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**Australian Council of Trade Unions (ACTU)
Submission to the Attorney-General's Consolidation
of Commonwealth Anti-Discrimination Laws
Discussion Paper**

3 February 2012

ACTU

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INTRODUCTION

The Australian Council of Trade Unions (ACTU) is the peak body representing 47 unions and almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation designed to protect these rights. Given the vast majority of instances of discrimination, sexual harassment and victimisation occur in workplaces, the ACTU has a keen interest to advocate for effective and efficient anti-discrimination laws.

We welcome the release of the Government's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, released in late 2011. We note the aims of the consolidation project include to:

- Reduce complexity and inconsistency in anti-discrimination regulation to make it easier for individuals to understand their rights and obligations under the legislation;
- Maintain current material protections from discrimination;
- Clarify and enhance protection where appropriate; and
- Ensure simple, cost effective mechanisms for resolving complaints of discrimination.

The ACTU congratulates the government on its Discussion Paper, which raises a wide range of aspects of reform of the legislation.

We are keen to see the consolidation process not only maintain current protections, but strengthen and improve the anti-discrimination legislation for the most vulnerable members of our society. This process is an opportunity to extend the best practice features of laws currently applicable to only one ground of discrimination to all areas under a new consolidated Act.

In particular, we note that the majority of the recommendations from the 2008 Senate Inquiry into the Effectiveness of the *Sex Discrimination Act (Cth) 1984* in Eliminating Discrimination and Promoting Gender Equality ('Senate SDA Inquiry') were referred by the government to be considered as part of this consolidation project. The ACTU has consistently called for assurances that these recommendations, so critical to the improvement of the efficacy of the legislation, are addressed in full and we are pleased to see their inclusion in the Discussion Paper.

We hope that in doing so, the opportunity to make meaningful improvements to the operation of the *Sex Discrimination Act*, and the equal opportunity framework in which it operates, remains firmly on the reform agenda.¹

The ACTU has worked closely with members of the Equality Rights Alliance ('ERA') to develop a collaborative response amongst the community sector, NGOs, legal experts, human rights and public interest lawyers to the Government's Discussion Paper.

¹ See the ACTU Submission to the Senate Standing Committee on Legal and Constitutional Affairs 2008 Inquiry into the Effectiveness of the *Sex Discrimination Act (Cth) 1984* in Eliminating Discrimination and Promoting Gender Equality and the ACTU Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Sex and Age Discrimination Bill 2010 for further details. Full copies of these submissions may be found at www.actu.org.au

The ACTU has endorsed the ERA submission as comprehensive and representative of the union position.² In the interests of brevity we do not intend to replicate the detail of that submission, but will, however, take this opportunity to make the some supplementary comments in addition to those outlined in the ERA submission and in the ACTU submissions in relation to the SDA Inquiry and the *Sex and Age Discrimination Bill 2010*.

REFORM OF THE ANTI-DISCRIMINATION LEGAL FRAMEWORK

The ACTU has consistently expressed the view that, in order to improve the effectiveness of the anti-discrimination legal framework, reform is required which will deliver:

1. A positive approach, including a clear statement of the objective of the consolidated Act to achieve *substantive* equality and the introduction of an obligation to take reasonable and appropriate measures to eliminate discrimination as far as possible;
2. New regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination, prevent its recurrence, and enforce non-compliance;
3. Greater synergy between anti-discrimination law and complementary legislation such as, for example, Equal Opportunity legislation; and
4. The social and economic benefits of inclusive employment practices to the Australian community based maximising the full participation of a diverse range of skilled, experienced and talented labour market.³

In our view, the key specific shortfalls in the anti-discrimination legal framework include:

- A lack of clear, positive objectives to prevent and eliminate discrimination and promote substantive equality;
- Out-dated definitions and technical requirements which serve to make it difficult for meritorious claims to progress;
- The reliance on individual complainants is biased in favour of large, well-resourced organisations and does not facilitate resolving systemic discrimination;
- There is insufficient provision for the Australian Human Rights Commission (AHRC) and other appropriate organisations to initiate investigations and claims of systemic discrimination;
- There is insufficient advocacy support and representation of vulnerable and disempowered complainants;
- The complaints process is time consuming, overly legalistic and costly;

² Although note our comments in relation to exemptions for religious organisations on page 7.

³ See for example, the research conducted by the Productivity Commission in its review of the Disability Discrimination Act which concluded that the overall economic and social benefits of compliance with the Act were likely to exceed the costs of compliance'. The Report can be found at www.pc.gov.au.

- There are insufficient regulatory tools to encourage and assist organisations to prevent and eliminate discrimination; and
- The enforcement provisions are insufficient both in terms of regulation and the level of punitive damages, particularly when compared to similar jurisdictions such as occupational health and safety and consumer protection legislation.

These broad reform areas must be addressed if we are to genuinely strive to improve the efficacy of the anti-discrimination laws to eliminate discrimination and promote substantive equality.

It is in this context that we make the following recommendations.

KEY RECOMMENDATIONS

- 1. The consolidated Act should contain an objects clause which clearly outlines the legislation's goals to eliminate all forms of discrimination and promote substantive equality.**

An objects clause should be included which acknowledges that promoting 'substantive equality' is more than treating people equally, but also about recognising and appreciating the differences between people, acknowledging the ongoing impact of current and historical inequalities that have come about as a result of those differences and the role that our actions play in achieving equality in the context of those differences.

The objects clause should also clearly state elimination of all forms of discrimination, harassment and victimisation as a key goal of the legislation. This would help encourage a shift from a complaints driven model to a shared responsibility for the elimination of discrimination.

- 2. The consolidated Act should include an express requirement that the legislation be interpreted in accordance with the international conventions that Australia has ratified.**

The ACTU is of the view that obligations created by Australia's ratification of international conventions ought to be explicitly reflected in legislation. Obligations that flow from the ratification of relevant international instruments should be clearly expressed in the *Sex Discrimination Act* as in all anti-discrimination legislation.

- 3. The distinction between direct and indirect discrimination should be removed.**

Removing the distinction between direct and indirect discrimination will provide consistent and streamlined application of the legislative framework. We note that the *Racial Discrimination Act 1975 (Cth)* ('RDA') does not distinguish between direct and indirect discrimination, nor does s. 351 of the *Fair Work Act 2009 (Cth)* ('FWA').

The ACTU supports the adoption of the definition of ‘discrimination’ proposed by the Discrimination Law Experts’ Group:

*“Discrimination includes any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.”*⁴

4. The requirement for a comparator to establish (direct) discrimination should be removed

The requirement for a comparator has proven to be an insurmountable hurdle for applicants with meritorious cases, but for whom a direct comparator cannot be found to establish a successful claim of direct discrimination.⁵ For example, it has been held that a complainant was not discriminated against when her employer denied her part-time work upon return from parental leave because there was no ‘comparator’ amongst her male managerial colleagues who had requested part-time work following a period of parental leave.⁶

Removal of the requirement for a comparator to establish (direct) discrimination would ensure complainants have access to justice and provide consistent and streamlined application of the legislative framework. We note that the *RDA*, the *FWA* and some state anti-discrimination legislation do not require a comparator, and, in recognition of the difficulties relating to the comparator test, Victorian anti-discrimination legislation has recently also removed the requirement.

5. Remove the reasonableness test for (indirect) discrimination

The ‘reasonableness’ test for indirect discrimination should be altered so that the test is whether the ‘condition, practice or requirement is legitimate or proportionate’.

Should the ‘reasonableness’ test be retained, as a minimum, the consolidated Act should clarify the elements of the test for determining the ‘reasonableness’ of a condition, requirement or practice. The test should require an employer to establish that they gave proper consideration to alternatives appropriate to the individual’s circumstances and had a high degree of business necessity in deciding to impose the condition, requirement or practice.⁷

Removing the reasonableness test will bring the Act further in line with the General Protections provisions of the *Fair Work Act* which provides that an employer must not take adverse action (widely defined), or threaten to take adverse action, against a person who is an employee, or prospective employee, on various discriminatory grounds.⁸

⁴ Discrimination Law Experts’ Roundtable, Report on Recommendations for a consolidated federal anti-discrimination law in Australia, of 29 November 2010.

⁵ See for example *Kelly v TPG Internet Pty Ltd 2003 176 FLR 214*, where it was held the complainant was not discriminated against when her employer denied her part-time work upon return from parental leave because there was no ‘comparator’ amongst her male managerial colleagues who had requested part-time work following a period of parental leave.

⁶ *Kelly v TPG Internet Pty Ltd 2003 176 FLR 214*.

⁷ For example, see cl.16 of the *Victorian Equal Opportunity Act 2010*.

⁸ Chapter 3, Part 3-1, Division 5 of the *Fair Work Act*, at sections 351 and 342(2),

6. The consolidated Act should introduce a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote substantive equality.

The ACTU has consistently advocated that the introduction of positive duties is critical to achieving meaningful changes to practices which entrench systemic discrimination.

The ACTU supports the introduction of a general obligation to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.⁹

Currently, Australia's anti-discrimination framework is based on individuals having the courage, time and resources to take claim against a wrong that has been committed. This system does not prevent systemic discrimination, or discourage further discriminatory acts against other victims, or promote lasting cultural changes to eliminate discriminatory customs and practices in the long term.

A positive duty would require organisations to identify and address discriminatory practices and promote substantive equality. Such a duty would encourage organisations such as public and private sector employers, educational institutions and other service providers to develop and promote internal policies and procedures which would over time effect organisational change and eradicate systemic discrimination.

Such a positive duty on the public sector has been part of the UK Equality Act for some time now, and there have been no significant issues concerning unnecessary regulatory burden or lack of clarity over legal obligations as flagged by some employer organisations. Many legislative frameworks in which employers, service providers and organisations regularly comply with are based on this shared model of responsibility, such as for example, consumer, employment and occupational health and safety laws.

The Australian Human Rights Commission (AHRC) should provide guidance, education assistance and support to organisations to fulfil their positive duty.

7. The burden of proof should shift to the respondent once the complainant has established a prima facie case of discrimination.

It is well established that an applicant's requirement to bear the onus of proving a respondent's action is discriminatory prohibits many cases from even getting off the ground. This is not because they lack merit but because respondents, by and large, are well enough briefed to not articulate the true reason for discriminatory treatment and because applicants do not have access to any evidence of such articulation. This is unfair to victims of discrimination and does nothing to the long term goal to promote the elimination of discrimination.

⁹ This wording reflects cl.15 of the *Victorian Equal Opportunity Act 2010*.

The ACTU strongly supports the adoption of the reverse onus of burden of proof model in discrimination cases so that the complainant does not bear the entire onus of establishing discrimination. The applicant should be required to establish a prima facie case to which the respondent must establish the action was not discriminatory.

This model is consistent with the recommendations of the Senate Committee in the *SDA Inquiry*, national and international trends, including the *FWA and the Equality Act 2010 (UK)*.

The consolidated Act should include a general limitations clause, namely that the respondent must show that the conduct in question was a “proportionate means of achieving a legitimate end or purpose”.

8. The (non-exhaustive) list of attributes protected from discrimination should be broadened.

Whilst we welcome the amendment to the *Sex Discrimination Act* to include ‘family responsibilities’, we note however, that this a more limited ground than the *Fair Work Act* and various state anti-discrimination legislation which protects those with ‘family or caring responsibilities.’¹⁰

The *Sex Discrimination Act*, defines ‘family responsibilities’ as responsibilities of the employee to care for or support (a) a dependent child of the employee, or (b) any other immediate family member who is in need of care and support. "Immediate family member" includes (a) a spouse of the employee, and (b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a spouse of the employee.

The ACTU supports the adoption of the broader ground of ‘family or caring responsibilities’ to protect against discrimination of a broader range of caring responsibilities, such as care for kin and extended family members by Indigenous workers for example.¹¹

We also note that the proposed extension of the family responsibilities ground to indirect discrimination continues to be subject to the reasonableness test. The reasonableness test should be replaced with a test that the condition, requirement or practice be legitimate and proportionate.

Experience of domestic or family violence, homelessness, socio-economic status and irrelevant criminal record should be included in the list of attributes upon which it is unlawful to discriminate across all areas.

The coverage of sexual orientation, sex characteristics, gender identity and gender expression should be given broad meaning to provide the maximum scope of protection against discrimination in the consolidated Act.

¹⁰ Section 351, *Fair Work Act*, 2009. This section does not apply, however, in circumstances where the action is ‘not unlawful under any federal or state anti-discrimination law in force in the place where the action is taken.’ Ensuring the Consolidated Act (and relevant State Anti-discrimination legislation) includes the ground of ‘family or caring responsibilities’ would promote consistency and clarity.

¹¹ The Victorian *Equal Opportunity Act 2010* for example, defines ‘carer’ as ‘a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly on a commercial basis.’

The definition and other references in the consolidated Act to marital status should be replaced with 'marital or relationship status'. The ACTU considers that broadening the definition of marital status should provide protection against discrimination across a range of modern relationships.

Protection against discrimination on the grounds of pregnancy should be extended to include the grounds that a woman is about to take, is on, or has taken parental leave and should encompass the period from the start of pregnancy to three months after she returns from maternity leave.

The consolidated Act should be reviewed within five years to ensure it captures those groups in need of protection.

9. The requirement to make reasonable adjustments should be extended to employees with family or caring responsibilities.

The ACTU strongly advocates for a positive obligation on employers to reasonably accommodate requests by employees for flexible work arrangements to accommodate family or carer responsibilities.

In formulating such an obligation, it should be clear that an employer can only refuse a request for a reasonable adjustment on the grounds of unjustifiable hardship and must provide evidence for such a refusal.¹²

Alternatively, we support the model used in the Victorian *Equal Opportunity Act 2010* which places an obligation on an employer, in relation to an employee, not to 'unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer' and which provides guidance to parties as to the 'reasonableness' of a refusal.¹³

The inclusion of a positive duty on employers to make reasonable adjustments to accommodate an employee's request for flexible work arrangements in the consolidated Act would provide meaningful protection and recourse against discrimination for employees with family and caring responsibilities.

10. The scope of protection should be extended.

We support the extension and clarification of the coverage of the Act to all occupational relationships, including volunteers, independent contractors, franchises and partnerships irrespective of size. It is the ACTU's firm view that all persons in employment and work related environments should be protected from discrimination of all forms, regardless of the form of their employment or the size of the enterprise in which they are employed.

The ACTU supports the coverage of the consolidated Act to bind states and state instrumentalities to, noting that the *Sex Discrimination Act* is the only federal anti-discrimination Act not to bind states and state instrumentalities.

¹² See also Clause 16 of the *Equal Opportunity Act (Vic) 2010*

¹³ Clause 17, *Victorian Equal Opportunity Act 2010*.

Contrary to the ERA submission, the union position is not unified on the issue of exceptions for religious organisations and consequently the ACTU makes no comment in relation to the matter, noting that in any event, the A-G Department's statement at paragraph 161 on p.40 of the Discussion Paper that the Government does not propose to remove the current religious exemptions.

11. The provision of education, support and data collection should be enhanced.

Under the consolidated Act, organisations should be required to develop action plans improve compliance.

The AHRC should issue best practice guidelines and provide education and support to employers, organisations and complainants. Evidence suggests that the AHRC's role in promoting an understanding of discrimination, articulating the merits of non-discrimination and disseminating best practice strategies and compliance guidelines have been successful tools in addressing discrimination.¹⁴

The EOWA should collect, and provide to the AHRC, complementary data from organisations submitting equal opportunity reports of all instances of discrimination, harassment and victimisation (non-identifying where necessary) complaints, conciliations, confidential settlements, hearing outcomes and action plans.

The AHRC should collect, publish and use de-identified data on complaints, conciliations, confidential settlements, hearing outcomes for research and public awareness purposes and to identify areas of systemic discrimination.

The consolidated Act should require the AHRC to monitor progress towards eliminating discrimination and achieving substantive equality and to report to Parliament every four years.

The AHRC's monitoring of discrimination inquiries and complaints must be extended to include the capacity to further investigate a particular employer, sector or group of people where it is deemed appropriate.¹⁵

Monitoring should include the capacity to identify repeat offenders or problem employers. The AHRC should have the capacity to follow up such employers to enforce further recommendations for change.

Indicators or benchmarks against which the extent of discrimination and the progress towards equality can be measured should be conducted by the AHRC on a regular basis and generate a review of the effectiveness of the anti-discrimination system.¹⁶

¹⁴ See Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, pp.19-27

¹⁵ For example, an analysis of 2004 complaints to VEOHRC found that the retail industry was an important source of sex discrimination complaints: Sara Charlesworth Submission to the Victorian Equal Opportunity Review, 2007

¹⁶ For example, gender statistics provided by the United Nations Economic Commission for Europe on Work and the Economy and the Gender and Work database at York University in Canada. Also the WA Office of Women's policy keeps a modest score card against indicators such as representation of women in public life, labour force participation, health and well being of women in senior positions and so on.

The AHRC should report to Parliament annually on progress towards gender equality. The government should be required to respond within one month to such reports, which should focus on key performance indicators.

The AHRC should receive increased funding to enable it to effectively perform its additional monitoring and enforcement roles under the consolidated Act.

12. More effective and efficient complaint resolution and enforcement mechanisms are required

The ACTU advocates for an overhaul of the current framework to ensure efficient, affective and affordable complaints mechanism for applicants.

The ACTU has (see for example the submission to the SDA Inquiry) advocated that given the majority of discrimination complaints occur in the workplace, one option would be to introduce a capacity for fair Work Australia to deal with workplace discrimination complaints. The tribunal has a well-respected track record of dealing with, for example, unfair dismissal complaints in a timely and cost-effective manner. The AHRC which currently assists in the mediation of settlements between employers and employees would be freed up to provide much needed assistance to complainants who are usually far less resourced and supported during the complaint process.

Alternatively, a quicker complaint resolution process using a 'triage' procedure could ensure that complainants receive early intervention and have access to dispute resolution at the earliest opportunity. Dispute resolution services should be provided in a manner which is consistent with the objects of the Act.

13. Complainants must be given greater advocacy and representation support

Complainants of sex discrimination are likely to be members of disempowered groups with limited resources. Expecting them alone to identify discrimination, prosecute claims and enforce outcomes without any public assistance is a fundamental flaw in the current anti-discrimination legislative scheme.

The consolidated Act should empower the AHRC to take representative actions, including the capacity to stand in the shoes of a complainant or group of complainants where this is appropriate.

The consolidated Act should also empower public interest organisations, including trade unions, to represent and engage in strategic litigation on behalf of complainants.

14. The capacity to address systemic discrimination must be increased

The anti-discrimination legal framework is significantly limited in its ability to address systemic discrimination using the individual complaint based model that seeks to compensate an aggrieved person without addressing the underlying causes of discrimination.

For the Act to effectively address substantive inequality between men and women, a framework to address systemic discrimination is required which actively uncovers discrimination and assists organisations and individuals to eliminate discrimination.

The consolidated Act should empower the AHRC to initiate inquiries into systemic discrimination in the consolidated Act (with no requirement for the lodgement of an individual complaint), initiate own motion proceedings and Commissioners should have broad *amicus curiae* functions and be able to intervene in matters relating to discrimination.

A more proactive public advocacy role is required to effectively deal with systemic discrimination. It is beyond the capacity of most individuals to identify systemic discrimination let alone find the resources to follow through a group complaint.

The Act should provide a capacity for regulatory agencies such as the AHRC to initiate own motion proceedings where it is in the public interest and where there is concern that discrimination is occurring or is likely to occur. The agency should be able to initiate an own motion proceeding on behalf of a group or class of complainants irrespective of whether a complaint has been lodged.¹⁷

The AHRC and relevant organisations should receive increased funding so they have the resources to provide advice and representation about matters under the consolidated Act.

15. The consolidated Act must include a greater emphasis on early intervention and preventative enforcement and compliance mechanisms

The ACTU has consistently advocated for a more comprehensive model of compliance which contains greater emphasis on early intervention and prevention. For regulation to be effective, there needs to be a full range of powers including the 'pyramid' of self-regulation, enforceable regulation and punitive sanctions.

The current anti-discrimination framework contains very little early intervention and enforceable regulation, instead relying on the two extremes of voluntary regulation or court enforcement.

The ACTU supports the use of *enforceable undertakings, improvement or unlawful action notices*, to act as corrective and preventative measures, assisting to avoid further costly legal proceedings and allowing for genuine engagement and cultural shift with the person or organisation breaching the Act.

The consolidated Act should provide the AHRC with powers to enter negotiations, reach settlements, set enforceable undertakings and issue compliance notices.

Similarly, without adequate punitive mechanisms, the self-regulatory and enforceable regulatory levels of the legislation lack a crucial incentive for organisations to eliminate discrimination.

¹⁷ As is the case in Queensland anti-discrimination law for example where a Commissioner has the power to initiate an investigation into contravention of or possible offence against the Act- s.155

Punitive mechanisms under the *Sex Discrimination Act* compare unfavourably to similar schemes including anti-discrimination schemes in the US and UK.¹⁸ Larger sums of damages generate significant publicity of sex discrimination cases and the concomitant threat of exposure of the identity of defendants serves as a critical preventative role in encouraging organisations to address discrimination issues.

In contrast, Australian discrimination legislation generally provides for a very low level of damages inconsistent with modern social expectations. The level of damages should be benchmarked equivalently to other common law amounts such as occupational health and safety and consumer protection jurisdictions in Australia.¹⁹

In addition, there must be a stronger role for public agencies in enforcing compliance with the consolidated Act. The practice of relying on victims to enforce orders is essentially self-regulation and is an unacceptable feature of the current anti-discrimination law²⁰ which in part does not deal effectively with intransigent repeat defendants.

The consolidated Act should be amended to provide the AHRC with the right to prosecute and enforce cases comparable to the powers of similar regulatory schemes in Australia such as occupational health and safety, and consumer and competition law and with similar anti-discrimination schemes in the UK and the US where regulatory agencies have the power to initiate claims and publicly prosecute them and to enforce judgments and settle them.²¹

The AHRC or the Office of the Fair Work Ombudsman would be able to perform such functions, with the AHRC needing to separate its conciliation functions from its enforcement role in order to maintain neutrality.

The jurisdiction should be no-costs, with the exception of vexatious complaints. The consolidated Act should contain civil penalty provisions, similar to those in the Fair Work Act's General Protections provisions, to assist a complainant with mitigating their costs.

16. The harmonisation of anti-discrimination law should be extended to include state and territory anti-discrimination laws as well as other relevant legislation.

Consideration should be given to availing opportunities to ensure Commonwealth, State and Territory anti-discrimination laws provide as consistent protection as far as possible. For example, the *FWA* protections against adverse action for employees with caring or family responsibilities only applies where State and Territory laws provide the same discrimination protection (the majority don't), which results in inconsistency and ultimately confusion for potential complainants and respondents as to their rights.

¹⁸ Compared to for example the US the limit is set at \$300,000 for punitive and \$300,000 for compensatory damages. In Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005, p.16

¹⁹ For example, breaches of the TPA can attract penalties of up to \$10m for organisations and up to \$750,000 for individuals.

²⁰ The AHRC does not have the power to enforce judgments or settlement agreements that have been made.

²¹ Belinda Smith, "Labour Law, Equity and Efficiency: Structuring and regulation the labour markets for the 21st century" University of Sydney, June 2005 P.14

Similarly, consideration should be given to availing opportunities to harmonise other relevant legislation, such as the Equal Opportunity for Women in the Workplace Act currently under review for example, which are intrinsically linked to anti-discrimination laws and the effectiveness of which is related to how well the laws work together as part of a wider framework.