Association of Consultants in Access, Australia (ACAA)

Submission on the Consolidation of Commonwealth Discrimination Law

January 19th 2011

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1 Introduction

The Association of Consultants in Access, Australia Inc (ACAA) is a national membership-based professional association for people working to achieve accessibility of the built environment for people with a disability. It is the peak national body for access consultancy in Australia and a major partner in advancing equity of built environmental accessibility for people with a disability As the main professional association of people who work with the DDA as practitioners in the built environment, ACAA members work to implement human rights objectives of the Disability Discrimination Act (DDA) in Australia.

Since the DDA's introduction in 1992, there has been marked progress across many areas of disability discrimination. There has also been momentous technological, medical and social change which continues to change the disability demographic within the community. More people are living longer and with increased chronic health and behavioural issues which add to the momentum to create flexible and effective legislated instruments to protect their human rights.

ACAA welcomes the Attorney General's intention to consolidate existing Commonwealth anti-discrimination law into a single Act as a key component of Australia's Human Rights Framework and to take part in this consultation based on the Discussion Paper issued in September 2011.

However, as noted section 9 in the Australian Human Rights Commission Submission to the Attorney-General's Department (6 December 2011)[1], discrimination against people covered by human rights legislation remains prevalent and that (among other measure) improvements are required both in the substance of discrimination laws and in associated mechanisms for achieving the objective of the law in promoting equality.

As one of the Discussion Paper's 'protected attributes', disability crosses all categories of sex, race, and age, applying across and within all the potential 'protected attributes'. The case for legal consolidation is strong, in particular that citizens with more than one protected attribute do not have to categorise themselves in one or more sections of discrimination as a new consolidated Act would embrace all these human rights in Australia.

2 Consolidation of Anti-Discrimination Laws

ACAA supports and welcomes the Attorney General's intention that the proposed consolidation will not weaken, but strengthen anti-discrimination law by streamlining and simplifying many matters. ACAA agrees with earlier research conducted by the Productivity Commission that the economic and social benefits of compliance with the DDA were likely to be very large. It estimated the benefits were likely to substantially exceed costs of

[1] http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_ConsolidationofCommonwealthAnti-DiscriminationLaws

compliance (with economic benefits estimated as exceeding $1billion per annum in 2004 dollars)[2]. It is imperative that the proposed consolidation not lose the momentum of change.

In particular, ACAA agrees with the win-win approach from the Discussion Paper (p.6): *That enhanced protection of human rights and better outcomes for businesses should not be conflicting objectives in considering the development of a consolidated set of anti-discrimination laws.*

RECOMMENDATION 1: That federal anti-discrimination law is consolidated to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community.

Naming a consolidated Act

The Attorney General's Discussion Paper has stated that there should be no reduction in the level of protection currently provided in the proposed consolidation. This is essential if the term 'DDA', which become shorthand in the building industry for planning and building more equitably is diluted. It takes a long time to build up awareness and the culture of the planning, building and construction industry is oriented to known laws, standards and obligations. A wider human rights lens may obfuscate the need for continuing and strengthened efforts towards compliance.

RECOMMENDATION 2: That the name of the new Act not move far from the 'DA' endings currently used by the Acts under consideration, to maintain as much cohesion as possible in the transition period.

Retaining specialist Human Rights Commissioners

The disability community and associated professional organisations have been well-served by the presence of the Disability Discrimination Commissioner role in the Australian Human Rights Commission. A consequence of the consolidation could be to erase this specialist role and that of the other Discrimination Commissioners. It is vital that in the merger into one consolidated act, the role, functions and public visibility of the specialist Commissioners be maintained. Each serve communities and industries with real, complex and varied needs which require specialist attention and pro-active engagement to work towards Australia's human rights obligations internationally and nationally.

RECOMMENDATION 3: Retain the role, functions and resourcing for offices of the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, and the Age Discrimination Commissioner under the proposed consolidation.

[2] http://www.pc.gov.au/__data/assets/word_doc/0020/94007/11-chapter06.doc.

3 Discrimination

Clearer consolidated legislation will help employers, property owners, services, facilities, clubs and occupiers to ensure compliance with the legislation. A complaints-based system is part of the checks and balances in democracy, but for many people with protected attributes, the idea of being involved in legal processes is terrifying and many self-select out because of the many factors that inhibit them from exercising their rights under anti-discrimination law.

The Australian Human Rights Commission backed by legislation offers hope and real assistance to many to lay complaints in what is often felt to be an unequal power relationship. ACAA would like to see a simplified consolidated law that helps all people understand their rights and feel confident that there are clear signals that compliance is required by all members of the society.

Other submissions have covered the detailed arguments about the simplification of the concepts of direct and indirect discrimination across the protected attributes of the Discussion Paper. ACAA would also favour a streamlining of these concepts to include a unified test for discrimination as in the ACT Discrimination Act 1991 as proposed by the Australian Human Rights Commission.

For people with disability who experience discrimination, a unified definition rather than 'direct' and 'indirect discrimination' will be easier to understand and to use. ACAA agrees that this unified test should also extend to people who use any form of assistive device, are accompanied by an associate or companion and people who use certified assistance animals.

Assistance animals are increasingly being used by people with behavioural and neurological impairments which are covered under the DDA but there is also a wide use of non-certified animals as 'friends' or companions to people in supported accommodation. It is important to be clear as to the intent of this inclusion.

RECOMMENDATION 4: That there be a unified test of discrimination, based on combined approaches of best practice as recommended by the Australian Human Rights Commission and that should extend to people who use any form of assistive device, are accompanying as an associate or companion and people who use certified assistance animals.

Comparator test

The current comparator test used in the DDA and other acts is unhelpful and complex. In itself, it also tends to discriminate against people with intellectual disabilities, for whom providing evidence and testifying is obviously difficult. International human rights legislation is about valuing difference, not comparing with a generic 'normal' individual, reinforcing the preconceptions of deficit which underlie such a procedure. Many ACAA members have experienced the difficulty of taking legitimate DDA complaints forward because of the rigidity and uncertainty of outcome with the comparator test.

RECOMMENDATION 5: That the comparator test be abolished in the consolidated Commonwealth discrimination law so that the new law required only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute/s, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply.

Onus of proof

One of the chief complaints in the disability community about the DDA and its ability to protect people against discrimination is the area of burden of proof which is felt to fall unfairly on the complainant. Current Commonwealth, State and Territory direct discrimination laws tends to place the onus of proving that a respondent has been treated less favourably by the complainant fully onto the complainant. This is shifted slightly off the complainant in a number of Australian anti-discrimination laws in cases where a case for indirect discrimination has been established.

This is out of step with progress in other Western countries, in particular the UK, however with the amendment to the DDA in 2010, human rights legislation in Australia is now moving towards the UK, where the burden of proof shifts to the respondent once the complainant has established a *prima facie* case of discrimination. In terms of releasing efficiency, removing the existing burden of proof requirements would build confidence in people the laws are meant to protect and help move the society more quickly to establishing equitable practices, facilities and services.

The Discussion Paper states that the best model of how this would operate is seen in the Fair Work Act. Both this Act and the UK model which have been in operation for some time do not appear to have created any significant problems in practice. The practical and symbolic value of overturning this provision of the DDA would be very welcomed by those who care to implement the objectives of consolidated anti-discrimination legislation.

RECOMMENDATION 6: ACAA supports the Australian Human Rights submission Recommendation 14: That a consolidated Commonwealth equality law provide for a shifting onus of proof on elements regarding causation and justification of *prima facie* discriminatory conduct, to confirm that the obligation to produce evidence sits with the party best placed to produce that evidence.

Reasonable adjustments

One of the many strengths of the DDA which ACAA believes has been responsible for substantial progress and could be extended to the other protected attributes is the concept of ‘reasonable adjustment’, that is enabled and supported by the 'disability standards' The DDA is the only Commonwealth Act to contain an explicit duty to make reasonable adjustments. The UK, EU and USA also require reasonable adjustments or accommodations to be made for people with disabilities.

The concept of reasonable adjustment is clarified within DDA by the Access to Premises Standard which reflects the community's expectations and acceptable limits for reasonable adjustments and a positive duty for persons responsible for the built environment to participate in creating accessible premises.

The DDA-referenced Access to Premises Standard enables reasonable adjustment by providing practical and achievable goals for the planning and construction industry and importantly, a necessary level of security against complaints so that projects can proceed with certainty.

RECOMMENDATION 7: Retain the duty to make reasonable adjustments in the consolidated Commonwealth equality legislation as in the DDA and extend this positive obligation to make practical steps to address disadvantage to people with other protected attributes within referenced standards.

4 Protected Areas of Public Life – Omission of Housing

As the Attorney General's Discussion Paper on consolidation notes, current Commonwealth anti-discrimination laws have been drafted over a period of nearly 40 years and consequently have significant differences in the drafting and coverage of protections under each Act.

In itself, the Discussion Paper also omits discussion of a number of areas already covered in existing Commonwealth discrimination laws, including education, provision of goods, services and facilities, accommodation, transactions in interests in land, etc. ACAA believes that these existing areas also reflect the times, interests and expectations of the time the laws were drafted.

There is support in the Australian Human Rights Commission submission for retaining current areas of coverage without diminution of existing rights. But what of areas that were not covered originally in law which in the 21st century stand out as oversights? ACAA believes that although the DDA has been a major step forward, its scope was limited to a narrow definition of 'public life' by progress that people hoped could be made coming out of the impetus from the decade following the 1981 International Year of Disabled People (IYDP). International conventions and best practice globally have moved on as have the demographic and economic realities of a growing disability population, most of whom in Australia are poor but all who require accessible living and working conditions.

Housing is a human right

ACAA points to the area of **housing** as a significant omission in current Australian human rights legislation which fits uneasily with international covenants and current strategic policy planning. It is an area of important public good and large-scale commercial and political interest. There is widespread community sentiment that all levels of government are failing in their responsibilities on housing.

Shelter is the foundation of life, along with food and clothing. To live in a place which daily reinforces limitations with steps at the entry, narrow corridors and toilets, switches and counters at inaccessible heights will be the future for the baby boomer generation and others to follow as the lack of options in the built environment become obvious. Australia has done poorly at preparing its housing stock for its own future.

Mortgage and rental stress, inflated house prices and rising rents are a measure of our failure to progressively reform the planning processes to meet the current and expected needs of Australians for shelter that meets accessibility needs. There is a lack of national consistency reinforced by the rise of objection based planning instruments with wide variations of standards from local, State and Territory governments.

International covenants and national policy

Article 11 of the International Covenant on Economic, Social and Cultural Rights of which Australia is a signatory states that the parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

A further international covenant that Australia is signatory to, the Convention on the Rights of Persons with Disabilities, in Article 9 of states that to enable persons with disabilities to live independently and participate fully in all aspects of life:

> *States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces.*

Both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 called for governments to ensure: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

The UN High Commissioner for Human Rights noted in general comments on the right to adequate housing in 1991, that the promotion by States parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.

Housing affordability is a human right

The UN High Commissioner calls for all individuals, as well as families, to be entitled to housing regardless of age, economic status, race, gender, group or other affiliation or status and other such factors, and the enjoyment of this right must be free from any form of discrimination. The Commissioner states that housing must be accessible to disadvantaged groups including the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups. In addition, housing must be adequately located with regard to work and basic facilities, and at a reasonable cost.

As well as having housing that meets access needs, housing affordability is a human right and must be protected within Australian human rights legislation as housing in this country is fast becoming a privilege and housing stress mainstream.

The Urban Design institute of Australia (UDIA) submission to the Senate Select Committee on Housing Affordability in Australia[3] opens with the contention that the present housing affordability crises is a product of insufficient dwelling supply and diversity of supply, excessive taxes and charges by all three levels of government, and inefficient and complex governance structures

State and local government taxes and charges when combined with the GST account for over 25 per cent of the cost of a house, a situation the UDIA states is 'simply unfair. It is not what governments are elected to do. It is an abduction of responsibility for short term political gain.'

The Federal Government's proposed National Disability Strategy has several key National Areas of Cooperation of which the first and crucial Outcome 1 aims at action to create Inclusive and Accessible Communities - People with disability live in accessible and well designed communities with opportunity for full inclusion in social, economic, sporting and cultural life. Policy Direction 3 of the Strategy calls for "Improved provision of accessible and well designed housing with choice for people with disability about where they live."

Further reinforcing the policy momentum for action in housing is the National Disability Strategy's Area for Future Action 1.5: All levels of government to develop approaches to increase the provision of universal design in public and private housing in both new builds and modification of existing stock.

Need for livable housing

Livable, accessible and affordable housing spans the generations, ensuring benefits to a wide range of Australians but also to a whole range of Government services impacted by

[3] Housing Affordability - ***A little Less Conversation - A little More Action*** *April 2008*

poor housing. Of the 4 million Australians who have a disability, 84 per cent are affected by a physical condition or limitation that restricts everyday activities. Physical disability remains the most commonly reported disability among people aged less than 65 years and increases proportionally with aging.

Will the current and projected housing stock meet the needs of the Baby Boomer generation, their friends and family as they move into more of a disability profile? Last century's idea of retirement homes may not appeal to the new aged who will be looking for accessible choices across a wide range of accommodation types and income brackets. 'Aging in place' is a priority for many reasons but without livable environments in which to age, substantial refurbishment or relocation costs and pressures come to bear.

Families who have a child with disability represent a specific market for livable homes. One in 12 children aged between 0-14 years has a disability, representing 317,900 children; cerebral palsy is the most common form of childhood disability, affecting about 34,000 Australians. After learning disability, physical disability is the second most prevalent disability amongst Australian children accounting for 162,800 children or 4.2 per cent of all children.[4]

Architects, developers, government agencies and private home owners need support and information on common sense, low cost methodologies aimed at simple means of access in the private home well in advance of adverse circumstances in people's lives that might precipitate enhanced access provisions.

In response to the growing Australian disability population's need to increase the accessible housing stock and Australia's human rights obligations, the Hon. Bill Shorten MP convened the National Dialogue on Universal Housing Design in 2009 with representatives from all levels of government and key stakeholders from the ageing, disability and community support sectors, the residential building and property industry.

This representative group came up with national consensus around six core principles that are a feature of livable housing:

1. A safe and continuous path of travel from the street entrance and/or parking area to a dwelling entrance that is level,
2. At least one level (step-free) entrance into the dwelling,
3. Internal doors and corridors that facilitate comfortable and unimpeded movement between spaces,
4. A toilet on the ground (or entry) level that provides easy access,
5. A bathroom that contains a hobless (step-free) shower recess, and
6. Reinforced walls around the toilet, shower and bath to support the safe installation of grabrails at a later date.[5]

[4] Disability, Ageing and Carers, Australia: Summary of Findings, 2009 , Australian Bureau of Statistics
[5] http://www.fahcsia.gov.au/sa/disability/pubs/general/Pages/LivableHousingDesignGuidelines.aspx

These six elements are the building blocks of a livable home and would provide widespread health, economic and other benefits in the majority of circumstances. The core design elements importantly reduce or avoid the costs associated with retrofitting a home to improve access in future. The National Dialogue on Universal Housing Design has agreed across these sectors to work towards an aspirational goal for all new homes to incorporate livable principles by 2020, now only eight years away. These six simple core principles for new housing would mean consistency of design and implementation across State and local government areas. It is a new approach, supported by a lot of goodwill and energy. It however relies on only voluntary action to meet its ambitious target.

The Australian Housing and Urban Research Institute (AHURI) has estimated that if 20 per cent of new homes included livable housing design, the cost savings to the Australian health system would range from $37 million to $54.5 million per annum. Assuming 100 per cent adoption in new homes, the cost savings ranged from $187 to $273 million per annum.[6] In addition, if all housing were planned, designed and built to livable housing standards, then much of the need for social housing could be alleviated. It would represent a transfer from the public purse to boost design and innovation from the private sector.

ACAA backs the AHURI research that shows widespread flow-on economic effects from livable housing design in new buildings. Government health and community sector spending would reduce due to reduced fall hazards in homes, resulting in fewer accidents, reduced health care costs, reduced cost of future government-subsidised home modifications, reduced need for aged care residential accommodation, reduced need for in-home assistance, shorter hospital stays, and freeing up carers to return to the workforce.

Reform of housing stock is too important to be voluntary in Australia. Governments have always skirted away from mandating change in housing, regarding it as a kind of sacrosanct private right. But the Livable Housing initiatives can only go so far as a voluntary scheme, even backed by major building and property interests.

Incorporating accessible new housing into national human rights law could bring the consolidated laws into alignment with public economic and strategic directions, defining housing as a 'public good' and integrating with building regulatory structures under the National Construction Code. Under the current Government, human rights legislative consolidation could include Class 1a dwellings as part of anti-discrimination legislation, hastening the current pace of reform and bringing needed outcomes to new housing stock.

As with all balancing in terms of regulation, this initiative would need to include the provision to negotiate areas for particular circumstances, perhaps similar to the unjustifiable hardship criteria in the Access to Premises Standard.

RECOMMENDATION 8: In accordance with Article 11 of The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General

[6] Australian Housing and Urban Research Institute (2010) Dwelling, Land and Neighbourhood Use by Older Home Owners, pp. 188-189

Assembly on 16 December 1966, and in force from 3 January 1976, housing must be preserved as a human right within the new consolidated Commonwealth human rights Act mandating housing as a protected area of public life and standardising State and Territory standards under a national protection such as the achievable Livable Housing core criteria.

Homelessness and domestic violence

The Australian Human Rights Commission submission on attributes that could be covered in new equality legislation suggests that domestic violence and homelessness are serious problems in our community where people are vulnerable to discrimination. Many people with disabilities experience physical, sexual, emotional and verbal abuse and domestic violence in their accommodation. Given that disability is so strongly linked with poverty, there are also many people who live in basic or sub-basic temporary accommodation which does not meet their basic rights.

Many homeless people suffer from multiple physical and mental impairments. Homelessness disproportionately affects people with attributes already covered by Commonwealth discrimination law including people affected by mental illness. Specific coverage of these issues within Commonwealth discrimination law could be seen to some extent as constituting a clearer statement of existing rights and responsibilities rather than involving wholly new regulatory requirements.

RECOMMENDATION 9: ACAA supports the call by the Australian Human Rights Commission submission in Recommendation 21: The Commission recommends favourable consideration of coverage by a consolidated Commonwealth equality law of discrimination based on accommodation status.

5 Protected Attributes

ACAA supports the consolidation of legislation for protected attributes of race, gender, disability and aging. Such consolidation and extension is in keeping with 'Universal Design' concepts that maximise appeal and function for the greatest cross-section of the community.

Australian-innovated unisex accessible bathroom facilities are one example where the initiative to address the disability requirements of one Australian group has evolved into a universal design concept providing practical and necessary facilities for breast feeding, family responsibilities and an ageing population.

Associates

The DDA was path-finding legislation in covering discrimination against associates of people with disabilities in 1992. The Race Discrimination Act also includes protection against discrimination based on the race of an associate of an aggrieved person. The power of these Acts to assist people to feel the full benefits of citizenship cannot be discounted.

People who associate with a person with disability can experience as many of the barriers, slights, disadvantage and discrimination as the person themselves. Since 1993, these people have had legal protection and the ability to make a complaint under the DDA. ACAA would like to see the rights of people who associate with any person with a protected attribute to have equivalent coverage under a consolidated Act.

RECOMMENDATION 10: ACAA supports extension of a consolidated equality law to discrimination on the basis of association with a person with a protected attribute/s.

Regulation of sport

As noted in the discussion on Livable Housing, the Federal Government's proposed National Disability Strategy Outcome 1 calls for action to create Inclusive and Accessible Communities - People with disability live in accessible and well designed communities with opportunity for full inclusion in social, economic, sporting and cultural life.

The Discussion Paper canvasses whether sport could be covered consistently under new anti-discrimination laws. People with disability have benefited from sport being included in the DDA. Given the clear direction of the National Disability Strategy and the National Arts and Disability Strategy, ACAA also recommends that cultural activities be also included in new drafting for consolidation to be more inclusive to the whole community of interest.

RECOMMENDATION 11: ACAA recommends that discrimination in both 'sport' and 'cultural activities' is included in consolidated Commonwealth equality law.

6 Exceptions and Exemptions

The Discussion Paper correctly notes the inconsistent use of the concepts of 'exceptions' and 'exemptions' within the human rights legislation covered in the potential consolidated Act. This is a complex area and needs attention to get the desired outcome of not diluting already existing protections of human rights.

General limitations clause

ACAA supports the development of a more general limitations clause and the development of industry specific exceptions and concessions within standards referenced by the consolidated Act, provided that the objectives of the Act are not diminished. They can give clarity and surety, as in the current exceptions in the Disability Access to Premises Standards which reflect present community values.

Exemption clauses, such as details of criteria for claiming unjustifiable hardship within the Access to Premises Standards are generally not within the ambit of the standard. The proposed consolidated act and referenced standards would be more concise and better administered by a general limitations clause within the Act itself.

RECOMMENDATION 12: ACAA agrees with the view of Recommendation 32 in the Australian Human Rights Commission submission that recommends: favourable consideration be given to adoption of a general limitations clause to replace other exceptions as far as possible, subject to further discussion of the impacts of this approach on clarity and certainty for affected parties and of any areas of possible diminution of existing protection.

Temporary exemptions

Temporary exemptions have been used by various industrial groupings to buy time to come into alignment with the intentions of anti-discrimination legislation. The Commission has published guidelines, criteria and procedures to enable these to be granted. The exemptions have been a source of dissatisfaction within the disability community as the concept does not build trust that an enterprise is genuinely interested in engagement and progress.

The exemptions can be granted for a maximum of five years. If you are person with a protected attribute, five years can seem a very long time in which there is little evidence to the public of action or change happening. There are questions as to how well the Commission can act in the public's interest in granting temporary exemptions to industry sectors.

Even with temporary exemptions, some bodies still want more time when they have appeared to have ample to make change. For example, the TV free to air networks have applied to the Human Rights commission for a further 12 month extension until 31 December 2012 on an exemption to complaints being brought under the DDA by people with the protected attributes of deafness and hearing impairment with respect to captioning. An agreement was put in place in 2008-09 under which the free to air TV networks would work towards 100% captioning by end of 2014 from 6am to midnight.

ACAA is interested to move from the temporary exemption concept which came out of the initial legislation times towards the concept advocated for further discussion by the submission of the Australian Human Rights Commission: a positive mechanism for certification of compliance plans.

A new framework of compliance based on certification of compliance plans rather than exemption from compliance would seem to give more surety for consumers and people with protected attributes who may be experiencing discrimination that committed, certified actions will be taken to overcome such discrimination.

RECOMMENDATION 13: ACAA supports the Australian Human Rights Commission submission Recommendation 37: The Commission recommends further discussion on possible provision for certification of compliance plans within a consolidated Commonwealth equality law, including the extent of effect of such certification if provided for, and resource implications of a certification procedure.

RECOMMENDATION 14: If temporary exemptions are retained, place them within the complaint and compliance framework of the consolidated Commonwealth anti-discrimination legislation.

7 Complaints and Compliance Framework

ACAA supports a mixture of systems to operate together within the projected new discrimination legislation. A balance of carrots and sticks, with choices for interacting styles of compliance plus strong support for the complaints function will give organisations, businesses and individuals a sense that this is enabling, not coercive legislation where they are able to participate most fully in the modality that suits their circumstances. Going too far in one direction or another, mandating forms of participation, is likely to cause disenchantment and result in lowered outcomes.

Options to assist business in meeting anti-discrimination obligations

With regard to improving competition, productivity and efficiency within the construction process that lead to safe equitable and non-discriminatory built environment, consideration should be given to moving the present construct of Acts, Standards and referenced standards towards more generic codes to be implemented by a qualified and indemnified workforce.

A simple illustration of how a discriminatory step can occur with compounding costs:

1. An unqualified, uninsured draftsperson draws plans for commercial premises with an entry door showing a 0.2 mm dotted line at the door to designate a threshold and submits for approval.
2. A Building Surveyor/ Certifier grants approval for the premises based on reading the line at the door being the line of the boundary.
3. The builder reads the levels on the plan and constructs the line. The line as constructed is a 190 mm non-complying step at the entry and an integral structural concrete beam.

The international trend for standards, particularly the ISO suite, is towards firstly achieving a basic level of accreditation of the organisations implementing the standards so that less specific and more generic performance based standards can be formulated and implemented. ISO certified organisations, like ACAA members and architects, are qualified, accredited and indemnified. However, in most Australian States, the building application process is inconsistently regulated and receives applications from bodies ill-equipped to implement the technical standards.

For instance, this situation in NSW is set to compound with the recent introduction of Work Health and Safety Act (WHA) in January 2012. Under both the DDA and WHS duty holders are accountable to the end user. Each successive duty holder is either (a) beholden on their predecessor to be qualified and indemnified or (b) invest inordinate administrative resources in double-checking previous work. Under the WHS law, every duty holder is

required to carry workers compensation insurance. However the DDA does not require its duty holders to carry professional indemnity insurance.

RECOMMENDATION 15: Duty holders responsible for the design of non-discriminatory accessible premises subject of the new consolidated Act shall be appropriately qualified, indemnified professionals.

DDA Action Plans

There are many benefits of DDA Action Plans, although beyond an initial flurry of activity when the DDA began, they are a relatively unknown provision that can be beneficial to organisations.

Many State governments have adopted requirements for disability planning and reporting by public authorities. They have raised the issue of disability in the workforce and in service delivery. Many organisations have used them as de facto DDA Action Plans, lodging them on the Australian Human Rights Commission's website for public accountability. Evaluation structures and assessments of impact have been built into many of these plans with varying degrees of progress.

One of the major benefits of DDA Action Plans is the encouragement for organisations to frame them working with people with disabilities in their organisation and/or service focus. The involvement itself brings the policies and strategies into more reality and the encounters and conversations tend to change the power dynamics of all involved in the processes. Action Plans made without participation of people with protected attributes miss the point. They often end up on a shelf as no one owns the actions set up in the document. People with protected attributes care about removing discrimination and are passionate to improve the society for others, willing to work towards these aims.

RECOMMENDATION 16: ACAA suggests that any newly consolidated human rights legislation be modelled on the DDA Action Plan strategy of inclusion of people with protected attributes at the core of Action Planning processes.

As part of the mix of strategies to improve human rights equity in Australia, registered voluntary Action Plans can form a transition strategy towards certified equity compliance plans. For government departments and any organisations receiving public funding, Action Plans and their periodic evaluation could be a condition of funding as a form of "positive duty" suggested by the Australian Human Rights Commission.

A criticism of the DDA Action Plan process is that they encourage what can be described as 'soft discrimination', an armature for present and continuing discriminatory practices for a maximum of five years renewable under DDA section 63 at any time. The plans do provide temporary relief from full compliance with the DDA by allowing time for preparation to redress discrimination but essentially they are non-binding and without obligation to act.

WHS models and the aged care standards offer workable models of identifying and acting on issues that could be readily adopted, such as the continuous quality improvement

process. Regardless of the methodology, any temporary relief must result in real action within a nominated time.

While Action Plans rely on goodwill to achieve progress, they do seem to lack any form of accountability or consequence for failure to carry out measures in the plan. They act to provide the organisation with breathing space and give public accountability through registration on the Australian Human Rights Commission website.

People with protected attributes are able to monitor plans and actions for organisations they watch and use complaint mechanisms appropriate to the situation. Responsibility is therefore a shared moral space where voluntary commitments are monitored voluntarily. Consideration of more formal provision for mutual recognition of enforceable undertakings would be well received by the disability community. Bodies that receive public funds need to move into a more stringent program of accountable Action Plan development and reporting.

In a functional democracy with a high degree of transparency and networking, there is much to be supported in encouragement of voluntary registered human rights Action Plans made in participation with people with protected attributes, as in the DDA's model.

RECOMMENDATION 17: ACAA supports the two recommendations to continue voluntary Action Plans in the Australian Human Rights Commission Submission: Recommendation 35: The Commission recommends that a consolidated Commonwealth equality law provide for development and provision to the Commission of voluntary Action Plans in relation to any or all protected attributes and Recommendation 36: The Commission recommends favourable consideration be given to provision in a consolidated Commonwealth equality law for mandatory development by public authorities of Action Plans covering all protected attributes.

Co-regulation

There is a lively debate in the ACAA industry sector about the benefits and limitations of a co-regulatory approach, with enthusiasms and passions on both sides of the argument. The problems of temporary exemptions discussed earlier leave people disenchanted with making progress, where enterprises or industry groupings are all talk and not much action. Temporary Exemptions can seem to be extended indefinitely for some industries.

The Discussion Paper raises the typical co-regulatory framework as one where a law sets minimum standards, but permits development of industry codes or other mechanisms developed in house which supplement the law. These codes and mechanisms may be monitored or validated by a government regulator.

The experience of this Association is the value of working for and growing a body of technical national Standards to assist professionals in the building and construction industry to build non-discriminatory environments and premises, co-regulation by another name. The culture of the people in this industry, building and construction, is one of having direct,

clear instructions or guidance, black and white, right or wrong. It is not an industry of moral ambiguity or need to question shades of grey in decisions. The national standards developed in Australia set a high standard of equitable access in new and refurbished premises which benefit the whole community, partly because of clear standardisation.

Loss of the current form of practice of the Temporary Exemption model, whether in the public transport, aviation, television or other resource rich industry groups who wish to see co-regulation, could seriously impinge on the national consensus built to date on technical standards for non-discriminatory practice. State by State, new norms could apply under a co-regulatory banner. Regional differences in implementation already exist to some extent with interpretation of current codes but there is a substantial national compliance via reference Australian Standards and technical codes.

The Australian Human Rights Commission submission puts forward yet another model: a more explicitly positive mechanism for certification of compliance plans to avoid disincentives to proactive compliance measures which could arise from negative reputation associated with applying for an "exemption" from the legislation.

A positive mechanism for certification of compliance plans would reduce or avoid this disincentive, and focus attention more beneficially on whether approval of the compliance plan would be appropriate in advancing the objects of the legislation rather than emphasise the exemption. The concept is that enterprises would be able to show compliance with an approved plan, but would retain flexibility through the ability to demonstrate legislative compliance by other means.

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

The Australian Human Rights Commission submission quotes "the successful interaction between the Commission, the Australian Building Codes Board, other areas of government, and industry and community representatives in development and authorisation of improved building access standards" as an illustration. It neglects to say this process took seven gruelling years of negotiation and compromise because there were strong advocates for both sides of the issue at the table. Industry codes may not have such strong, well-resourced advocacy at the negotiating table to have its voice heard.

The challenge of new standards is to ensure they are serving the people they are designed for and not the industry's convenience or interests alone. Again, development of compliance plans would greatly benefit in every field if there were stipulation for people with protected attributes themselves and their associates to be a vital part of negotiations with a voice in shaping such plans across the attributes of gender, race, age or disability.

RECOMMENDATION 18: ACAA endorses a further discussion on the merits of adding co-regulation to the package of compliance measures under a consolidated anti-discrimination law using certified compliance plans based on national standards and involvement of people

with protected attributes in order to facilitate more efficient and equitable outcomes for industry and consumers.

Access to knowledge

Co-regulation works where all people have access to the tools of the Act. It is founded in publicly available knowledge, technical specifications and guidelines on how to create accessible, non-discriminatory environments. The benefit of the model is its ability to overcome one of the greatest obstacles to freedom and equity; knowledge.

It will be difficult to implement with the current DDA Standards practice of referencing Australian Standards for Access and Mobility, owned by a Royal Charter company and operating under a Memorandum of Understanding with the Commonwealth government as Australia's peak national standards body, which charges high fees for access to the referenced material.

Areas where substantial progress has been made in changing practices and environments have had more open access to criteria, guidelines and regulations, including the Aged Care Act, Work Health and Safety (WHS) Act and OH&S regulation and advisory notes issued by state authorities, the Access to Premises Standard, the Advisory Notes on Access to Premises Standard. The Americans with Disabilities Act has referenced technical materials available via the Internet. There are no 'tariff walls' to this knowledge.

In terms of competitive practice which underlies the Productivity Commission's goals, Australia is only served by Standards Australia, an anti-competitive monopoly holding the rights to these Standards for Access and Mobility created by the industry. They are the tools Australians have to work with to implement anti-discrimination legislation, but at a price that keeps this information from a larger freed up market.

The co-regulation model as exemplified by the banking industry standards for the non-discriminatory design and placement of Automatic Teller Machines to better facilitate access and use which is a real and workable model. The Australian banking Industry prepared its own technical specification and made it freely available on the industries web site.[7]

Likewise the consolidation of Commonwealth anti-discrimination Discussion Paper has been prepared under Creative Commons, presumably to promote the dissemination of information, referencing of the content in the interest of advancing civil liberties, reducing costs to business and enabling participation.

RECOMMENDATION 19: ACAA suggests that all primary documentation referenced by the proposed consolidation of anti-discrimination legislation, including referenced Standards, guides and technical specifications, draft documents, amendments and variations be issued

[7] www.bankers.asn.au/ArticleDocuments/atm%20standard.doc.

under the terms of a Creative Commons Licence[8], provided free of charge within the Commonwealth of Australia in Portable Document Format (PDF) and made available on the Australian Human Rights Commission's website for full transparent accountability.

Standards

Australians maintain some of the highest standards for access in the world and continue to innovate in many areas, such as access standards, assistive devices and goods for people with disability requirements. Australians are well placed to service regional communities as they evolve and implement their Human Rights frameworks through Australian Standards being used in regional countries and through alignment of Australian codes with international best practice. Already many of our members advise in Southeast Asia, the Middle East, Latin America and Europe.

RECOMMENDATION 20: Ensure that any new compliance structure facilitates agreement on Mutual Recognition on Conformity Assessment with larger product design centres of European Community (EC) and the USA and secondly invest in research and development of Australia Standards and access services for both domestic and export purposes.

Certification of 'special measures'

'Special measures' are positive or beneficial measure generally aimed at accelerating or achieving substantive equality for a group within the community that has suffered from historical and entrenched discrimination and disadvantage. 'Special measures' could be used as an appropriate vehicle for monitoring and eliminating discrimination with mandatory annual reports to the federal Parliament by other Governments.

The actuarial data compiled by the courts and tribunals on complaints and the origin of complaints is necessary feedback that assists in the formulation of targeted standards and policy setting. Currently, each State anti-discrimination authority compiles statistical data reportable within their respective annual reports, as does the Commonwealth. However, there are differences in the detail and terminology of the findings.

The community would benefit if the States and Territories data were in a standardised format and collated by the Commonwealth to give a national picture of annual progress particularly in regard to building elements that are cause of complaints.

RECOMMENDATION 21: To assist in research and development towards target reform, Commonwealth, State and Territory actuarial data on the nature and origin of complaints should be standardised, collated and published by the Australian Human Rights Commission annually.

[8] http://creativecommons.org/licenses/by/3.0/au/deed.en

Interaction with other laws

A major benefit of the DDA is that it is clearly a dominant Act in the hierarchy of other legislation when there are conflicts of hierarchy. This would benefit all the other acts as part of a consolidated equality act, so that the clarity of the Commonwealth power is manifest.

For instance, consolidating the discrimination law presents an opportunity to better reference the harmonised NSW Work Health and Safety (WHS) laws which commenced on 1 January 2012, within the 'Exemptions' and 'Exceptions' divisions. Clarification is also sought on the application of the laws with respect to designing places for specialist care of persons within health care settings.

As State responsibilities, there are no referenced to OH&S or new WHS laws directly within the national DDA. The construction industry refers to a third level document such as the Building Code of Australia/National Construction Code for direction on the applications of exemptions for areas not required to be accessible on the grounds that the area would pose a health and safety risk for persons with a disability.

The design and workplace procurement process required by the WHS law, 'a process of hazard identification and risk assessment to eliminate or minimize risk of injury throughout the life of the product'[9] is at times is in conflict with DDA Part 2, prohibition of discrimination in employment.

Conflict arises when the duty holders under the WHS law are in the same body as the duty holders under the DDA and a determination is required as to whether or not an area meets the exemption criteria within the 3rd tier Building Code of Australia, National Construction Code and Access to Premises Standard. Non-exhaustive examples are access within commercial kitchens, mine site control rooms, plant rooms, storage areas, manufacturing facilities.

One possible model is to apply the WHS 'Reasonably Foreseeable' criteria by a 'person conducting a business or undertaking' (PCBU). However, as yet there are no administrative provisions recognising or facilitating the process and methods within WHS law.

The procurement of health care, mental health and aged care facilities in particular could be better, more efficiently served with WHS referenced at all levels of a consolidated discrimination law.

RECOMMENDATION 22: ACAA supports the Australian Human Rights Commission submission Recommendation 52: consideration be given to a "prescribed laws" provision in a consolidated Commonwealth equality law as a means for managing interaction of this law with other laws.

[9] Cited: http://www.safeworkaustralia.gov.au/SafetyInYourWorkplace/SafeDesign

Conflicts of hierarchy

The ACAA endorses the present DDA approach of referencing of standards under section 31 of the Act on the grounds of efficiency. As disability crosses all the other protected attributes of gender, race and age, it is vital that the level of protection of human rights which the DDA stands for is not diluted by the consolidation process.

The DDA Standards referenced by the parent Act have been implemented to improve efficacy of the parent act with industry specific content. Where productivity efficiencies are possible is in review of third and forth tier referenced documents.

A diagrammatic illustration of the hierarchy of referenced tiers:

1. Parent Act:
   The Disability Discrimination Act 1992
2. Referenced: Disability (Access to Premises -Buildings) Standards 2010 [sic]
3. Referenced: Schedule 1 Access code for Buildings
4. Referenced: Standards Australia Design for access and mobility series (AS 1428)
5. Referenced: Secondary referenced construction standards.

This hierarchy has inherent efficiencies in that higher order legislative building blocks maintain a strong consistent framework and permit lower tier referenced documents flexibility to meet changing community needs and enable implementation.

Key criticism of the existing DDA document hierarchy is;

- The DDA referenced standard and building codes are overly technical and detailed owing to the fact that they are written for implementation by an unskilled, uninsured workforce such as drafters.
- With each additional update of referenced document come inevitable revision overlaps, conflicts and sometimes contradictions of jurisdiction and powers of enforcement.
- The cost of the fourth tier Standards documents is an inordinate impost on business. The AS 1428 series is $492.00 for a PDF copy of the AS1428 2010 series or $155.82 for Part 1 which is 74 pages, heavily enforced by copyright and no longer available at regional libraries. The fourth tier document content is need to comply with Commonwealth law and formulated by professional volunteers and based on external research.
- The number of fourth and fifth tier documents are ever increasing and could be amalgamated into a single standard for distribution, and
- The naming of second tier documents 'Standards' invites confusion with the fourth and fifth tier Australian Standards and possibly with State and Territory laws.

Comparison to the new NSW Work Health and Safety (WHS) may offer insight into potential productivity gains because of its streamlined structure:

1. Parent Act: Work Health and Safety Act 2011
2. Referenced: Work Health and Safety Regulation 2011

3. Referenced: Codes of practice.

National Codes of Practice examples:

- National Code of Practice for the Prevention of Musculoskeletal Disorders from Performing Manual Tasks at Work (2007)
- AS 2865 – 1995 Worksafe Australia National Standard, Safe working in a confined space (free to download in PDF).

There are two significant differences between the WHS and DDA structure. Firstly, the structure owes its brevity to the fact that the roles and responsibilities of duty holders are highly defined and backed up; 'All employers in NSW (except exempt employers) are required by law to have a workers compensation insurance policy'.[10] [sic] And importantly, the codes of practice including referenced Australian Standards are free to download.

Access to information resources including free access to the law support resources will reduce compliance costs, improve productivity and become a pillar of the communication and deployment strategy for the consolidated Act. The WHS model reduces red tape by focusing on implementation within a workforce that has the knowledge, qualifications and resources and should anything go wrong, they are insured.

RECOMMENDATION 23: ACAA welcomes a rationalisation of standard referencing in any consolidated new anti-discrimination legislation to improve efficacy, access to clear information and avoid current mismatches and conflicts.

Litigation costs

The Attorney-General's Discussion Paper acknowledges the costs of litigation and the risk of adverse costs orders create a significant barrier to the pursuit of unlawful discrimination actions.

Many in the community who have experienced discrimination are keen for the Australian Human Rights Commission, with its proven track record of efficient, informal and low cost conciliation of complaints, to be granted further resources for its work. IN an ideal world, ACAA would support it having an expanded brief with the ability to issue determinations or directions, rather than relying on the courts when conciliation fails.

Even the act of laying a complaint through the Commission is very challenging for some people without the support of an adviser, family member or close friend acting on their behalf. Many cases that fail would have had a much better outcome if the complainant had received the benefit of expert or friendly advice as a pre-cursor to lodging a complaint.

The court process is costly and difficult process for people who have a discrimination claim. In addition, there is the possibility of being required to pay costs of the respondent, as has

[10] www.workcover.nsw.gov.au/insurancepremiums/Policies/Pages/default.aspx

happened this month in a case of a person with disability losing her DDA complaint case against an airline and having to pay $20,000 of its court costs.

This type of widely publicised case has the effect of scaring people from taking their complaints through the Federal court system. If the Commission were enabled by the newly consolidated legislation to issue determinations or directions, it would be largely welcomed by many citizens with protected attributes as an improvement on current legislation.

RECOMMENDATION 24: Consider whether an expanded role for the Australian Human Rights Commission to issue determinations or directions would produce more efficient and fair outcomes than the current system for complainants and respondents.

8 Summary

ACAA represents a largely voiceless, growing sector in the Australian community. It encourages the current Government to consolidate laws that were 40 years in the making into a fresh 21st century context, taking into account views and perspectives from this consultation.

The key initiative ACAA would like to see in consolidated anti-discrimination legislation is the inclusion of housing as an area of discrimination in order to achieve outcomes that will demonstrably benefit all Australians over coming years.

9 Appendix – List of recommendations

RECOMMENDATION 1: That federal anti-discrimination law is consolidated to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community.

RECOMMENDATION 2: That the name of the new Act not move far from the DA endings currently used by the Acts under consideration, to maintain as much cohesion as possible in the transition period.

RECOMMENDATION 3: Retain the role, functions and resourcing for offices of the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, and the Age Discrimination Commissioner under the proposed consolidation.

RECOMMENDATION 4: That there be a unified test of discrimination, based on combined approaches of best practice as recommended by the Australian Human Rights Commission and that should extend to people who use any form of assistive device, are accompanying as an associate or companion and people who use certified assistance animals.

RECOMMENDATION 5: That the comparator test be abolished in the consolidated Commonwealth discrimination law so that the new law required only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute/s, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply.

RECOMMENDATION 6: ACAA support the Australian Human Rights submission Recommendation 14: That a consolidated Commonwealth equality law provide for a shifting onus of proof on elements regarding causation and justification of *prima facie* discriminatory conduct, to confirm that the obligation to produce evidence sits with the party best placed to produce that evidence.

RECOMMENDATION 7: Retain the duty to make reasonable adjustments in the consolidated Commonwealth equality legislation as in the DDA and extend this positive obligation to make practical steps to address disadvantage to people with other protected attributes within referenced standards.

RECOMMENDATION 8: In accordance with Article 11 of The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976, Housing must be preserved as a Human Right within the new consolidated Commonwealth human rights Act housing as a protected area of public life and standardising State and Territory standards under a national protection such as the Livable Housing core criteria.

RECOMMENDATION 9: ACAA supports the call by the Australian Human Rights Commission submission in Recommendation 21: The Commission recommends favourable consideration

of coverage by a consolidated Commonwealth equality law of discrimination based on accommodation status.

RECOMMENDATION 10: ACAA supports extension of a consolidated equality law to discrimination on the basis of association with a person with a protected attribute/s.

RECOMMENDATION 11: ACAA recommends that discrimination in both sport and cultural activities is included in consolidated Commonwealth equality law.

RECOMMENDATION 12: ACAA agrees with the view of Recommendation 32 in the Australian Human Rights Commission that recommends: favourable consideration be given to adoption of a general limitations clause to replace other exceptions as far as possible, subject to further discussion of the impacts of this approach on clarity and certainty for affected parties and of any areas of possible diminution of existing protection.

RECOMMENDATION 13: ACAA supports the Australian Human Rights Commission submission Recommendation 37: The Commission recommends further discussion on possible provision for certification of compliance plans within a consolidated Commonwealth equality law, including the extent of effect of such certification if provided for, and resource implications of a certification procedure.

RECOMMENDATION 14: If temporary exemptions are retained, place them within the complaint and compliance framework of the consolidated Commonwealth anti-discrimination legislation.

RECOMMENDATION 15: Duty holders responsible for the design of publicly accessible premises subject of the new consolidated Act shall be appropriately qualified, indemnified professionals.

RECOMMENDATION 16: ACAA suggests that any newly consolidated human rights legislation be modelled on the DDA Action Plan strategy of inclusion of people with protected attributes at the core of Action Planning processes.

RECOMMENDATION 17: ACAA supports the recommendations about Action Plans in the Australian Human Rights Commission Submission: Recommendation 35: The Commission recommends that a consolidated Commonwealth equality law provide for development and provision to the Commission of voluntary Action Plans in relation to any or all protected attributes and Recommendation 36: The Commission recommends favourable consideration be given to provision in a consolidated Commonwealth equality law for mandatory development by public authorities of Action Plans covering all protected attributes.

RECOMMENDATION 18: ACAA endorses a further discussion on the merits of adding co-regulation to the package of compliance measures under a consolidated anti-discrimination law using certified compliance plans based on national standards in order to facilitate more efficient and equitable outcomes for industry and consumers.

RECOMMENDATION 19: ACAA suggests that all primary documentation referenced by the proposed consolidation of anti-discrimination legislation, including referenced Standards, guides and technical specifications, draft documents, amendments and variations be issued under the terms of a Creative Commons Licence, provided free of charge within the Commonwealth of Australia in Portable Document Format (PDF) and made available on the Australian Human Rights Commission's website for full transparent accountability.

RECOMMENDATION 20: Ensure that any new compliance structure facilitates agreement on Mutual Recognition on Conformity Assessment with larger product design centres of European Community (EC) and the USA and secondly invest in research and development of Australia Standards and access services for both domestic and export purposes.

RECOMMENDATION 21: To assist in research and development towards target reform, Commonwealth, State and Territory actuarial date collection process and terminology on the nature and origin of complaints should be standardised, collated and published by the Australian Human Rights Commission annually.

RECOMMENDATION 22: ACAA supports the Australian Human Rights Commission submission Recommendation 52: consideration be given to a "prescribed laws" provision in a consolidated Commonwealth equality law as a means for managing interaction of this law with other laws.

RECOMMENDATION 23: ACAA welcomes a rationalisation of standard referencing in any consolidated new anti-discrimination legislation to improve efficacy, access to clear information and avoid current mismatches and conflicts.

RECOMMENDATION 24: Consider whether an expanded role for the Australian Human Rights Commission to issue determinations or directions would produce more efficient and fair outcomes than the current system for complainants and respondents.