EQUAL OPPORTUNITY COMMISSION OF WESTERN AUSTRALIA

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?

Direct vs Indirect Discrimination

My issue with existing tests of direct and indirect discrimination is not so much their potentially misleading labels, or whether they should be unified, but with the formulation of the tests themselves. The *Sex Discrimination Act* (SDA) at the time of its enactment was a breakthrough, as were a number of other anti-discrimination statutes passed by the states at that time.[1] Making discrimination in Australia unlawful was an achievement in itself in 1984. It has understandably taken some time for the case law and commentary to build up to the point where the effectiveness of the tests, and the legislation generally, can be properly analysed.

I concur with the Discussion Paper's assessment that the requirement for a comparator, usually hypothetical, in the test for direct discrimination in Federal discrimination law, raises significant difficulties, not least the limitations arising out of the High Court's *Purvis*[2] decision. The absence of an actual comparator means that the complainant, who carries the burden of proof, more often has to rely on inferences, rather than direct evidence, in order to prove less favourable treatment. The ACT *Discrimination Act*, passed in 1991, adopted the 'detriment' test.[3] The recently enacted Victorian *Equal Opportunity Act* 2010 has done the same.[4] Both the Australian Human Rights Commission (AHRC) and the Australian Council of Human Rights Agencies (ACHRA) have in their submissions to this inquiry recommended that the comparator be removed from the definition and replaced by the detriment test. I agree. It is not necessary that a complainant establish that he or she was treated "less" favourably than someone else; it is sufficient that complainant is disadvantaged in some way, in a causal sense, as a consequence of the discriminatory act.

Regarding the test for indirect discrimination, there has been considerable divergence in the way that the Commonwealth, states and territories have developed the definition over the last 30 years. The SDA was amended in 1995 to remove the proportionality test and reverse the onus of proof so that the respondent has to establish that the impugned requirement is reasonable.[5] The SDA was also amended to include matters that are to be taken into account in deciding whether a requirement or

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[1] WA *Equal Opportunity Act* 1984; Vic *Equal Opportunity Act* 1984 (since repealed); SA *Equal Opportunity Act* 1984

[2] *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62

[3] *Discrimination Act* 1991, s 8

[4] *Equal Opportunity Act* 2010, s 8

[5] *Sex Discrimination Amendment Act 1995 (Cth)*

condition is reasonable. The *Age Discrimination Act* (ADA) adopts the same approach to indirect discrimination as the SDA, except that it does not provide express guidance as to reasonableness. The *Disability Discrimination Act* (DDA) and *Racial Discrimination Act* (RDA) both include the extra limb that the complainant does not comply with the requirement. The RDA is alone in not reversing the onus of proof in relation to reasonableness.

In my review of the WA *Equal Opportunity Act* ("the WA Act") in 2007, I recommended that the test for indirect discrimination in the Act should be amended to reflect the tests in the SDA and the ADA.[6] That is still my position, with one important change. I refer to the recommendation by ACHRA and the AHRC that further consideration be given to replacing the current 'reasonableness' test with a 'legitimate and proportionate' test, as summarised in the Discussion Paper.[7] Although I am not convinced that the 'legitimate and proportionate' test represents an advance over the concept of 'reasonableness', I agree that it should be considered, given the preference for it in overseas jurisdictions, and the recommendation by the Senate Standing Committee on Legal and Constitutional Affairs in its SDA Report. However, it is arguable that the matters that must be considered when determining reasonableness under the SDA, as currently drafted, already achieve this purpose.[8]

Unified Test

I appreciate there is significant support for a unified definition of discrimination, which would do away with the distinction between 'direct' and 'indirect'. I note, for example, the proposed definition in the ACHRA submission.[9] Another possibility is that the definition of discrimination in the ACT Discrimination Act be adopted.[10] Although a unified approach might have merit in terms of simplifying the form of the test, the separate concepts of direct and indirect discrimination are largely carried over. In other words, the unified test appears to alter the form, but not the substance, of direct and indirect discrimination. If the form of the test is simplified or made easier to understand, then it should be supported, but I do not regard the unified test, as proposed, as a radical departure from the existing approach.

Question 2: How should the burden of proving discrimination be allocated?

Regarding indirect discrimination, I refer to my comments in response to Question 1, above. I support the onus of proof in cases of indirect discrimination being reversed so that the respondent is required to demonstrate that the requirement in question is reasonable, or legitimate and proportionate, as the case may be.

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[6] 'Review of the Equal Opportunity Act 1984', May 2007, at 32-33 – eoc.wa.gov.au/publications/reviewsandreports

[7] AHRC submission, at 13-14; ACHRA submission at 17-18;

[8] SDA, s 7B, see also Vic *Equal Opportunity Act* 2010, s 9

[9] ACHRA submission, 14-15

[10] ACT *Discrimination Act*, s 8

In respect to direct discrimination, I note comments by ACHRA and the Discrimination Law Experts' Group[11] regarding the approach taken in overseas jurisdictions, and in the *Fair Work Act* 2009 (FWA) when determining 'general protections' applications.[12] It has certainly been my experience that whilst a complainant may initially be able to make an arguable allegation of discrimination, the burden of presenting probative evidence capable of supporting an inference that discrimination has occurred (direct discrimination is rarely proved from primary facts) is too great, resulting in frequent dismissals by courts and tribunals. There should be a rebuttable presumption in the consolidated bill that discrimination is taken to have occurred unless proved otherwise by the respondent.

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?

One of the problems with the WA Act is that the scheme of operative provisions and exceptions is repeated unnecessarily for each ground in the Act. This is not so with more recently enacted discrimination legislation.[13] There should be one 'special measure' provision in the consolidated bill, covering all grounds. In my experience, employers and service providers have been reluctant to use the special measures provision, not least because they fear accusations of 'favouritism'. I agree with ACHRA's submission that the use of a special measure should not be characterised as an exception, but as a separate concept, the intention of which is to achieve equality. The drafting of the special measures provision in the Victorian Act[14] goes some way to explaining the purpose behind the concept, and is more likely to encourage its use. It should be considered as the preferred model for the consolidated bill.

Question 4: Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

I agree with the submissions by the AHRC, ACHRA, SA and ACT that the reasonable adjustments provision in the DDA should apply to all attributes in the consolidated bill, but using the approach in the Victorian Act.[15]

Question 5: Should public sector organisations have a positive duty to eliminate discrimination and harassment?

In 2007, I recommended that the WA Act should be amended to include a positive gender duty, to apply to all public authorities when carrying out their functions. The State's Director of Equal Opportunity in Public Employment would be given strengthened oversight powers to enable it to monitor and enforce compliance by public sector employers in performance of that duty. That has not yet occurred but I

[11] Discrimination Law Experts' Group Submission, 13 December 2011
[12] FWA, Part 3.1
[13] ACT *Discrimination Act* 1991; Tas. *Anti-Discrimination Act* 1998; Qld *Anti-Discrimination Act* 1991; Vic. *Equal Opportunity Act* 2010
[14] Equal Opportunity Act 2010, s 12
[15] Discussion Paper, at 17

remain a strong supporter of reducing the occurrence of discrimination, particularly in the areas of employment and the delivery of goods and services, through compliance of a duty by public authorities.

The concept of an equality duty is not new. Until recently, a 'gender equality duty' had been in force in the UK since 2007, under the *Sex Discrimination Act 1975*, as it was then known.[16] This followed the creation of a disability duty under the UK *Disability Discrimination Act 1995* in 2006, and a race duty under the *Race Relations Act 1976*, in 2001. In April 2011, a broad 'equality duty' came into effect in the UK, under the recently enacted *Equality Act* 2010, itself an example of 'harmonised' legislation. This was followed by specific duties regulations in September 2011, from which public authorities take guidance as to how to comply with the duty. Gender equality policy initiatives have also been formalised in Canada[17] and a number of countries in the European Union, where it is known as 'gender mainstreaming'.

In Australia, the Victorian Act is alone amongst discrimination legislation that sets out positive duty. However, it goes a step further than the UK model, and extends the duty to any person who is the subject to the 'negative' duty not to discriminate, harass, or victimize another person. Under the Act, this includes employers, educators, providers of goods, services, accommodation, clubs, and in sport.[18] The Victorian Commission is able to investigate and report on alleged breaches of the positive duty.[19] I agree with the ACHRA submission that the duty should apply to both public and private entities, however, it may be advisable to have it apply to public authorities first, so that the effectiveness of the scheme can be reviewed. The AHRC would hold a central role as an educator and investigator.

Since 2005, the WA Commission has been responsible for overseeing the implementation of the Substantive Equality Framework, a policy which requires state government agencies to identify and remedy deficiencies in the delivery of services to Aboriginal people and people from ethnically and linguistically diverse backgrounds.[20] The guiding principle behind the Framework is the recognition that formal equality – where everyone is treated equally – does not necessarily result in substantive equality and, in fact, keeps systemic discrimination hidden from view. Agencies are taken through various stages, from reviewing policies and practices that may actually entrench discrimination, through to implementing and monitoring changes that are intended to ensure actual equality in the delivery of services. This policy approach could be adopted at Federal level and be applied to all grounds of discrimination under the consolidated bill, alongside, and complimentary to, the positive duty.

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[16] *Sex Discrimination Act 1975*, as amended by the *Equality Act 2006*. A similar duty commenced under the *Disability Discrimination Act 1995* in December 2006 and under the *Race Relations Act 1976* in 2001.

[17] 'Federal Plan for Gender Equality', administered by Status of Women Canada.

[18] Victorian Act, s 15

[19] Victorian Act, Part 9

[20] 'The Policy Framework for Substantive Equality: responding to the different needs and priorities of individuals and communities', Department of Premier & Cabinet, Equal Opportunity Commission, www.eoc.wa.gov.au.

Question 6: Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

I agree with the submissions by the AHRC, ACHRA, SA and ACT that harassment in relation to all grounds covered under a consolidated bill should be prohibited, using a single definition.

PROTECTED ATTRIBUTES

Question 7: How should sexual orientation and gender identity be defined?

In 2002, the WA Commission recommended that gender identity discrimination be included as a ground under the WA Act, using a definition sufficiently broad to include persons whose identity is indeterminate or changing, and who do not necessarily seek to live as persons of a particular sex. In my review of the Act in 2007, I made the same recommendation. Western Australia remains the only state in Australia that does not prohibit discrimination on the ground of gender identity. At the very least, for the benefit of Western Australians with different gender identities, Federal protection is needed.

I agree with the ACHRA and AHRC submissions that the definitions of sexual orientation and gender identity should be as broad as possible, although this will require further extensive and thorough consultation with the gay and lesbian, and gender identity, communities.

Question 8: How should discrimination against a person based on the attribute of an associate be protected?

I note the Discussion Paper's observation that WA does not cover associates of a person with a protected attribute. This is incorrect – the WA Act protects relatives and associates on the grounds of impairment, sexual orientation, and race.[21] The absence of protection for relatives and associates on the other grounds under the WA Act is not intentional; the opportunity to amend the Act to include the other grounds has simply not arisen. The consolidated bill should cover relatives and associates on all grounds.

Question 9: Are the current protections against discrimination on the basis of these attributes appropriate?

In my 2007 review of the WA Act, I recommended that certain grounds not currently included in the Act should be. The relevant grounds were: industrial activity, membership or non-membership of an association of employers and employees, irrelevant criminal record, profession or occupation, physical features, irrelevant medical record (including workers' compensation history) and gender identity (see above). I agree with the ACHRA and AHRC submissions that the consolidated bill should include all grounds currently covered by the *Australian Human Rights Commission Act* 1986, including the listed ILO Convention grounds, and the *Fair Work Act*, in all areas of public life. ACHRA supports the inclusion of the additional grounds of homelessness, and victims of domestic and family violence, as do I.

[21] WA Act, s 35O(2), s 36(1a), s 66A(1a)

I also recommend that the consolidated bill include the ground of family status, which is defined in the WA Act as being, '*the status of being a particular relative* (for example, a father) *or the status of being a relative of a particular person* (someone regarded as notorious).[22] Finally, the offensive behaviour based on racial hatred provisions in the RDA should be extended to apply to all grounds under a consolidated bill.[23]

Question 10: Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

Like the other States and Territories, a reference to "the doing of an act" in the WA Act includes the doing of an act on more than one ground.[24] I investigate complaints of discrimination in which it is alleged that an act, the subject of the complaint, was done on more than one ground under the Act, for example, sex and race. The consolidated bill should adopt the same approach.

PROTECTED AREAS OF PUBLIC LIFE

Question 11: Should the right to equality before the law be extended to sex and/or other attributes?

I support extending the right of equality before the law in the RDA to all of the other attributes in a consolidated bill.

Question 12: What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

Question 13: How should the consolidated bill protect voluntary workers from discrimination and harassment?

The WA Act, along with the SDA, ADA, and DDA, does not cover areas such as volunteer workers, and administrative functions of government that are not 'services', but more regulatory or coercive in nature. I recommended in my review of the WA Act that these important areas should be included.

I note the Discussion Paper's reference to the broad approach adopted by the RDA, and its discussion about voluntary workers. In respect to allegations of race discrimination lodged with me by volunteers and persons in receipt of certain state or local government services, I have referred them to the AHRC. Reference has been made to the Tasmanian Act as the best example of the existing approach that is used in all jurisdictions except the RDA. However, the Tasmanian Act is still limited by having an exhaustive list of areas. I believe the RDA approach should be incorporated into the consolidate bill, across all attributes. As an interpretive aid, the bill can refer to a non-exhaustive list of areas, including employment, education, accommodation, and the provision of goods and services. In this way, the body of case law that has developed in respect to the various areas of public will continue to be relevant. For the sake of

[22] WA Act, s 4
[23] RDA, Part IIA
[24] WA Act, s 5

completeness, the definition of 'employment' should include volunteer and unpaid workers.

Question 14: Should the consolidated bill protect domestic workers from discrimination? If so, how?

The WA Act contains an exception in relation to the hiring of domestic workers in terms similar to most of the existing Commonwealth, State, and Territory discrimination legislation. The exception does not extend to the terms and conditions under which the worker is engaged, or to sexual harassment. In my opinion, this is an appropriate way to deal with employment which is at the intersection of the public/private divide. The consolidated bill should continue with this approach.

Question 15: What is the best approach to coverage of clubs and member-based associations?

The WA Act adopts the same definitions for 'club' and 'voluntary body' as the SDA. The definition of 'club' is fairly restrictive and arbitrary, for reasons that are not clear. I support the option proposed in the Discussion Paper that the DDA definition, which does not refer to liquor or a minimum number of members, be used in the consolidated bill. Smaller associations that do not have premises, facilities, or maintained funds, would, by definition, be excluded. I also note from the SA Commission's submission that the term 'association' is not defined in the SA Act, and there is no reference to membership numbers or the provision of liquor in the operative provisions. Aside from not defining 'association', the approach under the SA Act is similar in effect to that of the DDA.

Regarding exceptions, these should be reviewed and discussed once the general approach to clubs and associations in the consolidated bill is known.

***Question 16: Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement*?**

The selection of an 'appropriate minimum size' for partnerships to be liable for unlawful discrimination appears arbitrary, as is apparent from the table included in the Discussion Paper. Commonwealth discrimination legislation has three minimum sizes, depending on the particular Act. Unless proponents of a minimum size are able to justify why it should be so, then the consolidated bill should apply to all partnerships, regardless of size.

Question 17: Should discrimination in sport be separately covered? If so, what is the best way to do so?

One of the problems with the WA Act is that aside from the ground of impairment, sport is not a separate area. Yet, there is an exception in sport on the ground of sex, regarding the relative strength, stamina, and physique of male and female competitors. Complaints about discrimination in sport can only be accepted under the WA Act as discrimination in the provision of goods, services, and facilities. Whilst the former WA Equal Opportunity Tribunal upheld a claim that a sporting association was providing

services and facilities to its players, this can depend on the particular circumstances of the case.[25] I believe therefore that to eliminate uncertainty, sport needs to be recognised as an area of life in a consolidated bill.

If the bill were to adopt the same broad approach to areas as that in the RDA, then discrimination in sport would only need to be referred to by way of specific exceptions relevant to the ground in question. Alternatively, if sport is included as a separate area, then any exceptions can be referred to as part of that area. I agree with the AHRC submission that the recently enacted Victorian Act provides the most appropriate model for sport as a separate area.

Question 18: How should the consolidation bill prohibit discriminatory requests for information?

Like the SA Act and the RDA, there is no express provision in the WA Act dealing with discriminatory requests for information.

The Discussion Paper refers to the approaches used in the Victorian and Queensland Acts, which could be used in the consolidated bill. I support the inclusion of this prohibition in the consolidated bill. I do not have a view as to which particular approach is to be preferred.

Question 19: Can the vicarious liability provisions be clarified in the consolidation bill?

The WA Act has a vicarious liability provision that is in similar terms to the equivalent provisions in the RDA and SDA. I note from the SA Commission submission that the SA Act provides some guidance as to what constitutes 'reasonable steps' in the prevention of unlawful discrimination. Consideration should be given to including similar guidance in the consolidated bill.

EXCEPTIONS AND EXEMPTIONS

Question 20: Should the consolidated bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

I have considered the summary in the Discussion Paper, and the AHCRA and AHRC submissions. There is an attraction in replacing separate exceptions with a general limitations exception, in keeping with the aim to simplify the concepts contained in a consolidated bill. Currently, the exceptions in Federal, state, and territory legislation, when viewed as a whole, are inconsistent, complex, and often arbitrary in effect (take, for example, the definition of 'club' in the SDA, and the variance in partnership numbers). In principle, I support a general limitations exception. However, as it would involve introducing a significant new legal test, the consolidated bill would need to have extensive explanatory aids, to guide lawyers, courts, and the public, as to the application of the exception.

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[25] *Jernakoff v WA Softball Association (Inc.)* (1999) EOC 92-981

Also, if a general exception is introduced at Federal level, uncertainty would be created as to the continuing application of specific exceptions in state and territory legislation. Currently, not all the exceptions in state and territory discrimination legislation align with Federal legislation; an otherwise discriminatory act that is lawfully excused under state or territory law may not be under Federal law, and vice versa. Or an exception that exists in a state or territory Act is not mentioned in any Federal Act. This has always had constitutional implications. If Federal legislation were to contain a general exemption of the kind proposed, consideration would need to be given as to the effect upon specific state and territory exceptions, from a constitutional standpoint, as the potential for inconsistency is increased. Before a general exception test is introduced, further investigation into a preferred model needs to be done, taking into account the potential difficulties involved in its implementation.

I agree with ACHRA, AHRC, and the ACT Commissioner that if a general exception provision is not introduced, then all of the existing exceptions should be regarded as temporary and be made subject to review.

Question 21: How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidated bill?

I note the reference in the Discussion Paper to the ILO Convention No.111 and the Fair Work Act. If inherent requirements and genuine occupational qualification are to be carried over as exceptions in the consolidated bill (as opposed to having a general limitation exception), then approach in the Fair Work Act should be used. Guidance and examples in respect to each of the grounds can be incorporated, so that continuity is not lost in the transition to the single exception.

Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

The WA Act intentionally only has one exception to discrimination on the ground of sexual orientation - 'measures intended to achieve equality' (special measures). Gender identity is not yet a ground in the WA Act. There are general exceptions for religious bodies, and education or employment in educational institutions established for religious purposes, in terms similar to the equivalent exceptions in the SDA.[26] There is also a general exception in respect to the provision of aged accommodation and ancillary services, although this is expressed in terms of restricting admission to persons with a particular attribute, including sexual orientation.[27]

In my review of the WA Act, I recommended that the exception relating to employment by educational institutions be amended so that it applies only to employees or contract workers with teaching or pastoral responsibilities, and not to workers whose duties are not relevant to, or do not impact upon, another person's religious beliefs, for example, a gardener or clerical officer. The exception in the consolidated bill should be in similar terms, and should not extend to all functions carried out by educational institutions.

[26] WA Act, s 72, s 73, SDA s 38
[27] WA Act s 74

Regarding religious bodies, the exception should be limited to the carrying out functions such as the appointment and training of priests and ministers, and recruitment of persons to perform duties in connection with religious observance, and should not apply to functions that are not in connection with religious observance or belief.

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?

I concur with the ACHRA submission and recommendations in relation to the granting of exemptions, with reference to the draft criteria advanced by Discrimination Law Experts' Group.

In 2006, I lodged an appeal in the WA Court of Appeal against a decision of the WA SAT to grant an exemption to ADI Ltd and its related entities, enabling it to exclude persons of specified national origin from employment, or to impose certain conditions on their employment, when fulfilling its defence contracts with the US government and its suppliers. The main issue before the Court was whether or not the SAT erred by taking into account the 'public interest' when it granted the exemption to ADI. My view is that the SAT should only grant exemptions in circumstances where there is uncertainty as to whether or not the applicant's proposed conduct is covered by one of the specific or general exceptions under the EOA, and it is reasonably clear that the conduct is consistent with objects of the EOA, irrespective of public interest considerations. The public interest in exemption applications is, in my view, a matter for the Parliament to address through legislation or specific regulations. In any event, the Court dismissed the appeal and made the following observation, at [72], per Martin CJ:

> "In summary, in my opinion when exercising the discretion conferred upon it by s 135 of the (WA) Act, it is consistent with the objects, scope and purpose of the Act, for the Tribunal to take into account any considerations which it considers would justify the commission of conduct which would otherwise be unlawful under the Act. So, provided there is a rational basis for the discriminatory conduct, it will fall to the Tribunal to determine whether the interests to be served by permitting that conduct outweigh the detriment which flows from discriminatory conduct. Often the interests properly considered by the Tribunal in that context will be public interests, but they need not be so. As can be seen, for example, from s 50 of the Act (Genuine Occupational Qualification), private interests have been recognised by the legislature as providing a sufficient justification or the permission of conduct which would otherwise be unlawful."[28]

Given the above statement on the law as it currently stands in respect to exemption applications, I support the inclusion in a consolidated bill of specific criteria that must be considered when deciding whether to grant an exemption. In my view, the public interest should not be one of those considerations.

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[28] *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261

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?

I concur with the AHCRA submission in relation to broadening the existing power to set Standards, empowering the AHRC to review an organisation's programs and practices to assess compliance with the consolidated Act, and allowing an organisation to submit voluntary action plans to the AHRC.

Question 25: Are any changes need to the conciliation process to make it more effective in resolving disputes?

I agree with ACHRA and the AHRC that there is no need for significant legislative changes to the current complaint inquiry and conciliation provisions in the *Australian Human Rights Provision Act* 1986**,** or for any reduction in the AHRC's complaint inquiry function. Direct access by complainants to the courts, bypassing the AHRC complaint process, should not be permitted.

Question 26: Are any improvements needed to the court process for anti-discrimination complaints?

I consider it an advantage under the tribunal system that operates in the states and territories that each party is expected to pay their own costs. This enables complainants, many of whom are unrepresented, to advance their claims without fear that if their complaints are dismissed, costs will follow the event, as is usually the case in courts such as the Federal Magistrates Court (FMA).

I support the same approach being applied to the FMA in a consolidated bill. I do not believe that the amount of compensation awarded will fall if the FMA changes to an 'own costs' jurisdiction. The WA SAT Act 2004 and regulations provide for circumstances when costs may be awarded in certain cases.[29]

Both the WA and SA Acts make provision for assistance to be given to complainants whose complaints have been referred to the tribunal for determination, in order to present their cases.[30] This entitlement only applies to complainants whose complaints have not been dismissed for one of the reasons provided for in the Act, for example, lacking in substance. Under the SA Act, assistance is discretionary, taking into account certain criteria as to whether assistance should be provided and to what level. The WA Act is non-discretionary – assistance must be provided to a referred complainant, although the level of assistance is reviewed. From my experience, one of the advantages of providing assistance in this way is that it results in a very high rate of settlement through mediation in the SAT, without the need for a hearing. Costs, inconvenience, and anxiety are effectively minimised as a result. I support assistance

[29] SAT Act, ss 87-89
[30] WA Act, s 93(2), SA Act, s 95C

being provided to complainants in the FMA, coordinated by the AHRC or through some other process, along the lines provided for in the SA Act.

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?

Question 28: Should a consolidated Act make improvements to mechanisms for managing interactions with the Fair Work Act?

Question 29: Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

The ACHRA submission has provided a detailed response to each of these questions, and I concur.

Question 30: Should the consolidated bill apply to state and territory governments and instrumentalities?

I note the Discussion Paper's observations about the SDA in this regard. The consolidated bill should apply to state and territory governments and instrumentalities equally and without exception.