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Attorney-General's Department
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Dear Assistant Secretary,

Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws, released by the Attorney General and Minister for Finance and Deregulation

Please find enclosed Diversity Council Australia's submission in response to the government's above public discussion paper.

DCA is the independent, non-profit workplace diversity advisor to more than 130 organisations – many of whom are among Australia's largest and leading diversity employers.

DCA and its members welcome the discussion paper. DCA members have long recognised the benefits of pro-actively preventing workplace discrimination and harassment, and effectively managing issues and complaints when they arise. This commitment is driven by social and legal imperatives, as well as good business practice.

If you would like any further information in regards to DCA's submission on this matter, please contact DCA Research Director, Jane O'Leary at jane.dca@stockland.com.au

We look forward to seeing the exposure draft legislation, scheduled for release for public consultation in early 2012.

Yours sincerely,

[signature removed]

Nareen Young
Chief Executive Officer



**DCA Submission to the
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
on
Consolidation of Commonwealth Anti-Discrimination Laws
Discussion Paper of September 2011**

1 February 2012

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1. ABOUT DIVERSITY COUNCIL AUSTRALIA

Diversity Council Australia (DCA) provides diversity advice and strategy to over 130 organisations, many of whom are Australia's biggest employers.

In partnership with our member organisations, our mission is to:

1. Lead public debate;
2. Develop leading diversity research, thinking and practice;
3. Enable diversity management in a dynamic environment; and
4. Drive business improvement through successful diversity programs.

Funded solely by member subscription and advisory services, our members are Australia's leading diversity and strategically-oriented businesses – they understand that membership of DCA as the peak diversity organisation in Australia pays dividends, both internally and externally.

2. THE BUSINESS BENEFITS OF STRONG ANTI-DISCRIMINATION LEGISLATION

DCA members have long recognised the benefits of pro-actively preventing workplace discrimination and harassment, and effectively managing issues and complaints when they arise. This commitment is driven by social and legal imperatives, as well as good business practice. Appropriate and effective action in this area:

- Minimises costs associated with unnecessary staff absenteeism,
- Reduces avoidable costs associated with turnover, recruitment and re-training,
- Positions organisations to receive positive rather than adverse publicity in relation to its people management practices,
- Provides a safe and healthy work environment,
- Generates productivity benefits through retention of valued staff,
- Improves staff morale, and
- Minimises legal exposure and risk

DCA reviews of the available research highlight that preventing workplace discrimination has demonstrable benefits to businesses through appropriate and effective management of issues and complaints.

Costs of Discrimination

Costs to individuals

Discrimination exacts a financial as well as emotional toll on complainants and their families. It is extremely difficult to precisely quantify the economic cost of this. However, available research demonstrates discrimination in employment has a range

of psychological, physical, and financial consequences. For instance, VicHealth research indicates that the health impacts of discrimination include higher rates of depression and other forms of mental illness¹. As a specific example, recent Australian research indicates pregnancy discrimination has a measurable detrimental effect on women's emotional and psychological health². In this research women who were discriminated against in their workplace, and/or had no access to maternity leave reported higher levels of distress, anxiety, anger and fatigue than women who were not experiencing these difficulties at their workplace during pregnancy. This finding is consistent with an emerging consensus that discrimination and stigmatization are major causal factors of ill health, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping³.

Beyond Blue estimates that depression costs the Australian economy \$3.3 billion in lost productivity each year. Six million working days are lost, with another 12 million days of reduced productivity and economic studies indicate that each employee with untreated depression and related conditions will cost their organisation nearly \$10,000 a year.⁴ While clearly, depression is not only associated with workplace discrimination, there are clear financial imperatives for businesses to minimize the impact of depression where possible.

In addition to adverse psychological consequences, individuals experiencing discrimination face a range of financial hardships. Foremost among these is reduced earning capacity, with US-based research indicating that over the course of a woman's life, the average female graduate loses \$1.2 million earnings⁵. Research indicates that were it not for sex discrimination, women would be earning just as much as or more than men⁶. Discrimination also exacts a financial toll associated with loss of employment, with Australian Human Rights Commission (AHRC) statistics indicating three out of four complainants are no longer employed with the organization when they lodge their complaint⁷. Added to this, in the process of seeking legal redress, complainants often incur significant legal costs.

Costs to organisations

Organisations incur a range of costs associated with discrimination. Readily quantifiable costs of diversity complaints to the organisation may take the form of negotiated damages (known to have reached \$225,000 in individual matters), awarded damages (known to have exceeded \$100,000), and legal fees (quotes of more than up to \$100,000 to defend complex complaints are not uncommon). The experiences of DCA members indicate that legal costs can regularly exceed \$100,000 in more complex cases and it would not be uncommon for legal fees to exceed double this amount.

¹ VicHealth, (2007). *More than tolerance: Embracing diversity for health*. Available at: [http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20\(4\)%20-%20FINAL%20060907.pdf](http://www.vichealth.vic.gov.au/assets/contentFiles/DCASv2%20(4)%20-%20FINAL%20060907.pdf)

² Cooklin, A., Rowe, H. & Fisher, J. (2007). *Workplace discrimination continues for women*. Available at: <http://www.onlineopinion.com.au/view.asp?article=6656>

³ Lynch, P. (2005). Homelessness, poverty and discrimination: Improving public health by realising human rights, *Deakin Law Review*. Available at: <http://www.austlii.edu.au/au/journals/DeakinLRev/2005/11.html#fn46>

⁴ beyondblue, *National depression in the workplace program*. Available at: http://www.beyondblue.org.au/index.aspx?link_id=4.1028

⁵ Murphy, E. with Graff, E.J. (2005). *Getting even: Why women don't get paid like men--and what to do about it*, New York: Touchstone.

⁶ Bergman, B.R. (2007). 'Discrimination through the economist's eye', in F. J. Crosby, M. S. Stockdale, and S. A. Ropp, (ed.), *Sex discrimination in the workplace*. Malden, MA: Blackwell Publishing.

⁷ HREOC, (2003). *A bad business: Review of sexual harassment in employment complaints 2002*. Available at: http://www.hreoc.gov.au/sex_discrimination/workplace/bad_business/media/fact_cost.html

Less easy to quantify are the “hidden” costs, including, for example unplanned absenteeism, reduction in work team cohesion and productivity, reduction in staff morale, lost management/employee time (investigations, hearings etc.), resignations and staff replacement costs, workplace accidents, stress and illness claims, damage to the company's reputation, and/or political and industrial relations impacts.

The following research provides some general indicators of these costs:

- The New South Wales Anti-Discrimination Tribunal (NSW ADT) has estimated the cost of resolving the average ‘in-house’ serious or complex complaint to be \$35,000. This includes wages and lost productivity for all parties involved – that is, those involved in the allegations and those involved in resolving the complaint. This estimate was made over ten years ago so, allowing for inflation, it is likely this amount would now exceed \$45,000. The recent experiences of DCA members suggest that the cost of resolving the average serious claim would be consistently higher than the \$45,000 estimated by the NSW Anti-Discrimination Tribunal – commonly at least \$90,000.
- DCA has estimated the average cost for a serious external grievance to be \$125,000. This allows for costs associated with managing the complaint, including possible settlement costs. It does not consider more indirect costs associated with lost productivity and turnover.
- The average penalty for sex discrimination in Australia over the period 1985-2000 (when anti-discrimination legislation was administered by the then Human Rights and Equal Opportunity Commission (HREOC)) was almost \$14,000⁸. This does not appear to have significantly changed since the transfer of the hearing function to the Federal Magistrates Court and the Federal Court in 2000. While the highest damages for sex discrimination awarded under the SDA was \$41,488.57 (*Evans v National Crime Authority* [2003] and *Commonwealth v Evans* [2004]), the average damages was approximately \$14,000. The highest damages awarded in sexual harassment cases under the *Sex Discrimination Act, 1984* (SDA) since 2000 was \$392,422.32 (*Lee v Smith (No 2)* [2007]), while the average damages was approximately \$37,000⁹.
- Turnover associated with complaints is common: at least three out of four complainants are no longer actively working for the organisation where the allegations occurred by the time they reported it to AHRC. As the AHRC points out, this represents a considerable cost to employers in recruitment, training and development, in addition to the indirect cost associated with loss of staff morale inevitably arising from unresolved disputes within workplaces¹⁰. Turnover costs have been variously estimated at between 50 and 150% of the person's annual salary.
- Research conducted by the US Department of Labor indicates that when employers have a diversity complaint which goes public, their share price will

⁸ Brooks, R. (2004). *The price of discrimination: an economic analysis of the human rights and equal opportunity commission rulings 1985-2000*. Available at: http://findarticles.com/p/articles/mi_m0PAO/is_3_23/ai_n6201943

⁹ Federal Discrimination Law Online, June 2008. Available at <http://www.hreoc.gov.au/legal/FDL/index.html>

¹⁰ HREOC, (2003). *A bad business (Review of sexual harassment in employment complaints 2002)*. Available at: http://www.hreoc.gov.au/sex_discrimination/workplace/bad_business/media/fact_cost.html

drop within 24 hours. Conversely, when employers win a Diversity Award their share price will increase within 10 days.¹¹

Cost to community

Not only does discrimination adversely impact upon individuals, groups, and organisations, it also incurs costs to the broader community. The United Nations estimates that discrimination against women has cost Asia-Pacific billions of dollars every year. The Economic and Social Survey for Asia and the Pacific 2007 identified that barriers to employment for women cost the region \$42 billion to \$47 billion annually.¹² Other research has demonstrated a direct relationship between higher sex discrimination in particular nations and lower output per capita. The authors note, their research, “suggests the costs of gender discrimination are indeed quite substantial and should be a central concern in any macroeconomic policy aimed at increasing output per capita in the long-run”¹³.

Benefits of Prevention and Management

Benefits to Individuals

Since the introduction of the SDA, women’s workforce participation has increased from 49% to more than 58% in 2006¹⁴. Having a job or being involved in a business not only improves financial independence, it enhances self esteem, reduces social alienation, and leads to improved incomes for families and communities with a positive flow effect on health, the education of children and more¹⁵.

Organisational benefits

A range of research quantifies the economic benefits of effectively managing gender diversity in organisations. Catalyst research, for instance, indicates that *Fortune 500* companies with the highest representation of women board directors attained significantly higher financial performance, on average, than those with the lowest representations of women board directors. This related to return on equity (companies with the highest percentages of women board directors outperformed those with the least by 53%), return on sales (by 42%), and return on invested capital (by 66%)¹⁶. Research by McKinsey & Company indicates that companies with gender diversity financially outperform their sector in terms of return on equity (11.4% versus a sector average of 10.3%), operating result (EBIT 11.1% versus 5.8%), and stock price growth (64% versus 47% over the period 2005-2007)¹⁷. Similarly, other research

¹¹ Wright, P.M., Ferris, S.P., Hiller, J.S. & Kroll, M. (1995). Competitiveness through management of diversity: Effects on stock price valuation. *Academy of Management Journal*, 88: 272-287.

¹² United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), (2007). *Asia-Pacific: The economic costs of discrimination against women*

¹³ Cavalcanti, T. & Tavares, J., (2007). *The output cost of gender discrimination: A model-based macroeconomic estimate*, Centre for Economic Policy Research. Available at: <http://www.cepr.org/pubs/new-dps/dplist.asp?dpno=6477.asp>

¹⁴ ABS 1986-2006 Censuses of Population and Housing. Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7002008>

¹⁵ Steering Committee for the Review of Government Service Provision (2007). *Overcoming Indigenous disadvantage: Key indicators 2007 Report*, Canberra: Productivity Commission.

¹⁶ Catalyst, (2007). *The bottom line: Corporate performance and women's representation on Boards*. Available at: <http://www.catalyst.org/publication/200/the-bottom-line-corporate-performance-and-womens-representation-on-boards>

¹⁷ McKinsey & Company, (2007). *Women matter: Gender diversity, a corporate performance driver*. Available at: http://www.mckinsey.com/careers/women/makingadifference/socialsectorimpact/womenmatter/Mckinsey_women_matter.pdf

has demonstrated that over a ten year period the top 50 companies for diversity outperformed the S&P 500 by 24.8% and the NASDAQ by 28.2%¹⁸.

Organisations calculating return on investment on diversity initiatives also demonstrate the economic benefits that can be generated. Deloitte Touche in the US generated savings of \$250 million by implementing initiatives aimed at retaining and developing their female staff, which reduced their annual turnover from 25% to 18%¹⁹. In the UK, Lloyds TSB increased their maternity return rate from 74% to 85% following the introduction of work-life policies, making business savings of £2 million per annum²⁰.

Leaders in managing diversity in Australia have also been able to demonstrate that effective management of diversity leads to significant business benefits:

- Health and aged care provider, Mercy Health, has seen its employee retention rate rise to 98%, from around 88% six years ago, through the introduction of a number flexible workplace initiatives including a Parents' Network and Mercy Bank Program.
- St George Bank has introduced a range of innovative policies to support employees to balance work and family responsibilities which have seen a reduction in staff turnover from 18% in 2001 to 15% in 2007, reductions in absenteeism and dramatic increases in staff satisfaction with surveys showing increases in staff satisfaction from 48% in 2002 to 78% in 2006. These policies include ground-breaking 12 months unpaid leave for grandparents; the opportunity to work for four years and take the fifth year off with pay; flexible working arrangements for mature age workers; 13 weeks' paid parental leave; flexible parental leave in two six month blocks; paid career break opportunities and paid volunteer leave.
- The Walter Construction Group introduced a 5-day working week from 6 days. This resulted in a 15% increase in productivity and 30-60% less sick leave, with 90% of staff preferring the arrangement.
- SC Johnson has an HR strategy to create a brand for themselves as an Employer of Choice - SC Johnson's global human resources strategy is 'Best People – Best Place'. A key focus is work/life balance programs, including nine weeks paid parental leave with flexible pay options (eg motor vehicle and superannuation payments). They now have a 100% return to work rate.
- Australian unit of Autoliv had 2002 sales of \$260 million to customers such as local car makers. The cost of flexible work hours is \$100,000-a-year. Flexibility provisions for those with family commitments include assisting family members get to appointments or school interviews and an early finish on Fridays to allow families to shop and organise for the weekend. It has reduced staff turnover to under 2% and saves the company about \$3.6 million a year.
- The 2007 Managing Work-Life Balance Survey of Australian employers found that best practice organisations reported significant business benefits of work-life initiatives including a reduction in staff turnover of 15%, a reduction in staff

¹⁸ Baue, B. (2006, July 31). First socially responsible investing portfolio devoted to diversity launched. *Sustainability Investment News*. Available at: <http://www.socialfunds.com/news/article.cgi/2071.html>

¹⁹ Kingsmill, D. (2001). *Report into women's employment and pay*. Available at: <http://www.equalities.gov.uk/pay/kingsmill.htm>

²⁰ Kingsmill, D. (2001). *Report into women's employment and pay*. Available at: <http://www.equalities.gov.uk/pay/kingsmill.htm>

absenteeism of 16%, a positive impact on productivity and an increase in the parental leave return rate of 40%.

DCA anticipates that when considering the costs of failing to prevent discrimination with the benefits associated with effective management, the business case for continuing action in this area is self-evident.

3. DCA'S RESPONSE TO THE DISCUSSION PAPER

Overarching DCA position

DCA is deeply committed to the spirit and application of Australian anti-discrimination law, which over the last 40 years has played an important role in raising awareness of discrimination and providing access to remedies for individuals whose complaints fall within the parameters of the various Act. We also support the important public and community role of the Commissioners of the AHRC.

In our submission to the Senate Committee Review into the effectiveness of the *Commonwealth Sex Discrimination Act (1984)* (the SDA Review), DCA recommended that a federal anti-discrimination act be established to provide a uniform national standard with respect to anti-discrimination rights and responsibilities.

We are pleased that the Government is now undertaking this important work and seeking input from the wider community about ways in which the various Commonwealth laws might be consolidated so as to provide a more efficient and effective anti-discrimination system.

Ideally, DCA is of the view that the new law proposed in the discussion paper would be truly national with states and territories agreeing to a national anti-discrimination framework by way of conceding to a federal act. A national legal framework for anti-discrimination is key to ensuring individuals across the country have access to equal protection under the law and would enable businesses to better comply with their legal obligations.

While the discussion paper does not specifically canvass this issue, DCA would also like to state our support for continuing the AHRC's existing system of specialist Commissioners (i.e. Human Rights Commissioner and Disability Discrimination, Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner, Sex Discrimination Commissioner and Age Discrimination Commissioner). We support the retention of the Commissioners as a way of ensuring due attention, resources and focus continues to be given to each of the important areas of human rights - Aboriginal and Torres Strait Islander social justice, age discrimination, disability discrimination, race discrimination, and sex discrimination - and envisage that these could be added to in the event of additional grounds of discrimination being adopted.

DCA would also like to raise a further issue not canvassed in the discussion paper – that of bullying. We would recommend that the new Act attempt to better clarify the difference between discrimination, harassment and bullying in order to reduce community confusion about these behaviours and their legal definitions. It is DCA's experience that the differences between these behaviours are not well understood in the general community, nor are the respective legal jurisdictions that cover each. The development of a new anti-discrimination framework offers a unique opportunity to clarify for individuals and the business community their rights and responsibilities with regard to workplace bullying. This view has been strongly supported by DCA members.

In this submission, DCA will focus on the questions of key concern to our members, rather than attempting to respond to every question raised in the discussion paper.

Meaning of Discrimination

Question 1

What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

DCA Response

DCA supports the introduction of a unified discrimination test. The existing distinction between direct and indirect discrimination is not one which assists potential complainants to understand their rights, nor respondents their responsibilities. We note that currently no Australian jurisdiction uses a unified test for discrimination, however we are confident that providing clear examples of some common discriminatory practices (both direct and indirect) in the Act would reduce the risk that existing protections would not be maintained under a simplified test.

Clearly a unified test will represent a significant change in the existing framework. To ensure that a unified test does not oversimplify the complexities involved, it is important that the legislation either contain or is linked to very clear guidance about how those matters which might currently be considered to constitute indirect discrimination, will be treated under the new law.

In DCA's consultation with our members prior to the SDA Review, members indicated that clarifying what constituted indirect discrimination would assist with promoting awareness amongst the community that many workplace changes (e.g. parent rooms for breastfeeding mothers) are not 'special privileges' but part of being responsive to differing gender-based needs. Providing clear examples in the new Act would be a way in which clarification might be achieved.

In drafting the Bill, we would encourage the Government to be mindful that it is also important that simplification of the discrimination test not encourage vexatious or inappropriate claims.

DCA supports the detriment test used in the ACT and Victoria, which more simply provides that discrimination occurs when a person is treated unfavourably because of a protected attribute. Such a detriment test is much more easily understood by both complainants and respondents. We believe that the current comparator test found in the SDA, *Disability Discrimination Act, 1992* (DDA) and *Age Discrimination Act, 2004* (ADA) is complex and does not adequately allow discrimination to be easily established.

The difficulties inherent in the comparator model are illustrated in *Kelly v TPG Internet Pty Ltd [2003]* where the court held that a contractual requirement to work full-time was not a 'condition, requirement or practice' which could be challenged within the legislation, and therefore there was no right to have the employer consider whether part-time work could be made available. Thus because the employer did not offer flexible work generally to its staff, it could be refused to new mothers in its workforce²¹. The current comparator model in this way only decreases clarity for

²¹ Gaze, B. (2005). Twenty years of the Sex Discrimination Act. *Alternative Law Journal*, 30, 5.

employers about what constitutes indirect discrimination, and more specifically an appropriate response to flexibility requests from employees with family responsibilities.

DCA also prefers the detriment test as used in Victoria and the ACT to the human rights based test used in the *Racial Discrimination Act 1975* (RDA). Like the comparator model, this requires complainants to demonstrate a third element to establish discrimination. The requirement (in RDA subsection 9(1)(c)) that the discrimination has the “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” adds significant unnecessary complexity. Regrettably, the language and of human rights as used in this section of the RDA are not well understood in the broader community.

Question 3

Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

DCA Response

DCA supports the principle that special measures must be provided for in anti-discrimination law to provide protection for individuals in those instances where equal treatment has the impact of impeding substantive equality.

We specifically support the introduction of a consistent special measures provision covering all protected attributes and note that a number of State and Territory jurisdictions already provide such a single special measures provision.

From the perspective of leading practice employers, introducing consistency of special measures provisions will provide clarity about their rights and responsibilities when an organisation wishes to introduce a policy or program to increase substantive equality in the workplaces. DCA members have told us that the existing provisions can make it extremely difficult for progressive organisations to introduce policies or programs aimed at remedying the effects of historical discrimination. A clear and consistent provision would assist organisations to achieve substantive equality to a degree not readily achievable in the present legislative environment.

Question 6

Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?

DCA Response

DCA supports the proposal put forward in the discussion paper to clearly include attribute based harassment within the meaning of discrimination and thus extend the prohibition to all protected attributes.

As noted in the discussion paper, case law already indicates that harassment will be a form of discrimination where it is based on a protected attribute. The proposal to explicitly include a prohibition on harassment would simply clarify the existing law.

DCA agrees that the European Union (EU) approach of deeming harassment to be a form of discrimination will clarify protection for individuals, remove some uncertainty

about the coverage available to victims of harassment under the different existing Acts and reduce complexity the consolidation bill and as a consequence complexity for individuals and employers.

Protected Attributes

Question 7

How should sexual orientation and gender identity be defined?

DCA Response

DCA congratulates the Government on delivering on its election promise to include sexual orientation and gender identity as new protected attributes in the consolidation bill.

DCA have long been concerned about discrimination against lesbian, gay, bisexual and transgender (LGBT) employees, and our members are well aware there is much to be gained in terms of reputation, recruitment, retention, productivity and market share from ensuring the workplace is welcoming and inclusive of LGBT employees.

In 2010, DCA partnered with ACON and Stonewall UK, to establish the *Pride In Diversity* program designed to assist Australian employers introduce human resource and diversity policies that specifically support LGBT employees.

DCA has undertaken its own research related to LGBT employees in Australia which found significant concerns about discrimination. Our *Working for the Future* research found 16% of gay men and lesbians said they had been discriminated against at work on the basis of their sexual orientation.

These people were also more likely to strongly disagree or disagree that, in their job, people treat each other with respect (26% homosexual employees vs 17% heterosexual employees), and less likely to indicate people are chosen for jobs on the basis of their competency (50% vs 70%).

Recent research from the US also gives cause for concern. In a survey of almost 3,000 LGBT employees conducted by the Center for Work-Life Policy²², and featured in the *Harvard Business Review* in July 2011, almost half (48%) of LGBT respondents reported being closeted at work, with this having substantial negative consequences. The research found that, in short, those who are out flourish at work, while those who are in the closet languish or leave:

- LGBT employees who are not out reported significantly greater feelings of being stalled in their careers and greater dissatisfaction with their rates of promotion and advancement;
- LGBT employees who are not out are 40% less likely to trust their employer than those who are out; and
- Employees who remain closeted and isolated are 73% more likely to leave their companies within the next three years.

²² Hewlett, S.A. & Sumberg, K. (2011, July 1). For LGBT workers, being "out" brings advantages. *Harvard Business Review*.

The researchers found that closeted workers suffer anxiety about how colleagues and managers might judge them and expend enormous effort concealing their orientation, which leaves them less energy for actual work.

Moreover, LGBT workers who feel forced to lie about their identity and relationships typically don't engage in collegial banter about such things as weekend activities – banter that forges important workplace bonds. Some 42% of closeted employees said they felt isolated at work, versus only 24% of openly LGBT employees. These factors may explain why 52% of all closeted employees, but just 36% of out employees, believe their careers have stalled.

Specifically in relation to the consolidation bill, DCA supports broadly defining gender identity to include people who may not be legally recognised as their identified sex. DCA is aware of the significant difficulties and discrimination many transgender people face which are often exacerbated when legal frameworks do not recognize the sex with which they identify. Likewise, it is important that intersex people are protected.

DCA also supports broadly defining sexual orientation as a person's sexual attraction to and sexual activity with a person of a particular gender. Such an inclusive definition would assist in providing protection for people who may not identify as lesbian, gay or bisexual but suffer discrimination based on their sexual identity. DCA notes the extensive work undertaken by the AHRC during 2010²³ in which this issue was canvassed. For example, a person who identifies themselves as 'queer' or 'same-sex attracted' and suffers discrimination as a consequence would be properly protected under a broad definition of sexual orientation.

Question 8

How should discrimination against a person based on the attribute of an associate be protected?

DCA Response

Clearly a situation in which discrimination is permitted because a person has an association with a person with a protected attribute, is likely to decrease social inclusion and participation generally by people with that attribute.

As noted in the Discussion Paper, the DDA and RDA currently include protection against discrimination based on the disability or race of an associate of a complainant and most State and Territory laws also already apply explicitly to discrimination against associates.

In the interests of not diminishing existing protections offered under the DDA and RDA, the promotion of consistency, and reducing complexity, DCA agrees it would be appropriate to provide for protection against discrimination against associates of persons with any protected attribute or attributes under one provision.

It is also apparent that this could be a particularly useful protection in some situations of discrimination. It is not difficult for example, to imagine a scenario where such a provision could provide important legal protection for an associate of a gay or transgender employee. DCA notes that a number of groups participating in the

²³ AHRC, 2011, *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation report*. Available at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/

AHRC's recent consultations on sexual orientation and gender identity highlighted the importance of such protections²⁴.

Question 9

Are the current protections against discrimination on the basis of these attributes appropriate?

DCA Response

In DCA's submission to the SDA Review, we recommended that a new Commonwealth anti-discrimination act should include grounds of discrimination currently included in various state and territory anti-discrimination legislation including:

age, race, ethnicity, national origin, social origin, sex, sexual orientation, gender identity, marital status, family responsibilities, pregnancy and potential pregnancy, religious conviction, political conviction, physical, intellectual, psychological or psychiatric disability, irrelevant criminal record.

At the time DCA also noted that new grounds of discrimination could be added to the proposed act as community definitions emerge.

DCA notes that in recent years the AHRC has received a significant number of complaints from people alleging discrimination in employment on the basis of criminal record. Twenty three percent of all complaints received by the under the [AHRC Act](#) in the year 2010-11 were on the basis of criminal record discrimination²⁵.

While these complaints indicate that discrimination on the basis of criminal record is a significant issue for both employers and people with criminal records, there is also a concern among employers that introducing criminal record as a new protected attribute should be carefully considered to protect businesses from unintended consequences. This may be particularly important in industries where criminal record checks are required as part of licensing or registration (for example teaching, nursing, security, casino workers, taxi drivers and bus drivers), where 'working with children' checks are required and in some financial services. In this regard, DCA would strongly support the introduction of guidelines to assist employers in determining whether a criminal record is relevant or otherwise to the role and how employers should assess an employee's or job applicant's criminal record.

DCA notes that the attributes currently provided with protection under the *Fair Work Act, 2009* give effect to Australia's broader obligations to prevent discrimination in work under the International Labour Organization Convention No. 111 and cover a wider range of attributes than those protected under Australian anti-discrimination law.

²⁴ See comments from the Law Council of Australia; ACON; Queensland Association for Healthy Communities and National LGBTI Health Alliance. In, AHRC, 2011, *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation report*. Available at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/

²⁵ Australian Human Rights Commission, Annual Report 2010-2011 at: http://humanrights.gov.au/about/publications/annual_reports/2010_2011

However one of the more significant anomalies arises in relation to the treatment of religious belief under anti-discrimination law. Currently under the RDA no protection is offered on the grounds of religious belief although many State and Territory jurisdictions offer such protection. Likewise, several States prohibit vilification of a person or people on the basis of their religion.²⁶

As a consequence, a person who is an immigrant and belongs to a racial group which adheres to a particular religion - for example a Lebanese born Muslim - could be offered protection under the RDA but a person who was of an Anglo-Australian background and had converted to the Muslim faith could not. In a multi-faith society such as Australia, this is a gap in the coverage of anti-discrimination law which should be rectified in the consolidation bill.

As this attribute is already covered by the Fair Work Act, in relation to employment, DCA would not anticipate such an addition to the attributes included in the consolidation bill imposing any significant additional burden on employers.

DCA notes the proposal raised in the discussion paper in relation to the need to provide protection from discrimination for people who are victims of domestic violence. We are mindful that Australia is beginning to lead the world in recognising domestic violence as an issue which can potentially impact on workers and workplaces, with approximately 300,000 Australian employees now covered by domestic violence clauses in their agreement or award conditions.

As a result of growing national interest, we are aware that the Commonwealth Department of Education, Employment and Workplace Relations has funded the Centre for Gender-Related Violence Studies at the University of New South Wales to undertake the Domestic Violence Workplace Rights and Entitlements Project. Research published by the Australian Domestic and Family Violence Clearinghouse as part of this Project found that initiatives to address the issue of domestic violence in the workplace had been valuable but relied on the commitment of a senior, influential individual within the organisation²⁷. As a consequence, the Clearinghouse has recommended that protection for victims of domestic violence be improved by being included in anti-discrimination law as well as in industrial instruments.

A national online survey about domestic violence and the workplace was carried out by the Australian Domestic and Family Violence Clearinghouse between February and July 2011²⁸. The survey investigated the impact of domestic violence at work and was completed by over 3600 union members. It found that:

- The majority of the respondents were women (81%), two-thirds were in fulltime employment and nearly two thirds (64%) of the respondents were aged 45 and older.
- Nearly a third of respondents (30%) had personally experienced domestic violence.
- Nearly half those who had experienced domestic violence reported that the

²⁶ This issue was considered in more detail in a paper by Associate Professor Carolyn Evans of the Centre for Comparative Constitutional Studies, Melbourne Law School *Legal Aspects Of The Protection Of Religious Freedom In Australia* (June 2009) as part of the AHRC's project *Freedom of Religion and Belief in the 21st Century*. Accessed at: <http://www.humanrights.gov.au/frb/index.html>

²⁷ Domestic Violence Workplace Rights and Entitlements Project, *Workplace Bulletin*, Winter 2011, Australian Domestic & Family Violence Clearinghouse, The University of New South Wales

²⁸ A full copy of the report is available on the website: www.dvandwork.unsw.edu.au

violence affected their capacity to get to work; the major reason was physical injury or restraint (67%), followed by hiding keys and failure to care for children.

- Nearly one in five (19%) who experienced domestic violence in the previous 12 months reported that the violence continued at the workplace
- The major form the domestic violence took in the workplace was abusive phone calls and emails (12%) and the partner physically coming to work (11%).
- The main reported impact was on work performance, with 16% reporting being distracted, tired or unwell, 10% needing to take time off, and 7% being late for work.
- 45% of respondents with recent experience of domestic violence discussed the violence with someone at work, primarily coworkers or friends rather than supervisors, HR staff or union representative.
- 48% of respondents who had experienced domestic violence did disclose the violence to a manager/supervisor, though only 10% found them helpful.
- For those who did not discuss the problem at work, the major reason given was 'privacy', followed by reasons of shame and fear of dismissal.

These findings suggest there is significant need to better protect victims of domestic violence at work, as well as through policing and community welfare initiatives.

DCA believes that it would be valuable when developing the consolidation bill to consider ways in which anti-discrimination legislation might assist in providing such protection. As with other proposed changes to the legislative framework, it would be valuable to provide examples within the consolidation bill to offer greater clarity to individuals and organisations about their rights and responsibilities with regards to this attribute.

Question 10

Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

DCA Response

Intersectional discrimination is a common experience for many complainants. While arguably these people are already protected by the law it is legitimate to suggest that the current laws may deter some people who have experienced discrimination based on multiple grounds from making complaints. Clarifying protection against intersectional discrimination through a provision such as that in the S3.1 of the Canadian Human Rights Act²⁹ would be a valuable addition to the consolidation bill.

DCA has been committed to taking a leadership stance in this area, encouraging practitioners to better acknowledge and leverage off diversity within various

²⁹ Section 3.1 of the Act provides that: *For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.*

demographic groups when designing and implementing diversity initiatives, through working with the concepts of intersectionality and identity³⁰.

Protected Areas of Public Life

Question 11

Should the right to equality before the law be extended to sex and/or other attributes?

DCA Response

DCA supports the principle that all people should have a right to equality before the law. We note the significance of this right as expressed in S10 of the RDA to fundamental legal changes in Australia – most importantly of course in relation to the recognition of native title in Australia as a consequence of *Mabo v Queensland (No.2)* 1992.

We note that a number of organisations including the Law Council, AHRC and Australian Law Reform Commission have previously made recommendations³¹ about the utility of such a right for other attributes – in particular sex – and that the change was supported by the Senate Committee in the Senate Committee SDA Review Report (the SDA Report).

Question 12

What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

DCA Response

As a general principle, DCA is of the view that coverage of anti-discrimination legislation should be as broad as possible. From the perspective of employers, employment is already comprehensively covered by legislation. As a consequence, any likely changes to the areas of public life covered by the consolidation bill would have minimal impact on employers and represent no increase in administrative burden.

We also note the findings of the SDA Report which highlight that current definitions of public life to which anti-discrimination law applies can be limiting for example in relation to small partnerships, voluntary workers and small member based associations.

We would support a general prohibition against discrimination in any area of public life being introduced which would have the benefit of reducing complexity of the legislation.

Notwithstanding, DCA is less supportive of the human rights based language taken in the RDA subsection 9(1) which appears unnecessarily complex. As mentioned in our response to question 1, regrettably the language and context of human rights are not well understood in the broader community and we feel that such language in the consolidation bill has the potential to generate confusion. Clearly one of the key goals

³⁰ Annese, L., O'Leary, J. & Young, N. (2011, February). More than a woman. *Diversity Matters*. Available at <http://www.dca.org.au/News/News/More-than-a-woman---A-new-approach-to-gender/160>

³¹ See for example the Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 and ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, July 1994, and ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, December 1994,

of this consolidation bill is to formulate anti-discrimination legislation which is as far as possible easy for the lay person to understand.

Question 13

How should the consolidation bill protect voluntary workers from discrimination and harassment?

DCA Response

DCA notes that people often move from volunteering into paid employment. As such, protecting volunteers is important to enable all people to fairly experience the benefits of volunteering.

Without wishing to speak on behalf of the not-for-profit sector in which the vast majority of volunteers work, it would appear that as these organisations already have protections in place for their employees, and that extending these protections to people working in a voluntary capacity would not impose a significant additional burden.

Question 14

Should the consolidation bill protect domestic workers from discrimination? If so, how?

DCA Response

It would seem perfectly reasonable for a person hiring an employee such as a nanny for her children or for a personal care provider to work in a private home to be able to make distinctions between prospective employees that might otherwise be unlawful in a public workplace. An exception to the prohibition against discrimination should continue to remain in place in relation to determining offers of employment for domestic duties or employment in a private household.

DCA would support that such an exception remain as a limited one and protection continuing to be provided for domestic workers in relation to termination and discrimination during employment.

Question 16

Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

DCA Response

DCA notes the current inconsistency in relation to the coverage of partnerships under different existing laws and jurisdictions.

We support the proposal put forward in the SDA Report to apply provisions in the consolidation bill to all partnerships regardless of size, given the apparently arbitrary nature of the existing distinctions.

Question 18

How should the consolidation bill prohibit discriminatory requests for information?

DCA Response

DCA is of the view that the existing prohibitions on discriminatory requests for information are unnecessary.

As the discussion paper points out, employers and service providers often request information from employees, potential employees, service users and customers for perfectly legitimate purposes.

We would argue that if discriminatory conduct ensues following a request for information, then an individual has legitimate grounds to make a complaint of discrimination. However a request for information in and of itself is not a discriminatory action and this prohibition could be removed from the consolidated bill as part of the simplification exercise.

DCA members have told us that the existing prohibitions on discriminatory requests for information are not only unnecessary but can in fact be counter-productive. For example a company may consider that it would be helpful to obtain information from its employees and/or customers to enable it to understand the diversity of its employee and customer base better – and in turn to provide better, and more targeted and relevant, services and support. However, the existing prohibitions represent a disincentive to do so, and can have the unintended effect of stifling such initiatives.

Question 19

Can the vicarious liability provisions be clarified in the consolidation bill?

DCA Response

DCA notes that all Commonwealth laws currently contain vicarious liability provisions. As leading employers, DCA members already take all reasonable steps to ensure that their employees and agents are discouraged from acting in a discriminatory manner towards fellow employees, clients and customers.

Part of DCA's core business is assisting our members to develop comprehensive policies and practices to prevent discrimination in their workplaces. This includes by:

- Developing strategies, programs and policies for organisations that are in line with leading practice;
- Providing advice on how to establish appropriate diversity infrastructure such as diversity councils, diversity champions, affinity groups, contact officer networks etc;
- Assisting organisations to develop metrics to gauge the success of their programs, establish accountabilities and drive outcomes;
- Recommending approaches to diversity education and training to engage employees in companies' diversity programs;
- Advising organisations on how to best communicate their diversity efforts to their stakeholders; and
- Assisting organisations to improve their managers' diversity skills and capabilities.

As a consequence, DCA is confident that our members are already meeting their obligations to take reasonable preventative actions and is happy to support the consolidation bill requiring employers to ‘take all reasonable steps to prevent the employee or agent from doing the act’.

Similarly to previous questions, this may also be an area of the bill in which examples could provide a valuable addition and so increase understanding among employers – particularly in small and medium sized enterprises – about their responsibilities and obligations.

Exceptions and Exemptions

Question 20

Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

DCA Response

In the interests of simplification, DCA concurs with the recommendation of the SDA Report to remove several existing permanent exemptions and replace them with a general limitation clause in the consolidation bill. As pointed out in the discussion paper, this would have the advantage of removing the requirement for employers and service providers to apply for numerous specific exceptions for various activities and could address gaps in coverage and inconsistencies.

The proposal by the Productivity Commission to retain specific exemptions under the DDA to provide greater clarity about the intent of the legislation, could achieve the same end by again providing examples in the consolidation bill.

While there may be a risk of interpretation by the courts leading to some uncertainty in the short term, DCA would anticipate that the benefits of reduced administrative burden for businesses in applying for exemptions would outweigh the risks.

Question 21

How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

DCA Response

DCA notes the current inconsistencies in relation to existing provisions relating to inherent requirements. In the interests of simplicity and consistency, we would suggest that the consolidation bill reflect the Fair Work Act by applying a broad general inherent requirements exception to all attributes and in all areas of work covered by the bill.

It would seem to be unnecessary to maintain both inherent requirements and genuine occupational qualifications exceptions in the consolidation bill and we would encourage a single provision to be adopted in drafting in an effort to assist employers to better understand their responsibilities and obligations.

As has been previously suggested, it may also be useful in this area to include examples in the legislation to provide clearer guidance to organisations. This is particularly the case as DCA members report there remains a degree of uncertainty as to what precisely qualifies as an inherent requirement of a particular job under current industrial law.

Question 22

How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

DCA Response

Reflecting the spirit of inherent requirements and genuine occupational qualifications exceptions discussed above, DCA would support limiting religious exemptions on any grounds to those where there is a specific religious element to employment or the provision of goods and services.

For example, DCA is supportive of continued exceptions where a religious body employs a person as a priest, minister of religion or member of a religious order. Similarly, if a religious school employs a teacher of religion it would appear reasonable for that person to be required to adhere to the relevant religion and its tenets.

However, DCA does not support general exemptions for religious bodies for any acts and practices. For example, it should be unlawful to discriminate against a school bus driver hired by a religious organisation on the grounds of his sexual orientation. We would encourage the Government to narrow the focus of current religious exemptions to bring them into line with the approach to exemptions taken for all other employers.

Question 23

Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

DCA Response

If a general limitations clause is introduced into the consolidation bill as outlined above, it would seem unnecessary to continue to make temporary exemptions available. Generally removing specific exemptions, including temporary exemptions, is likely to simplify this area of law and reduce the administrative burden on businesses in relation to applying for exemptions.

Complaints and Compliance Framework

Question 24

Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

DCA Response

In general terms, DCA believes that options to assist individuals and organisations to understand their rights and responsibilities with regard to anti-discrimination legislation are best focused on education and practical assistance rather than by introducing additional regulation and administrative burden.

Leading diversity employers already have effective policies and procedures in place to prevent discrimination in their workplaces. Adding legislative requirements to have such policies and practices certified will only add to the administrative burden

experienced by businesses and will arguably not offer any greater defense against claims of discrimination.

For example, the advantage of Action Plans as suggested in the discussion paper appears to be that organisations can analyse and improve their existing policies and practices and market their good practice. However, many employers clearly already undertake such practices under another name and are recognized for their efforts through such things as the Equal Opportunity for Women in the Workplace Agency's Business Achievement Awards.

In the event that a co-regulatory framework were established it would seem that with the exception of the issue of technical standards relating to disability, there would be limited value for businesses in this mechanism.

As indicated in our submission to the SDA Review, DCA supports the development of community guidelines which detail standard workplace grievance procedures. While larger employers generally have workplace grievance guidelines in place, many smaller employers do not. This hinders effective resolution of issues as employers and their employees are not equipped with the necessary information on appropriate processes to follow and outcomes to expect.

Standard grievance procedures should list resolution options from informal to formal and lowest to highest levels of intervention. The guidelines would stipulate that the complainant should have already sought to resolve the issue at the workplace level, before seeking assistance or further resolution through AHRC.

Such guidelines would assist in improving the general lack of awareness and understanding amongst the general community about grievance and resolution options available to individuals with complaints. Specifically, such guidelines would make clear that in some types of complaints (for example, bullying or sexual assault in the workplace) there are connections with industrial relations, civil and criminal legislation and these may take precedence over anti-discrimination legislation. They could also clarify issues concerning the distinction between bullying and unlawful discrimination and the most appropriate course of action for complainants and employers.

Given that there are likely to be not insignificant costs to Government of introducing processes like the administration of Action Plans and co-regulation and certification of standards and special measures, DCA would suggest that these resources might be better directed toward assisting small and medium sized enterprises with education and support to increase compliance. DCA members have indicated that it would be particularly valuable for written guidelines and supporting documents dealing with a range of issues relevant to the new law, to be developed for employers.

The development of the consolidation bill offers a unique opportunity for the Government to also direct limited resources towards community education for individuals and businesses about the new legislation.

Question 25

Are any changes needed to the conciliation process to make it more effective in resolving disputes?

DCA Response

As previously outlined, DCA has estimated the average cost for a serious external grievance to be \$125,000. This allows for costs associated with managing the complaint, including possible settlement costs. It does not consider more indirect costs associated with lost productivity and turnover.

While the aim of conciliation in the AHRC is to provide a low cost, informal first stage of alternative dispute resolution to achieve resolution between the parties, this is often not the case for either complainants or respondents who can incur significant legal costs.

However, clearly conciliation remains far less costly than having a matter considered by the federal courts.

Increasing the range of alternative dispute resolution options available to the parties is supported as a way of encouraging matters to settle prior to proceeding to court.

Notwithstanding, if the parties are in agreement, a matter should be able to proceed to court without a compulsory conciliation stage as a way of avoiding delays and thus limiting as far as possible the damage to the employment relationship. It is of course crucial that such a step is only taken with the full consent of both parties.

DCA's submission to the SDA Review recommended that the AHRC's conciliation structure be extended so that:

- Conciliators with appropriate expertise (i.e. workplace and diversity and equal employment opportunity experience and expertise) are appointed from the community, and
- Conciliations sit in regional areas (following the example of relevant state industrial tribunals).

Acting on this recommendation would:

- Strengthen the profile of AHRC in the community, including particularly in regional areas,
- Improve access in regional areas and so minimize fear of the conciliation process (for example, of having to travel to a capital city to navigate an unfamiliar and potentially intimidating process),
- Assist with local ownership and resolution of issues and complaints,
- Promote timely resolution of issues, prior to employment relationships being irrevocably damaged, and
- Raise awareness and understanding amongst the general community about what constitutes discrimination and harassment.

DCA members have noted that in their experience as participants in the AHRC's conciliation process, the single greatest change required to make the process more effective is to increase the amount of funding and resources available to the AHRC so as to enable it to perform its work more expeditiously. It is very common for complaints to take 3-4 months, once lodged, to reach a respondent. It is very uncommon for a conciliation to occur earlier than 6 months after the complaint is lodged. This undermines the effectiveness of the conciliation process, and is particularly counter-productive when the complainant and respondent have an ongoing employment relationship which is impeded by the stalled AHRC process. The AHRC is a useful and helpful forum for addressing these issues, but it clearly has limited resources that prevent it from reaching its full potential in the conciliation sphere.

In addition to the need for greater resources to carry out its existing workload, any extension of the work of the AHRC as a consequence of the consolidation Bill will also require additional resourcing.

Question 27

Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

DCA Response

DCA supports a number of the reforms proposed for the AHRC in particular:

- Extending formal inquiry powers of the AHRC to State/Territory activities. Given the AHRC currently has powers to conduct formal inquiries into matters relating to Commonwealth acts or practices which infringe human rights, it would seem it may be also useful to extend such powers.
- Extending the requirement to monitor progress towards equality for other groups in addition to Aboriginal and Torres Strait Islander people. A report to Parliament every 4 years on Australia's progress in achieving substantive equality for all people would be a welcome development and highlight important issues for Governments and the wider community.
- Allowing the AHRC to bring actions as well as resolve disputes in the same way as the Fair Work Ombudsman. Allowing the AHRC to pursue important public interest matters can be advantageous to employers as well as employees by having contentious questions resolved in court. If such a role is to be introduced it is crucial that perceived conflicts of interest be avoided. This could be done in a similar way to Fair Work Australia where the role of the Fair Work Ombudsman is separated. Clearly more thought will have to be given in drafting how this would be managed under such a regime but it is critical for public confidence that any investigative/prosecutorial role for the AHRC is seen to be clearly distinct from the dispute resolution role. It is also important to note that any such additional role for the AHRC must bring with it increased resources to ensure that the existing dispute resolution roles are not compromised and that parties do not have longer to wait for conciliation services.

Interaction with Other Laws and Application to State and Territory Governments

Question 28

Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

DCA Response

It is DCA's view that it is important that existing prohibitions in place to prevent forum shopping should not be weakened in the consolidation bill.

It has also been suggested by DCA members that dispute resolution might be further streamlined by not only preventing claims under both the Fair Work Act and under anti-discrimination laws but by requiring applicants to elect between pursuing a claim under anti-discrimination law and litigating at common law.

As noted in the Discussion Paper, there is substantial overlap between discriminatory conduct in employment dealt with by the Fair Work Act and provisions relating to discrimination in work in Commonwealth anti-discrimination laws. Consistent with the objective of avoiding inconsistencies and unwarranted administrative burden, particularly on national employers, the Government should give serious consideration to removing the overlap between Commonwealth anti-discrimination laws and the Fair Work Act and dealing with anti-discrimination matter solely within the framework established in the consolidated bill.

Question 29

Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

DCA Response

DCA is in favour of a consolidated Commonwealth bill covering the field. While anti-discrimination laws operate concurrently in both federal and State/Territory jurisdictions, individuals and organisations will continue to experience confusion about their rights and responsibilities under anti-discrimination laws.

From the perspective of private sector employers, it is particularly frustrating having concurrent anti-discrimination legislation operating at a local and national level when employment law is now otherwise almost completely the responsibility of the Commonwealth.

In addition, many DCA members are large national employers working across the country. The significant administrative burden and sometimes conflicting obligations required by different State and Territory anti-discrimination frameworks can be difficult to manage.

DCA would strongly encourage the Attorney General to pursue an agreement with the States and Territories through the Standing Council on Law and Justice to vacate the field in favour of a modern, comprehensive anti-discrimination framework at the federal level.

This would reduce the burden on business, increase compliance by increasing community awareness of rights and responsibilities, and provide more comprehensive protection from discrimination for all Australians, no matter where they live.

DCA's members have strongly emphasised that that in order to provide a truly efficient, fair and consistent anti-discrimination framework, it is crucial that the consolidated law establish a truly national anti-discrimination framework. The alternative is that a plethora of federal, state and territory anti- discrimination laws will continue to cause inconsistencies and confusion, and impose an unwarranted administrative burden on national employers.

Question 30

Should the consolidation bill apply to State and Territory Governments and instrumentalities?

DCA Response

DCA is of the view that while the issue of inconsistency between federal and State and Territory laws is not really an area of key concern to business, as a general principle, primacy of Commonwealth law should be maintained to ensure Australian's continued compliance with our international human rights obligations.