) sch 26 – Amendments, cl 21.
[239] Ibid s 22.
[240] Ibid s 23.
[241] Ibid s 24.
[242] Ibid sch 26 – Amendments, cl 15 and 16.
[243] Ibid s 30.
[244] Ibid ss 31-32; *Equality Act 2010* (UK) sch 26 – Amendments, cl 18-19.
[245] *Equality Act 2006*, sch 2, cl 16.
[246] Ibid sch 2, cl 12.
[247] Ibid sch 2, cl 13.

Recommendation 12:

The Attorney-General should consider providing for the direct access of complainants to the courts for the litigation of individual and representative complaints, in a manner similar to the *Equal Opportunity Act 2010* (Vic).

Recommendation 13:

The Attorney-General should consider conferring on the Australian Human Rights Commission the right to intervene in relevant legal proceedings and institute representative complaints, in addition to its present conciliatory and investigative functions. It should also consider conferring on the Australian Human Rights Commission greater powers for monitoring compliance if a public sector equality duty is introduced.

7. EXCEPTIONS AND EXEMPTIONS

7.1 THE AUSTRALIAN POSITION

Each of Australia's federal anti-discrimination statutes prohibits unequal treatment of individuals on the basis of protected characteristics, yet permits differentiation on these grounds in limited instances. These instances of permissive discrimination vary according to the manner in which a certain group or class of individuals is treated differently. Generally, policies of indirect discrimination, which are seemingly neutral in their terms, but disadvantage members of certain demographics, may be legal if they meet general exceptions or exemptions identified in the applicable statute. In contrast, policies that categorically treat one or more groups differently from others—for example, age restrictions for certain types of welfare benefits—require an explicit statutory or administrative exemption.

Each of the federal anti-discrimination statutes contains several subject-specific exceptions or exemptions which exclude the operation of non-discrimination requirements in particular contexts. The *Sex Discrimination Act* is illustrative. The Act outlines with reasonable clarity the specific instances in which an exemption may be relied upon. For the most part, these seem to be logically reasoned and proportionate in effect. For example, in the ascertainment of whether it is a 'genuine occupational qualification'[248] of a particular job that the employee be of a particular sex, it is not lawful to discriminate, in the abstract, on the grounds that only one gender possesses the 'particular physical attributes' required for the occupation. Instead, it would only be lawful to discriminate on such grounds where the 'particular physical attributes' are gender specific *and* where they are not 'attributes of strength or stamina.' [249] This limitation pre-empts the inevitable accusation that only men are strong enough to perform certain roles. Similarly, the exemption in s 30(2)(f) (engaged when the potential-employee would be required to live on premises provided by the employer in circumstances where the premises are not equipped with separate sleeping or sanitary spaces for persons of opposite sex) may only by relied upon where the premises are already occupied by persons of gender opposite to the would-be employee and where it would be 'unreasonable' to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex.[250]

However, some of these provisions are open to question. A particular example, the subject of recent debate in the Australian context, is that by which religious organisations are free to discriminate on gender-based grounds. For example, s 37 allows religious organizations to discriminate on the basis of sex not only in the ordination or appointment of the clergy, but also in the context of 'training or educati[ng] persons seeking ordination or appointment as priests, ministers of religion', as well as 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion.' There is increasing debate both in the Australia context and more widely about whether discrimination which is clearly unlawful should continue to be tolerated within religious organisations and practices. Existing exceptions or exemptions should be reviewed in light of the international human rights law by which Australia is bound, which among other things provides for limitations to religious freedom where necessary to protect 'the fundamental rights and freedoms of others'.[251]

---

[248] *Sex Discrimination Act 1984* (Cth) s 30 (1), (2) (a).
[249] Ibid.
[250] *Sex Discrimination Act 1984* (Cth), s 30 (2) (f) (iii).
[251] *ICCPR*, article 18.

7.2 THE UK EXPERIENCE

The duties of non-discrimination in the *Equality Act 2010* are also not absolute. In a similar manner to Australian anti-discrimination legislation, the enactment is structured to provide a number of exceptions. We focus here on the exceptions to direct and indirect discrimination.

Where specified, it is lawful to directly discriminate on the basis of a particular characteristic. To that end, Parts 3-8 of the *Equality Act 2010* contain various sections explaining which protected characteristics are not to be regarded as protected for the purposes of the activities and conduct regulated by the particular Part or Chapter of that Part.[252] For example, it is not unlawful to discriminate (directly or indirectly) in the provision of services on the basis of a customer's age, but only in relation to 'persons who have not attained the age of 18';[253] or to discriminate as regards the disposal of premises on the basis of a person's status as married or in a civil partnership;[254] or to harass a member or would-be member of an organised association on the basis of that person's religion, belief or lack thereof, or his sexual orientation.[255]

Concerns have been raised that many of exceptions contained in the *Equality Act 2010* are over-broad. For example, the UK Parliamentary Joint Committee on Human Rights has criticised the blanket freedom of service providers to discriminate against children no matter how extensively or maliciously. It reported that:

> The total absence of protection against age discrimination for those under 18 in service provision…means that children who are subject to unjustified discrimination are left with little or no legal protection. This may prevent children enjoying full protection of their rights as set out in the UN Convention on the Rights of the Child.[256]

The main reason why this provision and others like it are troubling is that they operate in a uniform fashion, and without appropriate limitations. Although in many instances, it is appropriate to treat children and adults differently in order to supply tailored services to persons under the age of 18 (e.g. healthcare), these distinctions should not include a blanket authorisation to discriminate on the grounds that a person is under 18, even in the context of healthcare services. The exclusion of such a broad sector of the population has profound and perhaps even deadly effects. In a survey conducted by Young Equals, a consortium of charities in the United Kingdom that are dedicated to the needs of children, respondents reported that their calls to emergency services were not taken seriously due to their age.[257]

---

[252] See, e.g. *Equality Act 2010* (UK) ss 28, 32, 84 .

[253] *Equality Act 2010* (UK) s 29 (1), (2), as read with s 28 (1) (a); at the time of writing (16/2/2011), age is not a protected characteristic whatsoever in relation to the provision of services, as the protection of age has not been brought into force: Equality Act 2010 (Commencement) Order SI 2010/2317, article 2 (3). The discussion rests on the hypothetical premise that the protection of those over the age of 18 will be brought into force at a future date.

[254] *Equality Act 2010* (UK) s 33 (1), as read with s 32 (1) (b).

[255] *Equality Act 2010* (UK) s 101 (4), as read with s 103 (2); at the time of writing (16/2/2011), age is effectively also not a protected characteristic in relation to associations, as the protection of age has not been brought into force: Equality Act 2010 (Commencement) Order SI 2010/2317, article 7 (1).

[256] Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, House of Lords Paper No. 169, House of Commons Paper No. 736, Session 2008-09 (2009) [44]. It is to be noted that public authorities for the purpose of s 6 of the *Human Rights Act 1998 (UK)* may not discriminate against children in relation to the enjoyment of their 'Convention rights' (as set out in Schedule 1 to that Act), except in so far as any interferences with Convention rights are lawful in that they pursue a legitimate aim and are proportionate to that aim, or in that they have been sanctioned by primary legislation.

[257] Young Equals, *The Unequal Equality Bill: Evidence of Unfair Age Discrimination Against Children and Young People* (2010) <http://www.byc.org.uk/asset_store/documents/resources__pbcr__parliamentary_evidence__the_unequal_equality_bill__24_february_2010.pdf> at 10 March 2011.

7.3 LESSONS FOR AUSTRALIA

There is a concern that the *Equality Act 2010* has undermined its own aims by the inclusion of blanket and unprincipled exceptions from duties of non-discrimination. Conduct which would otherwise be direct or indirect discrimination but which fall under their protection can be committed with general impunity. The very idea of anti-discrimination law is that discriminatory treatment must be justified by logical and sound rationale. The *Equality Act 2010* has too many examples (some of which have been discussed) of blanket exemptions which do not appear to reflect this ideal. Their effect has been to endorse a 'hierarchy of protected characteristics' when there are no principled reasons justifying the prioritised status given to some characteristics over others.

It is important that any exceptions in Australia's proposed equality are principled, and justified on objective and reasonable grounds. Australia's obligations under international human rights law provide an appropriate framework to consider such exceptions. There are many situations where it *is* necessary and appropriate to differentiate between different groups or citizens. It follows that not every instance of differential treatment will amount to discrimination. Something more is required to translate that differentiation into discrimination – it remains necessary to distinguish between 'invidious discrimination and appropriate differentiation'.[258] Christopher McCrudden distills a requirement that inequality be 'properly justified, accordingly to consistently applied, persuasive and acceptable criteria'.[259] This requirement has manifested itself in various admonitions in domestic, regional and international treaties. For example,[260] the Human Rights Committee has interpreted Article 26 of the *International Covenant on Civil and Political Rights* to be subject to the following proviso: '…the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[261]

Recommendation 14:

Exceptions and exemptions contained in any proposed Australian equality legislation should be reasonable and objective, pursue a legitimate aim and be framed in a manner proportionate to achieving that aim. Throughout the consultation process the Attorney-General should explicitly the rationale underpinning any exception, and the evidence that rationale is based on.

Existing exceptions and exemptions should be reconsidered in light of Australia's human rights obligations.

---

[258] Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 30.

[259] Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (2nd ed, 2009) 523.

[260] For example, the Human Rights Committee has interpreted Article 26 of the ICCPR to be subject to the following proviso: '…the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.' *General Comment No 18: Non-Discrimination* in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN CCPR, 37th sess, [13] UN Doc HRI/GEN/1/Rev.7 (1989).

[261] Ibid.