Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper: Office of the Anti-Discrimination Commissioner Submission

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Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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Introduction

The Office of the Anti-Discrimination Commissioner (OADC) welcomes the opportunity to provide this submission on the Discussion Paper, *Consolidation of Anti-Discrimination Laws* (the Discussion Paper), prepared by the Federal Attorney-General's Department to progress the consolidation of Federal anti-discrimination laws (the Federal Consolidation Project).[1]

This submission is informed by the experiences of the Office of the Anti-Discrimination Commissioner as a consequence of its work in community outreach, policy review, investigation and complaint handling; a practical understanding of the *Anti-Discrimination Act 1998* (Tas) and how it has been implemented in Tasmania; and the experience of the Commissioner in this and other jurisdictions. Responses are set out under the headings used in the Discussion Paper for ease of reference.

Overview of the *Anti-Discrimination Act 1998* (Tas) and the OADC

The role of Anti-Discrimination Commissioner is established under the *Anti-Discrimination Act 1998* (Tas).[2] The Commissioner has functions and powers that are set out in the Act.[3] The Act also provides for the establishment of the Anti-Discrimination Tribunal, the functions of which are to conduct inquiries into complaints and review, on application, decision of the Commissioner in relation to exemptions and withdrawals, rejections and dismissals of complaints.[4]

The Office of the Anti-Discrimination Commissioner supports the Commissioner in the performance of her role and functions.

The *Anti-Discrimination Act 1998* (Tas) relevantly prohibits 'discrimination and other specified conduct and [provides] for the investigation and conciliation of, and inquiry into, complaints of such discrimination and conduct'.[5]

The Act outlaws discrimination on the basis of the following attributes:[6]

- age;
- breastfeeding;

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1 Commonwealth of Australia, Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (2011).

2 *Anti-Discrimination Act 1998* (Tas) s 4.

3 *Anti-Discrimination Act 1998* (Tas) ss 5 and 6.

4 *Anti-Discrimination Act 1998* (Tas) ss 12 and 13.

5 *Anti-Discrimination Act 1998* (Tas) Long Title.

6 *Anti-Discrimination Act 1998* (Tas) s16.

- disability;
- family responsibilities;
- gender/sex;
- industrial activity;
- irrelevant criminal record;
- irrelevant medical record;
- lawful sexual activity;
- marital status;
- relationship status;
- parental status;
- political activity;
- political belief or affiliation;
- pregnancy;
- race;
- religious activity;
- religious belief or affiliation;
- sexual orientation;[7]
- association with a person who has, or is believed to have, any of these attributes or identities.

Discrimination is defined to be both direct and indirect discrimination, both of which are defined.[8]

Subject to exceptions and exemptions, the Act applies to discrimination and prohibited conduct (other than incitement), 'by or against a person engaged in, or undertaking any activity, in connection with' the following activities:[9]

- employment;
- education and training;
- provision of facilities, goods and services;
- accommodation;
- membership and activities of clubs;
- administration of any law of the State or any State program in relation to gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities;
- awards, enterprise agreements or industrial agreements on the grounds of gender, marital status, pregnancy, breastfeeding, parental status or family responsibilities.

As well as making discrimination unlawful, the following conduct is also prohibited under the Act:

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7 As an outcome of the 2009 review of the *Anti-Discrimination Act 1998*, it is hoped that the Tasmanian Government will introduce legislative amendment to the *Anti-Discrimination Act 1998*in 2012 that will exclude transsexuality from the definition of sexual orientation and insert a new definition of 'intersex' as a stand-alone attribute.

8 *Anti-Discrimination Act 1998* (Tas) ss 14 and 15.

9 *Anti-Discrimination Act 1998* (Tas) s 22.

- conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of gender, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed;[10]
- sexual harassment;[11]
- public acts that incite hatred, serious contempt or severe ridicule on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or affiliation, or religious activity;[12]
- publishing, displaying or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct;[13]
- knowingly aiding, causing or inducing another person to contravene the Act;[14] and
- victimisation (being subjecting or threatening to subject to detriment a person or an associate of a person because the person has, intends to or refuses to take actions relevant to the rights and obligations under the Act).[15]

Further details of Tasmania's legislation are provided in the context of comment on particular issues raised within the discussion paper.

Review principles

The introduction of consolidated federal anti-discrimination legislation represents an important opportunity to re-affirm Australia's commitment to fundamental human rights protection and address gaps in Australia's framework for the protection of human rights.

The OADC encourages the Commonwealth Government to use this opportunity to introduce broad-based legislation that sets out a robust framework for the protection, promotion and fulfilment of the human rights to equality and non-discrimination through the articulation of positive rights and duties, including mechanisms to facilitate positive action to ensure equality and non-discrimination are achieved.

The preparation of a single national law encompassing all equality and non-discrimination obligations provides an opportunity to ensure that Australia is at the forefront of efforts to protect and promote human rights.

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10 *Anti-Discrimination Act* (Tas) s 17(1).

11 *Anti-Discrimination Act* (Tas) s 17(2) and (3).

12 *Anti-Discrimination Act* (Tas) s 19.

13 *Anti-Discrimination Act* (Tas) s 20.

14 *Anti-Discrimination Act* (Tas) s 21.

15 *Anti-Discrimination Act* (Tas) s 18.

Re-focussing efforts away from a reliance on complaints-based approaches to protecting equality and non-discrimination is central to achieving these objectives. Doing so will mark an important shift toward addressing systemic discrimination and manifestations of inequality that perpetuate disadvantage in our community.

To achieve this, it is critical that Australia follows the lead of other countries in adopting a more positive, proactive and innovative framework for addressing equality and non-discrimination issues.

Statutes introduced at the Federal level aimed at addressing discrimination and meeting equality obligations under international human rights treaties have evolved over several decades, from the *Racial Discrimination Act 1975* to the amendments that resulted in the *Australian Human Rights Commission Act 2009* and aspects of the *Fair Work Act 2009*.

The circumstances under which these Acts have been developed has led to significant differences in coverage and levels of and interpretation of protection and it is, therefore, timely to ensure that a more consistent approach is adopted.

The OADC considers that the new legislation should be reflective of contemporary thinking on human rights and represent international best practice in the promotion and protection of the human rights to equality and non-discrimination.

Importantly, the Act should place Australia at the forefront internationally of protection of the rights to equality and non-discrimination and be flexible enough to respond to contemporary thinking on these rights.

The OADC believes that the *Declaration of Principles on Equality* (the Equality Declaration) released by the Equal Rights Trust in London in 2008 provides an important yardstick against which to measure whether the consolidated law meets international best practice in relation to the rights to equality and non-discrimination and should be used to guide the development of the legislation.[16] The Equality Declaration sets out universally applicable principles on equality intended to assist the development of human rights legislation. A copy of the Equality Declaration has been included at Appendix 1.

Consistent with the principles contained in the Equality Declaration, the OADC considers that any new Commonwealth legislation should:

1. Give full effect to the human rights treaties to which Australia is a party;
2. Ensure that there is no diminution of existing rights, responsibilities or protections afforded under Commonwealth or State and Territory laws;
3. Include a clear objective of achieving substantive equality for all Australians;
4. Provide clarity and certainty in relation to both rights and obligations;

[16] The Equal Rights Trust, *Declaration of Principles on Equality* (2008).

5. Promote innovation and consistency across jurisdictions;
6. Include provisions which prescribe positive duties to prevent discrimination and promote equality, including special measures and duties to make reasonable adjustments to assist in the realisation of these rights;
7. Incorporate obligations and functions that enable systemic causes of discrimination to be effectively addressed and ensure the full enforcement of duties;
8. Include a comprehensive system of penalties and sanctions that are effective, proportionate and dissuasive; and
9. Provide increased powers and appropriate resources to the Australian Human Rights Commission to enable it to appropriately implement new actions.

The development of anti-discrimination legislation in Tasmania

> *There is something very special about finally having your State of birth or your State of adoption recognise that you are an equal partner in the society that you live in and that you have all of the rights for protection and access and community involvement that anybody else does.*
>
> Michael Foley, Member of the Tasmanian House of Assembly, 1998

Tasmania was the last jurisdiction in Australia to introduce broad-based anti-discrimination legislation and the history behind the introduction of this legislation is illustrative of the evolution of thinking within the Tasmanian community and, as such, relevant to the Federal Consolidation Project.

The Tasmanian Act given Royal Assent on 18 December 1998 was preceded by almost two decades of debate and unsuccessful attempts to have comprehensive legislation adopted in the State. At issue was largely the scope of the legislation and the attributes it would cover. Particularly contentious was the desire to cover sexual orientation at a time when homosexuality was illegal and community views remained deeply divided.

Legislation was first introduced in 1979. The Bill passed the Legislative Assembly of the Tasmanian Parliament with the support of all major parties, but then lapsed on prorogation of the Parliament in 1981 after the Legislative Council—Tasmania's Upper House—referred the matter to Committee and failed to vote on the Bill. A second attempt to introduce legislation in 1991 also lapsed.

In 1994, the Government (then Liberal) introduced sex discrimination legislation. This was criticised for not extending to other forms of discrimination including that based on race, social status, disability and sexual orientation. Key to the debate around this legislation was the extent to which other forms of discrimination would be covered by Commonwealth legislation. Despite attempts to have the legislation extended, the Bill remained limited to sex discrimination and the *Sex Discrimination Act 1994* remained on the statute books until it was repealed in 1998 in favour of more broad-based legislation.

Labor in opposition sought to introduce broad-based anti-discrimination legislation in 1996. The Bill afforded comparable levels of protection to Commonwealth legislation and coverage extended to discrimination on the grounds of race; social status; gender; sexual orientation; marital status; pregnancy; parental status; disability and trade union activity. The Bill included extensive grievance procedures and a range of civil remedies, including the establishment of a Tribunal to make binding orders.

In debating this legislation, the Tasmanian Government acknowledged changes in community understanding of human rights issues. The Bill however lapsed

through lack of support in the Legislative Assembly (the Lower House of the Tasmanian Parliament).

A further attempt at introducing legislation was made in 1997 and this was again rejected by Tasmania's Legislative Council.

The Rundle Liberal Government introduced a Bill to provide broad-based protection against discrimination in May 1998. This Bill and the repeal of the provisions of the Tasmanian *Criminal Code Act 1924* dealing with homosexuality represented significant advances in human rights protection in Tasmania.

The Bill set out prohibitions of discrimination on the grounds of age, disability, industrial activity, lawful sexual activity, religious belief or affiliation, religious activity, political belief or affiliation, political activity, race, irrelevant criminal record, irrelevant medical record and association with a person who has any of these attributes. Areas of activity covered in the Bill were employment; education and training; provision of facilities, goods, services and accommodation; and membership and activities of clubs. It provided for the prohibition of both direct and indirect discrimination and outlawed the incitement of hatred, serious contempt or severe ridicule on a range of grounds.

This Bill, however, also lapsed due to the prorogation of the Tasmanian Parliament in late 1998.

In December 1998 a fourth and ultimately successful attempt was made to introduce broad-based anti-discrimination legislation with the support of both chambers of the Tasmanian Parliament.

The passage of the *Anti-Discrimination Act 1998* demonstrated that Tasmania was at last willing to protect those whose equality and non-discrimination rights needed to be safeguarded, and comply with Australia's international obligations on human rights in respect of equality and non-discrimination.

It came over two decades after New South Wales was the first state or territory to introduce broad anti-discrimination legislation.[17] Prior to the passage of the Act, Tasmania stood out as behind the times and not fully supportive of the equality and non-discrimination rights of all sectors of the Tasmanian community.

Delay in the adoption of comprehensive anti-discrimination legislation in this State reflected the fact that there was insufficient community consensus on the areas in which the Bill would cover and the enforcement mechanisms. The Tasmanian community was deeply divided on many social issues and the desire for legislation to be realistic sat uncomfortably with the desire to ensure that the legislation represented national best practice. Equally there were strong views that any anti-discrimination measures should not themselves be discriminatory.

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17 South Australia was the first jurisdiction to introduce laws prohibiting discrimination, with the *Prohibition of Discrimination Act 1966* (SA), that dealt with racial discrimination.

This was particularly true with respect to the difficulty in which the Tasmanian Parliament had in debate around lawful sexual activity and sexual orientation. Those in favour of genuinely progressive legislation strongly supported the need to ensure that it encompassed all areas of society. These debates were difficult and the delay meant that those with disability and others who were without protections were forced to wait until social attitudes had caught up and it was possible to introduce comprehensive legislation.

Delay in passing legislation to protect the rights of Tasmanians meant, however, that the Act that was eventually proclaimed was the most comprehensive piece of anti-discrimination legislation in Australia at the time.

The history of efforts to promote equality and non-discrimination in Tasmania is illustrative of the evolution in thinking about rights, duties and obligations in relation to human rights more broadly. It is also illustrative of the way in which recognition of responsibilities to safeguard equality and the right to fair treatment are reflective of social attitudes. Importantly it also highlights the importance that law-makers have in leading social change.

Discrimination law has played a key role in both driving and responding to change.

A similar analysis can be applied to recent legislation such at that adopted in Victoria and the United Kingdom.

Amendments that resulted in the Victorian *Equal Opportunity Act 2010* introduced important new features into discrimination law in this country, including a positive duty to eliminate discrimination, which obliges organisations covered by the law to implement proactive, reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.

Similarly, the UK *Equality Act 2010* represents a clearer and more streamlined framework for equality legislation, which has the capacity to produce better outcomes for those who experience disadvantage. The Act is aimed at both harmonising existing discrimination laws and strengthening requirements to promote equality.

The OADC is of the view that harmonisation of Commonwealth laws presents an important opportunity for the Commonwealth Government to lead changes to make existing legal protections more effective and provide a role model for best practice approaches to the protection and promotion of the equality and non-discrimination rights of all Australians.

Discrimination

1. Definition of Discrimination

Q1: 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?

The OADC supports a simple and concise definition of discrimination that has the capacity to more closely align Australia with internationally recognised definitions of discrimination and therefore better implement human rights treaty obligations.

To be effective, however, it is necessary to ensure that the discrimination that is prevented encompasses the impacts on both individuals and vulnerable groups who shared protected attributes. This will assist in ensuring that the right to substantive equality (reflected in the provisions covering indirect discrimination, including systemic effects) continue to be protected.

The Tasmanian legislation

Under Tasmanian legislation discrimination is direct or indirect discrimination on the grounds of any prescribed attribute.[18]

> **14. Direct Discrimination**
> …
> (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.
>
> (3) For direct discrimination to take place it is not necessary –
> (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
> (b) that the person who discriminates regards the treatment as unfavourable; or
> (c) that the person who discriminates has any particular motive in discriminating.
>
> **15. Indirect discrimination**
> (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –
> (a) share or are believed to share, a prescribed attribute; or
> (b) share, or are believed to share, any of the characteristics imputed to that attribute –
> more than a person who is not a member of that group.

[18] *Anti-Discrimination Act 1998* (Tas) ss 14 and 15.

> (2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

A potential benefit of the approach taken in the Tasmanian Act is that the definition of discrimination is arguable inclusive of both direct and indirect and there should be less need for a complainant to elect one or the other in their complaint.

Another benefit is that it includes discrimination on the basis of the 'prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute' in the definition of direct discrimination and prescribed attributes and characteristics imputed to a shared prescribed attribute in the definition of indirect discrimination.

However, it should be noted that even these definitions are not co-extensive and neither expressly include a characteristic related to an attribute, but only characteristics 'imputed' to an attribute.

Further, the Act provides, in respect of the definition of disability, that it includes current, past and future disability (as does the *Disability Discrimination Act 1992* (Cth). It would be useful to ensure that protection is provided against discrimination on the basis of past attributes in respect of all attributes where this is a relevant consideration, such as (under the Tasmanian Act) sexual orientation, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, and religious activity.

An element of Federal anti-discrimination law, which is not reflected in the Tasmanian Act, is the capacity to challenge future discriminatory conduct. Under the definition of the discrimination found in the *Disability Discrimination Act 1992* (Cth), a person discriminates if he or she 'treats or proposes to treat' a person less favourably[19], or 'requires, or proposes to require' a person to comply with a requirement or condition.[20] Similar provisions are found in the *Age Discrimination Act 2004* (Cth)[21] and, in respect of indirect discrimination, in the *Sex Discrimination Act 1984* (Cth).[22] This importantly provides an avenue to address potentially discriminatory practices prior to them occurring and prevent them occurring.

Finally, the definitions retain the requirement to compare the treatment or the effect of the treatment complained of with the treatment or effect on a person or people without the attribute. This, as with other jurisdictions, can create problems for complainants and adds complexity to legislative interpretation.

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19 *Disability Discrimination Act 1992* (Cth) s 5(1).

20 *Disability Discrimination Act 1992* (Cth) s 6(1)(a).

21 *Age Discrimination Act 2004* (Cth) ss 14(a) and 15(1)(a).

22 See, for example, *Sex Discrimination Act 1984* (Cth) s 5(2).

Preferred approach

Any definition of discrimination should cover both direct and indirect discrimination and be flexible enough to enable new and emerging forms of discrimination to be covered. It should also afford protection for both formal and substantive equality and aid in the promotion of efforts to address systemic or underlying forms of discrimination.

The OADC supports the view outlined in the Discussion Paper that the current definition of discrimination is complex and difficult to understand and agrees that clarity is required, whilst ensuring that no current protections are diminished.

A simplified definition which, in a single provision, covers both direct and indirect discrimination would encourage a unified test of discrimination, and would bring all Federal anti-discrimination legislation into line with the rights-based approach contained in the *Racial Discrimination Act 1975* (Cth).

A group of Australian discrimination law experts recommend the following definition of discrimination:[23]

> Discrimination includes:
>
> (a) treating a person unfavourably on the basis of a protected attribute;
> (b) imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person; or
> (c) failing to make reasonable adjustments if the effect is that the aggrieved person experiences less favourable treatment under (a) or is disadvantaged under (b).
>
> The conduct in (a) and (b) is not mutually exclusive.

In its December 2011 submission, the Experts' Group argues that the definition should be viewed in conjunction with an objects clause that makes clear that the purpose of the legislation is to eliminate unlawful discrimination.

This approach posits a broad view of discrimination. It promotes action to reduce or eliminate discrimination and focuses on the outcomes or consequences of the discriminatory action. Importantly it expressly deals with both detrimental treatment and detrimental effect of conduct and, as such, provides coverage for actions that have the effect of causing detriment to people with a protected attribute.

This definition also has the advantage of not including a prescriptive list of attributes to which it applies, enabling these to be identified elsewhere in the Act.

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[23] Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws: Submission* (2011) 8–9.

The OADC considers that the approach suggested by Discrimination Law Experts has merit and with the suggested additions could usefully be used as the basis for developing a new definition under the Act.

One concern is that it retains a comparator test as it still requires in (b) the establishment of a common detrimental effect on people who share an attribute and, as such, implies a comparison with the effect on people who do not share that attribute.

Another is that it does not put the definition in context of discrimination impairing the enjoyment of equality rights, as does the definition found in the *Racial Discrimination Act 1975* (Cth).

Any consolidated Federal anti-discrimination law needs to ensure that it expressly includes protection not only on the basis of protected attributes, but also:

(a) characteristics related to a protected attribute;
(b) characteristics imputed to that attribute; and
(c) the imputation of an attribute; and
(d) the imputation of characteristics related to a imputed protected attribute.

This could either be done in the text of the definition of discrimination or in the text of the provision setting out the protected attributes. The OADC prefers the latter approach in order to keep the definition of discrimination clear and succinct.

Similarly, protection should, where relevant, be afforded on the basis of past and future attributes. Again, the OADC prefers that this be dealt with under the provision setting out the protected attributes in order to keep the definition of discrimination as clear as possible.

In respect of future conduct, any consolidated legislation should ensure the definition of discrimination includes proposed treatment as is found in the *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). It is the OADC's view that this needs to be done through express inclusion of appropriate text in the definition of discrimination.

Use of the comparator test to identify discrimination has given rise to a number of problems and the OADC supports the adoption of a detriment test as provided under the ACT and Victorian Acts as a means of establishing whether discrimination has occurred. This would assist in alleviating the uncertainty associated with the current approach.

The OADC is also supportive of removing the requirement that the complainant does not or cannot comply with the condition, requirement or practice as a test for indirect discrimination. Continued inclusion of this requirement would

diminish the protections provided under the *Age Discrimination Act 2004* (Cth) and the *Sex Discrimination Act 1984* (Cth) and is not supported.

The OADC is of the view that what in part complicates discrimination law unnecessarily is that the confusion in the various definitions of discrimination between what constitutes discrimination and what constitutes unlawful discrimination, once all circumstances surrounding any discriminatory action are taken into account.

The OADC believes there is a case for clearly distinguishing between the discrimination experienced by a person or groups of people on one hand and whether the actions undertaken were 'reasonable in the circumstances' or constituted a *bona fide* requirement or action on the other.

Actions that have considerable detriment to a person or group of people with a particular attribute should, on the face of it, be considered 'discriminatory'. The inclusion of a 'reasonableness' test within a definition of discrimination confuses the different elements of a case. It brings a defence into the provision defining the conduct.

A simpler approach is to provide a definition of discrimination that includes detrimental treatment of and/or a condition, requirement or practice having a detrimental effective for a person with one or more protected attributes and/or failure to make adjustments.

The question of the reasonableness of adjustments, or of a condition, requirement or practice could then, appropriately, be considered separately in the determination of whether or not the alleged discrimination is defensible.

Under this approach 'reasonableness' would then form part of general *bona fide* justification test as defined in the Act. This approach is consistent with that taken in the *Canadian Human Rights Act 1985,* which sets out what is discriminatory in sections 5-14 and then the defences in section 15.[24]

2. Burden of Proof

Q2: How should the burden of proving discrimination be allocated?

The OADC notes that the burden of proving that the action of a respondent amounted to a breach of anti-discrimination law rests largely with the complainant. This approach is reflected in most state and territory legislation, including the Tasmanian Act.

In part, the approach reflects the fact that matters relating to reasonableness are conflated with the definition and prohibition of discrimination and the complainant is required to prove that discrimination took place.

[24] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 5–15.

This approach is not consistent with other Commonwealth laws, including the *Fair Work Act 2009,* or with international best practice which shifts the responsibility to the respondent once a complainant has established a *prima facie* case.

The OADC is of the view that a simplified definition of discrimination together with clear defence provisions, including a statement that a respondent is to provide evidence of lawful reasons for the treatment or action, would appropriately shift some of the burden of proof to respondents and be more equitable to complainants.

This would result in the complainant being required to establish, on the balance of probabilities, that the alleged conduct took place and that it was *prima facie* conduct within the definition of discrimination. That is, that it was treatment or effect that was *prima facie* on the basis of a protected attribute, which the person has.[25]

The burden would then shift to respondents to establish that the challenged treatment or effect occurred for a valid, non-discriminatory reason or that it was justified in the circumstances under one of the defences available in the legislation.

This approach is consistent with the approach adopted in the United Kingdom where the *Equality Act 2010* includes specific provision to shift the burden of proof to the respondent.[26] Similarly, the *Canadian Human Rights Act 1985* requires that a respondent must be able to demonstrate a *bona fide* justification or requirement in order to avoid a finding of unlawful discrimination.[27]

Recommendation 1

The OADC recommends that the consolidated legislation provide that the burden of proof on complainants should be limited to establishing, on the balance of probabilities, that the alleged conduct took place and that it was conduct *prima facie* within the definition of discrimination. The burden of establishing a valid, non-discriminatory reason for the treatment or effect and the availability of a defence should rest on the respondent.

3. Special measures

Q3: 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?

All current federal anti-discrimination statutes have provision for special measures, eg, employment programs, scholarship programs, quotas, etc, generally aimed at accelerating the achievement of substantive equality for so

25 This would include imputation and characteristics relating to, as well as past, present and future attributes as relevant.

26 *Equality Act 2010* (UK) c 15, s 136.

27 *Canadian Human Rights Act*, RSC 1985, c H-6, s 15.

long as the measures are necessary and achieving those outcomes. All state and territory Acts contain similar provisions.

The Tasmanian Act includes the following provisions:[28]

> **24. Disadvantaged groups and special needs**
> A person may discriminate against another person in any area if it is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute.
>
> **25. Equal opportunities**
> A person may discriminate against another person in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.

It is noted, however, that special measures are often cast as an exception or exemption to the Act. This risks sending the wrong message regarding the purpose of these measures and does little to promote actions aimed at achieving equality. A stand-alone provision would assist in establishing positive actions as important mechanisms for promoting the protection of equality and non-discrimination rights.

The *Declaration of the Principles of Equality* seeks to promote positive action as a key measure to realising full and effective equality. In relation to positive action the Declaration states:[29]

> To be effective, the right to equality requires positive action.
>
> Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

The OADC supports the inclusion of a separate, stand-alone, special measures provision in the consolidated Bill. This provision should clearly state that special measures are aimed at achieving substantive equality and do not constitute discriminatory behaviour under the Act.

Recommendation 2

The OADC recommends that the consolidated legislation include a separate, stand-alone special measures provision that clearly specifies that special measures are aimed at achieving substantive equality and do not constitute discrimination.

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28 *Anti-Discrimination Act 1998* (Tas) ss 24 and 25.

29 The Equal Rights Trust, above n16, Principle 3.

4. Duty to make reasonable adjustments

Q4: Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

The *Disability Discrimination Act 1992* (Cth) (DDA) is currently the only Commonwealth Act containing an explicit duty to make reasonable adjustments and this requirement should be retained.

Inclusion of reasonable adjustment provisions in the DDA arose in part because of the legal uncertainty created by the High Court's decision in *Purvis v New South Wales (Department of Education and Training)*[30] including the minority decision of Justices McHugh and Kirby. McHugh and Kirby JJ were of the view that the Act did not include an express duty to make reasonable adjustments. At the same time, McHugh and Kirby expressed the view that failure to make reasonable adjustment may result in unlawful discrimination.[31]

In assessing the impact of this decision, the Productivity Commission in its review of the DDA was of the view that a duty to make reasonable adjustments was important to achieving substantive equality for people with disability and would position the DDA as a 'positive force for change'.[32]

The OADC appreciates, however, that the way in which this duty has been cast within the DDA makes it difficult to understand and supports the development of a stand-alone provision that would explicitly cast the duty to make adjustments as a positive duty applicable to all protected attributes in all areas of activity.

The Canadian federal jurisdiction has a duty to accommodate[33] up to the point of 'undue hardship' that applies generally.[34] The duty is integrally linked to the defences of *bona fide* occupational requirement and *bona fide* justification found in section 15. 'Undue hardship' is akin to 'unjustifiable hardship' that currently applies in disability discrimination law at the Federal level and in, for example, the Tasmanian Act.[35] There is no basis, in the OADC's view, to limiting the application of unjustifiable hardship to only one protected attribute, just as there is no basis for limiting the application of the duty to accommodate to only one or some protected attributes. The approach in Canada to that the duty exists in

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30 (2003) HCA 62.

31 Productivity Commission, *Review of the* Disability Discrimination Act 1992*, Report No 30* (2004) 187.

32 Productivity Commission, *Review of the* Disability Discrimination Act 1992*, Report No 30* (2004) 194.

33 It should be noted that the duty of accommodation is not, in the Canadian legislation, qualified by the word 'reasonable'. Rather, it is limited by undue hardship.

34 *Canadian Human Rights Act*, RSC 1985, c H-6, s 15(2).

35 *Anti-Discrimination Act 1998* (Tas) ss 45(a)(ii) and 48(b).

respect of all protected attributes and is limited by undue hardship. (This is considered further below under the discussion related to Exceptions and exemptions.)

As noted above, the question of reasonableness should be separated out, so that the complainant should have the burden of establishing the failure to make adjustments, while the respondent should be required to establish the adjustments would cause an unjustifiable hardship.

Recommendation 3

The OADC recommends that the consolidated legislation include a separate, stand-alone duty to make adjustments in respect of all protected attributes in all areas of activity that clearly specifies that a failure to make adjustments is a form of discrimination.

5. Positive Duties

Q5: Should public sector organisations have a positive duty to eliminate discrimination and harassment?

The inclusion of positive duties to eliminate discrimination and promote equality would assist in addressing systemic discrimination and bring Commonwealth legislation into line with best practice internationally.

The *Declaration of Principles on Equality* states:[36]

> States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must
>
> (a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;
> (b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;
> (c) Promote equality in all relevant policies and programs;
> (d) Review all proposed legislation for its compatibility with the right to equality;
> (e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;
> (f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;
> (g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

Tasmanian legislation currently includes provisions which oblige all organisations to, *inter alia*, 'take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct'.[37] Organisations not complying with this requirement are

[36] The Equal Rights Trust, above n16, Principle 11.

[37] *Anti-Discrimination Act 1998* (Tas) s 104(2).

liable for any contravention of the Act committed by any of its members, officers, employees and agents.[38]

The introduction of stand-alone positive duty provisions in federal legislation will assist in reorienting efforts to promote the attainment of human rights from one in which duty holders have a responsibility not to discriminate, to one where there is a positive obligation on duty holders to promote the attainment of rights.

The OADC is of the view that the obligation should apply to all organisations, rather than only to public sector organisations. To limit the obligation to only public sector organisations suggests that the right of equality in the context of the activities of public sector organisations is somehow qualitatively different from the right to equality in the context of activities of other organisations.

A positive duty requirement will focus efforts on a more compliance-based approach with less reliance on addressing inequality by providing redress to individuals through complaints processes. It will assist in improving efforts to promote substantive equality and encourage public and private sector organisations to undertake proactive efforts to ensure that they comply with legal obligations.

Whilst the OADC recognises that application of a positive duty provision to both public and private sectors may, some would argue, introduce additional requirements for some sectors, clarity around the action necessary to address discrimination in a systemic way will assist in promoting a clearer understanding of duties under anti-discrimination law and aid in a more transparent understanding of actions required across the community to promote equality.

Inclusion of a stand-alone provision requiring positive duties will promote the development of range of proactive and compliance measures such as action plans, employment programs, standards and/or quotas which will accelerate progress toward equality for all.

As noted elsewhere, the Victoria's *Equal Opportunity Act 2010* contains a clear duty to accommodate and this represents an important shift to a more progressive policy approach.[39] Section 15(2) of the Act provides that

> a person must take reasonable and proportionate measures to eliminate (that) discrimination, sexual harassment or victimisation as far as possible

In determining whether a measure is 'reasonable and proportionate' the Act requires the following factors to be considered:[40]

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38 *Anti-Discrimination Act 1998* (Tas) s 104(3).

39 *Equal Opportunity Act 2010* (Vic) Part 5.

40 *Equal Opportunity Act 2010* (Vic) s 15(6).

(a) the size of the person's business or operations;
(b) the nature and circumstances of the person's business or operations;
(c) the person's resources;
(d) the person's business and operational priorities;
(e) the practicality and the cost of the measures.

The OADC notes in this context that the Senate Standing Committee on Legal and Constitutional Affairs Report on the effectiveness of the *Sex Discrimination Act 1994* (SDA) recommended that further consideration be given to amending the SDA to require that public sector organisations, employers, educational institutions and other service provider adopt positive measures to eliminate discrimination and promote gender equality.[41] Consolidation of federal human rights laws would provide a significant opportunity to give effect to this recommendation.

The OADC considers that the AHRC should have a central role in promoting, assisting and ultimately enforcing the requirement to undertake positive duties and additional resources should be provided for this purpose. Enforcement of obligations should include both positive and punitive measures, including the ability to 'name' non-compliant organisations and ultimately the capacity to seek legal sanctions.

Recommendation 4

The OADC recommends that the consolidated legislation include a separate, positive duty on all organisations to take all reasonable and proportionate steps to eliminate discrimination and other forms of conduct prohibited under the legislation.

6. Attribute-based harassment

Q6: Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

Explicit provisions regarding harassment vary across jurisdictions.

Under section 17(1) of the Tasmanian Act, 'a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person' based on gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed'.[42]

Proposed amendments to the Tasmanian Act include extending section 17(1) to all attributes identified in the Act.

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41 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the* Sex Discrimination Act 1994 *in Eliminating Discrimination and Promoting Gender Equality* (2008) 164.

42 *Anti-Discrimination Act 1998* (Tas) s 17(1).

In addition section 17(2) prohibits a person sexually harassing another person and section 19 makes it unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief, religious affiliation or religious activity.

The OADC notes that jurisdictions, other than Western Australia which prohibits race-based harassment, do not explicitly prohibit attribute-based harassment. Nor do the *Age Discrimination Act 2004* (Cth) (ADA), the *Racial Discrimination Act 1975* (Cth) (RDA) or the *Sex Discrimination Act 1984* (Cth) (SDA) explicitly prohibit attribute-based harassment other than sexual harassment.

As the Discussion Paper notes, however, case law suggests that harassment will be considered discrimination where it is based on a protected attribute.

A stand-alone provision that prohibits harassment on the basis of all protected attributes or by clearly including attribute-based harassment within the meaning of discrimination would remove uncertainty.

It will be important to ensure that the meaning of harassment is clear in the legislation. This is the case because it may be conceptually difficult for many people with rights or obligations under the Act to extrapolate from the concept of sexual harassment to harassment on the basis of other protected attributes and the dictionary meaning of harassment suggests repeated or persistent conduct.[43] It is the OADC's view that the consolidated legislation should define harassment to include conduct that is offensive, humiliating, intimidating, insulting or ridiculing.

Accordingly, the OADC recommends that harassment be made unlawful on the grounds of all protected attributes.

Recommendation 5

The OADC recommends that the consolidated legislation expressly make it unlawful to harass in all areas of activity on the basis of one or more protected attributes or a combination or attributes, with all attributes protected. Further the OADC recommends that the consolidated legislation include a definition of harassment that expressly includes conduct that is offensive, humiliating, intimidating, insulting or ridiculing.

[43] See, for example, *The Macquarie Concise Dictionary* (The Macquarie Library, 3rd ed, 2001) 512: 'to trouble by repeated attacks, incursions, etc… to disturb persistently …'

Protected attributes

7. Sexual orientation and gender

Q7: How should sexual orientation and gender identity be defined?

The *Anti-Discrimination Act 1998* (Tas) currently includes sexual orientation as a protected attribute. 'Sexual orientation' means heterosexuality, homosexuality, bisexuality or transsexuality.[44]

'Transsexuality' is defined as the condition of being a transsexual. 'Transsexual' is defined as meaning a person of one sex who (a) assumes the bodily characteristics of the other sex by medical or other means; or (b) identifies himself or herself as a member of the other sex; or (c) lives or seeks to live as a member of the other sex.[45]

Tasmania's position with regard to this attribute was reviewed in 2009 and it is proposed that the Act be amended to clarify provisions in this area. This includes identifying 'intersex' as separate protected attribute.[46]

These changes are aimed at clearly distinguishing between the concepts of sex or sexual characteristics, gender identity and sexual orientation.

The Australian Human Rights Commission (AHRC) in its discussion paper regarding federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity acknowledges that terminology in regard to these matters is often contested and that definitions currently contained in state and territory Acts risk being non-inclusive.[47]

Binary constructs of sex and/or gender promote recognition of individuals as either male or female and fail to recognise that there is a spectrum of biological sex or sexual characteristics and gender identity and sexual orientation.

Biological sex or sexual characteristics refers to the anatomical and physiological characteristics associated with maleness and femaleness separate from the cultural expressions of gender or gender identity. This includes the characteristics of intersex and transsexual persons who are neither wholly female nor wholly male or have a combination of features with or without regard to the individual's designated sex at birth.

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44 *Anti-Discrimination Act 1998* (Tas) s 3.

45 *Anti-Discrimination Act 1998* (Tas) s 3.

46 Department of Justice: *Final Report of the Review of the Complaints Handling and Dispute Resolution Provisions of the* Anti-Discrimination Act 1998 (2009).

47 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination: Consultation Report* (2011).

Gender identity refers to the gender a person identifies with or lives as, which may be different to the one designated at birth regardless of whether the person is intersex or their biological sexual characteristics have been medically or surgically altered.

One approach considered in the United States of America is to define gender identity in a way that does not incorporate binary notions of sex as either male or female. Included in the Employment Non-Discrimination Bill of 2009 (US) gender identity is defined as:[48]

> The gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

This approach has the advantage of not restricting gender identity to only those who identify with a sex other than that assigned at birth and avoids a binary approach to the understanding of gender.[49]

Sexual orientation refers to a person's sexual attraction to another person and may include those who identify as heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

In addition to distinguishing between these three separate concepts, consideration should also be given to separately identifying intersex as a protected attribute.

A person who is intersex is a person whose chromosomal, gonadal or anatomical sex is not exclusively 'male' or 'female'. Intersex persons may or may not identify their sex or gender as intersex. Nor are they transsexual (as defined under the Tasmanian Act).

The Australian Coalition for Equality defines intersex as follows:[50]

> ***Intersex*** means the status of having physical, hormonal or genetic features that are:
>
> (a) neither wholly female nor wholly male; or
> (b) a combination of female and male features; or
> (c) neither male nor female.

For some time organisations representing intersex persons have been lobbying governments to have their condition separately recognised in equal opportunity law. There are persuasive arguments for this approach. People who are intersex

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48 Employment Non-Discrimination Bill of 2009 (USA) cl 3(6).

49 See Anna Chapman, *Protection from Discrimination on the Basis of Sexual Orientation or Sex and/or Gender Identity in Australia* (2010) 8.

50 Australian Coalition for Equality, *Equality (Gender Identity, Intersex and Sexual Orientation) Model Bill 2009* (2009) cl 19(3).

are vulnerable to discrimination in relation to a range of matters and some of these are unique to persons born with indeterminate biological sex characteristics. To confuse issues related to the circumstances of intersex people with those who, for example, may be voluntarily seeking to undergo gender reassignment risks marginalising this group and contributing toward an even greater sense that they are 'invisible' to the broader community.

Recommendation 6

The OADC recommends that sex or sexual characteristics, gender identity and sexual orientation be separately defined in the consolidated federal Act and that intersex be included as a separate attribute.

8. Associate discrimination

Q8: How should discrimination against a person based on the attribute of an associate be protected?

Extending the coverage of associates in respect of all protected attributes under one provision will create consistency and clarity in the consolidated legislation.

Section 16(s) of the Tasmanian legislation makes it is unlawful to discriminate against another person on the grounds of association with a person who has, or is believed to have, any listed attribute.

Recommendation 7

The OADC recommends that the consolidated legislation association with a person with any other protected attribute as a protected attribute and that associates be protected against discrimination and all other forms of conduct prohibited in the legislation.

9. Attributes covered by states and territories, the *Fair Work Act 2009* and the *Australian Human Rights Commission Act 1986*

Q9: Are the current protections against discrimination on the basis of these attributes appropriate?

The consolidation of Commonwealth Acts provides an opportunity to consider whether attributes not currently protected under Commonwealth law should be covered.

Current Commonwealth anti-discrimination laws cover the following attributes:

- Race
- Immigration status
- Sex
- Marital status
- Pregnancy or potential pregnancy
- Breastfeeding
- Family responsibilities
- Disability

- Age

Sexual orientation and gender identity have also been identified as attributes the Federal Government also considers should be protected.

Consolidation of Commonwealth legislation provides an opportunity to ensure that all attributes currently contained in anti-discrimination legislation across the Australian jurisdictions are covered.

At a minimum the Act should contain all attributes identified in current Commonwealth legislation, including the *Australian Human Rights Commission Act 2009* and the *Fair Work Act 2009*, together with all attributes covered by state and territory legislation.

Coverage of all attributes would reduce inconsistent protection between jurisdictions and assist in simplifying responsibilities. The present situation where a person, for example, has protection from discrimination on the basis of sexual orientation in Tasmania but not if the discrimination was through actions of the Federal Government is inconsistent with the underlying principle of equality for all.

Currently Tasmania prohibits discrimination on the basis of the following attributes:[51]

- age
- breastfeeding
- disability
- family responsibilities
- gender/sex
- industrial activity
- irrelevant criminal record
- irrelevant medical record
- lawful sexual activity
- marital status
- relationship status
- parental status
- political activity
- political belief or affiliation
- pregnancy
- race
- religious activity
- religious belief or affiliation
- sexual orientation

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[51] As an outcome of the 2009 Review of the *Anti-Discrimination Act 1998*, it is hoped that the Tasmanian Government will introduce amendments to the Act that will exclude transsexuality from the definition of sexual orientation and insert a new definition of 'intersex' as a stand-alone attribute.

- association with a person who has, or is believed to have, any of these attributes or identities

A comprehensive summary of attributes covered under Commonwealth, state and territory legislation is included at Appendix 2. Based on an analysis of current legislation, at a minimum the consolidated legislation should cover the following attributes:

- age
- breastfeeding
- criminal record
- disability (as defined in the DDA and including reliance on a guide dog, hearing dog or other assistance animal, reliance on a wheelchair or other remedial, palliative or therapeutic device, being accompanied by or reliance on an assistant, carer, interpreter or reader)
- employment activity
- ethno-religious origin
- gender/sex
- gender identity
- family or carer responsibility
- HIV/AIDS status (although this is generally covered by the definition of discrimination in the various jurisdictions)
- identity of a spouse or partner
- immigration status
- industrial or trade union activity
- intersex
- lawful sexual activity
- marital status
- medical record
- parental status
- physical features
- political belief, affiliation or activity
- pregnancy or potential pregnancy
- race (including ancestry, descent, colour, country of origin, ethnicity, ethnic origin, immigration status or status of being or having been an immigrant nationality, and national origin)
- relationship status
- religious belief, affiliation or activity
- religious appearance or dress
- sexuality or sexual orientation
- sharing accommodation with a child
- transsexuality
- association with a person who has, or is believed to have, any of these attributes or identities

The Discussion Paper raises the option of extending the Act to covered attributes relating to ILO discrimination, including religion, political opinion, industrial activity, nationality, criminal record and medical record. The OADC notes that

Tasmania's legislation already covers these attributes, and supports their inclusion in the consolidated Act.

The OADC supports the approach suggested by Discrimination Law Experts that the Act contain a provision that prohibits discrimination on the basis of a 'protected attribute' and that specific attributes be defined elsewhere in the Act in an exhaustive list (race, sex etc) which may be added to as required.[52]

There are a number of models that could be adopted to give effect to this approach.

One option may be to adopt the wording which has been used in Article 26 of the *International Covenant on Civil and Political Rights*:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground **such as** race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth **or other status**. [emphasis added]

The use of the phrase 'such as' prior to the listing of attributes is not exclusive and the insertion of the phrase 'or other status' in Article 26 provides flexibility to extend coverage to other attributes.

Principle 5 of the *Declaration of Principles of Equality* identifies a broad list of grounds or attributes which warrant protection in respect of equality and non-discrimination. In addition the *Declaration* contains a three-step test for the identification of further characteristics which should be protected:

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds (stated above).

The OADC endorses the approach set out in both the ICCPR and the *Declaration of Principles of Equality* and considers these should form the basis for the identification of attributes under the consolidated Act.

Additional attributes

Consideration should also be given to including attributes such as protection on the basis of domestic violence, homelessness, place of residence and socio-economic status. This would ensure that the Act is reflective of contemporary social values.

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52 Discrimination Law Experts' Roundtable, *Report on Recommendations for a consolidated federal anti-discrimination law in Australia* (2010) 7.

Victims of domestic violence potentially face a range of discriminatory practices in employment and important areas of service delivery (including the provision of housing).

Homeless persons are often faced with similar barriers and these difficulties are in many instances compounded by the combined or intersectional nature of the discrimination experienced.

Protection from discrimination on the grounds of socio-economic status would have the effect of extending protection to persons who are unemployed or in receipt of welfare support.

Inclusion of these characteristics as attributes under the consolidated Act would assist in combating adverse treatment and position Australia at the forefront of emerging international trends.

Criminal and medical record

With reference to the attributes of criminal and medical records, the OADC cautions against including any qualifying language such as the word 'irrelevant' as is currently the case in the Tasmanian Act.

Section 3 of the Tasmanian Act defines 'irrelevant criminal record' as follows:

> "irrelevant criminal record", in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where –
> (a) further action was not taken in relation to the arrest, interrogation or charge of the person; or
> (b) a charge has not been laid; or
> (c) the charge was dismissed; or
> (d) the prosecution was withdrawn; or
> (e) the person was discharged, whether or not on conviction; or
> (f) the person was not found guilty; or
> (g) the person's conviction was quashed or set aside; or
> (h) the person was granted a pardon; or
> (i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises.

Section 50 provides an exception relating to irrelevant criminal record when dealing with children:

> A person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances.

No definition of 'irrelevant medical record' is included in the Act and nor are any exceptions included in the Act beyond the reasonableness test which applies in respect of indirect discrimination for all attributes.[53]

Terminology that defines the criminal and medical records attributes has an effect on what burden of proof each of the parties bears. Inclusion of the words 'irrelevant' has the effect of requiring the complainant to prove that a record is irrelevant (for example to a job's requirement). Removal of this qualification would mean that, in respect of criminal record, the complainant would be required to establish that they have a criminal record or have been imputed to have a criminal record and that the alleged discrimination they experienced was *prima facie* on that basis, with the respondent being required to justify any discrimination on the basis of the relevance of that record to the circumstances. In respect of medical record, the complainant would not be required to establish they had a medical record, because arguably every person has a medical record, but rather would be required to establish that the alleged discrimination they experienced was *prima facie* on the basis of their medical record or a particular medical record imputed to them, with the respondent being required to justify any discrimination on the basis of the relevance of that record to the circumstances.

Further, the inclusion of the qualifier, 'irrelevant', in defining the protected attribute creates unduly convoluted analysis in respect of the protection on the basis of:

- imputed attributes; and
- association with a person with a protected attribute.

In respect of imputed attributes, it is incoherent to imagine that a person would discriminate against a person on the basis of an imputed criminal record that was an irrelevant criminal record. If a person were to impute a criminal record to another person, they would almost inevitably impute a record that was relevant to the circumstances. It is equally arguable that no imputed record can be relevant as it is a record that doesn't exist.

In respect of association, the qualifier means that person can legitimately be discriminated against on the basis, for example, of the criminal record of an associate if the nature of the record is arguably relevant. For example, a person may be the sister of a man with a criminal record for sexual assault. The discrimination might arise in the context of the sister applying for a job working with vulnerable people. While the nature of the record would quite properly be relevant to consideration of the brother's potential employment in such a setting,

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53 Information in this section is sourced from Alex Dennis, 'Position Paper: Legislative Changes to the 'Irrelevant Medical Record' Provision in the Anti-Discrimination Act 1998 (Tas)' (Intern Research Report, Office of the Anti-Discrimination Commissioner, 10 November 2011) and Fiona Hagger, 'Discrimination on the Grounds of Criminal Records' (Intern Research Report, Office of the Anti-Discrimination Commissioner, 16 September 2011).

and, as such, is arguable not an 'irrelevant criminal record' for the purposes of the Act, it is not at all clear that relevance should be a factor in considering whether or not the sister is being discriminated against because of her association with her brother.

On this basis, the 'relevance' of a medical or criminal record would be dealt with as a defence to an allegation.

Recommendation 8

The OADC recommends that the consolidated legislation protect against discrimination and other forms of prohibited conduct on the basis of all of the attributes currently protected under the various federal and state and territory anti-discrimination laws.

Recommendation 9

The OADC recommends, in addition to the attributes previously recommended for inclusion, the consolidated legislation provide protection on the basis of homelessness, place of residence and social status (including source of income being social security or emergency assistance and other social support, such as public housing).

10. Discrimination based on more than one protected attribute ('intersectional discrimination')

Q10: Should the consolidation Bill protect against intersectional discrimination? If so, how should this be covered?

A clear benefit of consolidating federal anti-discrimination laws is the potential to much more easily protect against intersectional discrimination.

Intersectional discrimination occurs when discrimination is experienced by a person on the basis of two or more attributes, eg, sex and race, or the combined effect of those attributes.

> Clearly, people are multi-dimensional and so cannot be classified according to, or defined by, a single characteristic. Each of has a gender, sexuality, age, ethnicity, etc. and no single aspect of our identity is necessarily more important than all the others. Any one of an individual's attributes, or any combination of them, may, therefore, form the basis of discrimination. In spite of this truism, many models of anti-discrimination law deal with each ground of discrimination separately. The law thus conceives of potential claimants as bearers of single characteristics and assumes that discriminators are simple creatures who will only base their discrimination on one ground at a time. Further, in recognising only a single aspect of a person's identity, the law fails to reflect the fact that people sharing one protected status may differ in respect of their other characteristics. It operates on the premise that all people within a protected group are the same.[54]

[54] Paula Uccellari, 'Multiple Discrimination: How Law can Reflect Reality' (2008) 1 *The Equal Rights Review* 24.

As Uccellari further observes, 'discrimination experienced on the basis of more than one ground can be both qualitatively and quantitatively different from the sum of the discrimination on each of these grounds'.[55]

A clear purpose of anti-discrimination law is the challenge the effects of prejudice and prejudicial views of people because of their identity. Prejudice is different and manifests differently depending on identity (and on the life experience of the person perceiving that identity). The prejudice experienced in Australia by a Sudanese man will be quite different from the prejudice experienced by a Sudanese woman. Presumptions made about the capacity of a man with a physical disability to do a particular job may be quite different from the presumptions made about the capacity of a woman with the same disability. This means that not only is the discrimination experienced likely to be different, but potentially the effect of that discrimination is also likely to be different. Both need to be effectively addressed within a consolidated law.

Despite being a single anti-discrimination statute prohibiting discrimination on a number of grounds, the Tasmanian Act does not explicitly refer to intersectional discrimination. Arguably, however, consideration (and prohibition) of intersectional discrimination is not precluded.

The UK *Equality Act 2010* expressly deals with intersectional discrimination (in a limited form) with the following provision:

> A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.[56]

This is arguably limited as it extends to only two aspects of identity, rather than the potential multiplicity of identities that may in combination be the basis of discriminatory treatment or effect.

The Canadian *Human Rights Act 1985* provides another model for expressly protecting against intersectional discrimination as it deals not only with discrimination on the basis of one attribute, or more than one attribute separately, but also with the qualitatively and quantitatively different nature of intersectional discrimination:

> 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.[57]

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55 Ibid 25.

56 *Equality Act 2010* (UK) c 15, s 14(1).

57 *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.1.

As well as expressly recognising the way in which discrimination on multiple grounds may be different and expressly protecting against such discrimination, the consolidated legislation also needs to deal with the fact that the effect on a person of intersectional discrimination may be different from the effect of single-attribute discrimination. Uccellari argues, correctly in the view of the OADC, that:

> In addition to being "qualitatively different" intersectional discrimination can also be "quantitatively worse" than discrimination on a single ground. The Equalities Review found that, "multiple markers of disadvantage" drastically reduce the likelihood of being employed.[58]

The Ontario Human Rights Commission has considered the question of remedies in respect of intersectional discrimination and noted in respect of the impact on the individual that:

> Therefore, while in some cases, a more significant award may not be warranted, there may be some situations in which the particular vulnerability of the person, as a result of the intersectionality of grounds, should be acknowledged in the damages for injured dignity, mental anguish and so forth. It could be another factor to be considered in determining the extent of the complainant's injury as a result of discrimination or harassment…[59]

In respect of discrimination with systemic effect, the Commission referred to:

> … the need for employers, service providers and others to design neutral rules and standards in a way that is as inclusive as possible. This could include a consideration of persons who are identified by an intersection of grounds. Possible remedies could therefore include requiring respondents to establish standards that provide for individual accommodation of persons who present with complex identities.[60]

The 'quantitatively worse' effect of intersectional discrimination could usefully be brought to the attention of tribunals for their consideration when determining remedies.

The OADC notes that expressly recognising and protecting against intersectional discrimination strengthens the argument for the removal of comparator tests. Comparator analysis tends to focus on comparison on the basis of the existence and absence of a particular protected attribute, either as the basis for the discriminatory treatment or the basis for the discriminatory effect.

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58 Uccellari, above n54, 29.

59 Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims – Discussion Paper* (2001) 24.

60 Ibid 25.

It is also an argument in favour of a general limitations clause rather than multiple exceptions (or defences) that apply differently to different protected attributes. Otherwise, the application of exceptions becomes unduly complex. Such complexity may result in a tribunal finding that the application of a specific-attribute exception is sufficient to legitimise discrimination that is on the basis of that specific attribute in combination with one or more other attributes.

Insertion of a phrase such as 'based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds' as is found in the Canadian federal legislation in the definition of discrimination and/or the attributes covered by the Act would enable recognition that discrimination can and does occur on the basis of more than one attribute and that this can result in both qualitatively and quantitatively different treatment and effect.

The OADC supports explicit recognition and prohibition of intersectional discrimination both in the definition of discrimination and in the remedies provisions.

Recommendation 10

The OADC recommends that the consolidated legislation include the following definition:

(1) For the purposes of this Act, discrimination includes:

(a) any distinction, restriction, exclusion or preference that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the civil, political, economic, social, cultural or any other field of public life on the basis of one or more protected attributes or on the effect of a combination of protected attributes; and

(b) harassment on the basis of one or more protected attributes or on the effect of a combination of protected attributes.

(2) Without limiting the generality of subsection (1)(a), a person discriminates against another person if:

(a) the person treats or proposes to treat the other person unfavourably on the basis of one or more protected attributes or on the effect of a combination of protected attributes; or
(b) the person imposes or proposes to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person, or a group of people, on the basis of one or more protected attributes or on the effect of a combination of protected attributes;
(c) the person fails or proposes not to make adjustments if the effect is that a person experiences unfavourable treatment under (a) or a detriment under (b).

The conduct in (a) and (b) is not mutually exclusive.

(3) Without limiting the generality of subsection (1)(b), a person harasses another person if the person engages in conduct that is offensive, humiliating, ridiculing, intimidating or insulting on the basis of one or more protected attributes or on the effect of a combination of protected attributes.

Recommendation 11

The OADC recommends that the consolidated legislation define protected attributes to include, where relevant, past, present and future attributes, and:

(a) characteristics related to the protected attribute;
(b) characteristics imputed to that attribute; and
(c) imputed attributes; and
(d) imputed characteristics related to a imputed protected attribute.

Protected areas of public life

11. Equality before the law

Q11: Should the right to equality before the law be extended to sex and/or other attributes?

This section of the Discussion paper raises the option of extending equality before the law coverage contained in the RDA to discrimination on the basis of other attributes.

There is no equivalent of section 10 of the RDA in any other Commonwealth, state or territory legislation. Section 10 operates by modifying any law of the Commonwealth, state or territories that denies or limits the rights of people of a particular race, colour or national or ethnic origin.

Extension of the right to equality before the law on the basis of sex or other attributes would not appear to have significant ramifications and would be consistent with Australia's international human rights obligations in regard to equality. However, equality before the law provisions in the original Disability Discrimination Bill were dropped due to concerns about the possible effects on special legal regimes for people with disability, such as guardianship and mental health legislation.

In its 2004 review of the DDA, the Productivity Commission acknowledged that many areas where equality before the law has been raised relate to state or territory responsibilities: accommodation, safeguards for decision making by and for people with cognitive disability, removing barriers to fair and equal treatment in the justice system and to civic participation; and challenging laws that deliberately or inadvertently discriminate against people with disability.[61]

Equality before the law is a fundamental human right under the UN *International Covenant on Civil and Political Rights*. However, in practice limitations have often been placed on this right for people with disability, particularly where people with disability have limited capacity to make decisions about their personal circumstances or their financial or legal affairs.

Nevertheless several 'equality before the law' issues have been raised including situations where people with disability are denied choice in terms of options following de-institutionalisation (accommodation, access to services, and tenancy rights for people in supported accommodation), arrangements for making informed decisions and the provision of legally effective consent (particularly with regard to those with cognitive disability), fair and equal treatment in the justice system and the right to participate in civic activities (particularly voting and jury duty).

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61 Productivity Commission, *Review of the* Disability Discrimination Act 1992*, Report No 30,* (2004) 233.

There is room for improvement at both Commonwealth and state and territory level in relation to these matters and 'equality before the law' provisions would assist in protecting rights in this area.

The Productivity Commission concluded its assessment of these issues by indicating that it is not clear why the concerns raised resulted in 'equality before the law' provisions being excluded in the DDA.[62] The Commissioners argued that the possible effect on special legal regimes in relation to people with disability, including guardianship and mental health legislation, could have been addressed by exemption mechanisms for 'prescribed laws'. This would have had the effect of exempting these laws from the operation of the Act, but preserve the general right to 'equality before the law'.

The OADC agrees with this observation and recommends that the consolidated Act include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law.

Equality before the law provisions should extend to all protected attributes, with exemption mechanisms used as the basis where the operation of the provision would have adverse effect.

Recommendation 12

The OADC recommends that the consolidated legislation include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law. Equality before the law provisions should extend to all protected attributes.

12. Mechanism for specifying areas of public life in which discrimination and harassment are prohibited

Q12: What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

The Discussion Paper identifies two approaches to specifying areas of public life in which discrimination and harassment are prohibited:

> Specify the activities to which anti-discrimination law is to apply, eg, hiring and firing employees, work, education, provision of goods and services.
>
> Specify the right and make it unlawful to do anything that interferes with the enjoyment of that right.

The later approach provides a positive statement of rights and enables a broader and more flexible interpretation of areas of activity to which the prohibited discrimination applies.

The OADC is of the view that there is no justification for limiting the reach of Australian human rights obligations in respect of equality and non-

62 Ibid 291.

discrimination. The identification of specific areas of public life to which legislation applies has the effect of preventing the effective coverage of important areas of government action (including, for example, policing) and means that some aspects of civic participation are outside the scope of the obligation to ensure equality and non-discrimination.

Australia's obligations and the human rights protected under international human rights treaties are not limited to 'areas of activity' and the differing provisions across legislation lead to inconsistency and complexity.

The OADC considers that if there is an intention to limit coverage to certain aspects of civic activity, these areas should be explicitly identified in the Act and dealt with by way of exclusion provisions. This approach would provide for greater ease of interpretation, more flexibility in the way in which the coverage of the Act is able to evolve over time and improved alignment with international human rights obligations.

The Tasmanian Act prohibits discrimination, offensive conduct, sexual harassment 'by or against' a person engaged in any activity as long as it is 'in connection with' specific areas of public life.[63] This means that conduct is caught when the person engaging in the conduct is engaged in an activity in connection with a specified area of activity, and that conduct is also caught if the person experiencing or affected by the conduct is engaged in an activity in connection with a specified area of activity.

The areas to which the Act applies are: employment (paid and unpaid); education and training; provision of facilities, goods and services (broadly defined); accommodation (business and residential); membership and activity of clubs; administration of any law of the State or any State program; awards, enterprise agreements or industrial agreements. The inciting of hatred, serious contempt or severe ridicule is also prohibited on specified grounds and in any of those areas of activity or in connection with any other activity.

The inclusion in the Tasmanian Act of the phases 'by or against' and 'in connection with' has provided flexibility in the scope of activities covered by the Act and activities that might otherwise be considered private or outside the scope of the legislation are considered to be covered under this definition. The Supreme Court has, for example, interpreted the provision to cover words spoken by a person from their front garden to a person passing as an activity undertaken in connection with accommodation.[64]

Arguably, however, this serves to emphasise that the application of laws to certain areas of activity unnecessarily complicates anti-discrimination legislation and should be excluded from future legal regimes.

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63 *Anti-Discrimination Act 1998* (Tas) s 22(1) and (2).

64 *Burton v Houston* [2004] TASSC 57 (11 June 2004) at [19-20].

The OADC supports the view of the Senate Standing Committee on Legal and Constitutional Affairs in its report on *The Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, that gaps in coverage of discrimination on the basis of sex discrimination and sexual harassment are often arbitrary and confusing.[65]

The OADC agrees that anti-discrimination legislation should not prescribe or limit the areas of activity to which it applies and supports a general statement of protection without specification. This would ensure that discrimination on the basis of all attributes is prohibited in all areas of activity.

The OADC supports the option of modelling an approach based on section 9 of the *Racial Discrimination Act 1975* (Cth), which would have the effect of providing a general prohibition on discrimination in any area of public life. For the sake of clarity for lay readers, the OADC supports a provision that also provides an inclusive list and that broadly defines each of the matters included on that list. In this regard, consideration could usefully be given to the definitions of particular areas of activity found in the various state, federal and territory laws.

Recommendation 13

The OADC recommends that the consolidated legislation should provide protection from discrimination and harassment by or against a person engaged in, or undertaking any, activity in connection with civil, political, economic, social, cultural or any other field of public life including but not limited to: accommodation; clubs and associations; education and training; disposal of land; access to premises; employment and employment-related areas; provision of facilities, goods and services (including services relating to superannuation, entertainment, refreshment and recreation), local, state, territory and Federal laws, programs and functions; statutory powers, services and functions; and sport.

13. Protection of voluntary workers from discrimination

Q13: How should the consolidation bill protect voluntary workers from discrimination and harassment?

The protection of voluntary workers from discrimination and sexual harassment is inconsistent across Australia. Whilst volunteers are protected under the Tasmanian legislation, this is not the case in several jurisdictions.

Coverage of volunteers in federal legislation would provide a mechanism for equality rights protection for volunteers on the basis of protected attributes and encourage states and territories to consider extending their legislation to do the same.

Discrimination law experts are of the view that protection should be extended to volunteers in a number of circumstances, including protection against harassment and protection against discrimination in work.[66] They consider that

[65] Senate Standing Committee on Legal and Constitutional Affairs, above n41, 149.

[66] Discrimination Law Experts' Roundtable: 2010, above n52, 13.

there is no policy reason for leaving volunteers exposed to discrimination and harassment without remedy.

The OADC notes that any protection of volunteers should not be limited to the area of work. Because of the coverage under the Tasmanian Act, the Commissioner has been able to undertake an investigation (under section 60(2) of the Act) into the practice of some insurance companies of excluding volunteers from volunteer insurance coverage on the basis of age.[67] This investigation is not dealing with a question of discrimination in employment, but rather a question of discrimination in the provision of services, in the form of insurance.

Recommendation 14

The OADC recommends that the consolidated legislation provide protection from discrimination for paid, voluntary and unpaid workers (including, for example, interns and work placement participants). Such protection should not be limited to protection against discrimination in employment.

14. Protection of domestic workers

Q14: Should the consolidation bill protect domestic workers from discrimination? If so, how?

Commonwealth and some state and territory Acts contain exemptions in respect of discrimination protection for domestic duties or employment in a private dwelling.

The Tasmanian Act does not provide any such blanket exemption for domestic duties or employment in a private dwelling, although discrimination on the basis of gender is permitted in employment if it is for the purpose of the residential care of a person under the age of 18 years.[68]

The OADC considers that there is no strong argument for the blanket exclusion of domestic workers from discrimination and harassment protection and that any appropriate exceptions to the prohibition of discrimination would be encompassed within the scope of the proposed general limitations clause (see below).

Recommendation 15

The OADC recommends that the consolidated legislation not provide an exception for domestic workers.

67 Anti-Discrimination Commissioner, *Volunteers, Insurance and Age: Investigation Issues Paper* (2011).

68 *Anti-Discrimination Act 1998* (Tas) s 27(c).

15. Regulation of clubs and other member based associations

Q15: What is the best approach to coverage of clubs and member-based associations?

Provisions covering clubs, voluntary bodies and incorporated and unincorporated associations in Australia's various anti-discrimination laws are inconsistent and complex. Definitions vary and levels of protection differ across different jurisdictions.

Under the Tasmanian Act a 'club' currently means an incorporated or unincorporated association of at least 30 persons associated together for a lawful purpose that:

(a) provides and maintains its facilities, wholly or partly, from the funds of the association; and
(b) sells or supplies liquor for consumption on its premises.[69]

This is essentially a narrow definition, covering only licensed clubs.

Following an assessment of this definition, it is hoped that the Tasmanian Government will introduce amendment to the Act to insert the word 'or' after 'and' at the end of sub-paragraph (a) of the definition. This would have the effect of broadening the definition of a club to include clubs that do not sell or supply liquor.

The Discussion Paper proposes two options to address the coverage of clubs and associations. The first is to broadly define clubs and associations in a manner consistent with the *Disability Discrimination Act 1992*, where the definition of a club includes both incorporated and unincorporated associations that provide and maintain their facilities from the funds of the association. This would go beyond the coverage provided by some state and territory legislation. The second is to use the narrower definition based on the *Sex Discrimination Act 1984*, which has the effect of only covering licensed clubs.

A narrower definition of 'club' would result in a diminution of protection for people with disability and would be at odds with the intention of the Tasmanian Government to amend the definition of a club in the Tasmanian Act.

Recommendation 16

The OADC recommends that the consolidated legislation extend coverage to membership and activities of all clubs and associations, whether licensed or not.

69 *Anti-Discrimination Act 1998* (Tas) s 3.

16. Regulation of partnerships

Q16: Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

The OADC notes the view expressed in the Discussion Paper that application of anti-discrimination legislation to partnerships is inconsistent across jurisdictions and that the policy rationale for excluding small partnerships from coverage under anti-discrimination legislation is unclear. Partnerships of up to six partners are exempted in some jurisdictions. Size limitations of this nature are arbitrary and unnecessary with no equivalence in other laws.

Partnerships are regulated under anti-discrimination laws as an aspect of the protection against discrimination in relation to employment. The nature of the corporate structure of an employer should not affect the protection.

The OADC supports the view that discrimination in all forms should be prohibited, subject to appropriate defences (see section 20 below).

Recommendation 17

The OADC recommends that the consolidated legislation extend coverage to partnerships regardless of size.

17. Regulation of sport

Q17: Should discrimination in sport be separately covered? If so, what is the best way to do so?

Commonwealth and state and territory laws are inconsistent in the way in which sport is treated.

The OADC supports coverage under the consolidated legislation of sport as is noted above as one of the areas of activity specifically named in the inclusive list (see recommendation above under '12. Mechanism for specifying areas of public life in which discrimination and harassment are prohibited').

Under the Tasmanian Act the following exceptions apply in respect of sport:[70]

> **29. Sport**
> A person may discriminate against another person in a competitive sporting activity by restricting participation to persons of one gender of 12 years of age or more.
>
> **31. Sporting activity of particular age group**
> A person may discriminate against another person on the group of age in relation to any competitive sporting activity by restricting participation to persons of a particular age group.

[70] *Anti-Discrimination Act 1998* (Tas) ss 29, 31 and 43.

43. Sporting activity for persons with disability
A person may discriminate against another person on the ground of disability in relation to any competitive sporting activity by –
(a) restricting participation to that person; or
(b) excluding the person from participating if the person is not reasonably capable of performing any action reasonably required in relation to that activity.

The OADC notes that restrictions in respect of gender in sport may need particular consideration with the extension of protection from discrimination on the basis of gender identity (however framed) as such protection is posited on recognising that gender is neither a binary nor a fixed state.

It is arguable that exceptions relating to sport are provided to ensure that people across the spectrum of age, gender and ability are able to participate in competitive sport. On that basis, it would be more appropriate to consider these exceptions as special measures to ensure participation. It is noted that this is the approach found in the DDA.

18. Requests for information

Q18: How should the consolidation bill prohibit discriminatory requests for information?

Seeking information about whether a person has a protected attribute or asking particular questions only of people with a particular attribute can be a precursor to discriminatory conduct or may be used to enable discriminatory conduct. It may also be done to enable consideration to be given to appropriate adjustments needed to accommodate a person's needs relating to a protected attribute. As outlined in the Discussion Paper, all Commonwealth anti-discrimination laws and some state and territory laws prevent people from making discriminatory requests for information.

Tasmanian legislation does not contain any equivalent provisions. However, discriminatory requests for information may fall within the broad prohibition against discrimination contained in the Act.

The Victorian and Queensland legislation prohibits requests for information that could be used to discriminate against a person on the basis of a protected attribute, but also provide an exception allowing the information to be requested where it is for non-discriminatory purposes.

The OADC considers there is a need to be clear about what is meant by 'discriminatory requests for information' and supports the inclusion of provisions that would expressly prohibit discriminatory requests for information, including provisions which provide coverage for requests where these may be used for discriminatory purposes. As with other areas, the proposed approach is to make such requests *prima facie* unlawful, with recourse to a defence that the purpose of the request was a non-discriminatory purpose or to the general limitations

clause if the request can be justified. This will provide clarity around rights and responsibilities in this area.

Recommendation 18

The OADC recommends that the consolidated legislation expressly prohibit requests for information that could be used to discriminate against a person on the basis of a protected attribute.

19. Vicarious liability

Q19: Can the vicarious liability provisions be clarified in the consolidation bill?

Vicarious liability provisions attribute liability to employers and principals for the unlawful acts of their employees and agents, where employers and principals do not take all reasonable steps to prevent discrimination or other prohibited conduct from occurring. Tests vary under each Commonwealth Act. However each Act provides for a defence based on establishing that reasonable precautions and due diligence was taken to avoid the conduct.

Under the Tasmanian Act, the relevant provision goes further than a traditional tortious vicarious liability analysis, requiring an organisation to ensure that:[71]

> (a) its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which the Act relates;
> (b) the terms of any order made under the Act relating to that organisation are brought to the notice of its members, officers, employees and agents whose duties are such that they may engage in conduct of the kind to which the order relates; and
> (c) no member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.

Further, 'an organisation is to take reasonable steps to ensure that no member, officer, employee or agent … engages in discrimination or prohibited conduct'.[72] An organisation that does not comply with these requirements is liable for any contravention of the Act committed by any of its members, officers, employees and agents.[73]

Requiring organisations to take 'all reasonable steps' to ensure that members, officers, employees and agents do not commit unlawful acts and 'to ensure that' members, officers, employees and agents are aware of discrimination and prohibited conduct under the Act encourages organisations to develop policies that clearly indicate the types of behaviour that are unacceptable, to pro-actively train everyone involved with the organisation and to actively respond to instances of potential or actual discrimination and harassment in order to avoid liability.

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71 *Anti-Discrimination Act 1998* (Tas) s 104(1).

72 *Anti-Discrimination Act 1998* (Tas) s 104(2).

73 *Anti-Discrimination Act 1998* (Tas) s 104(3).

Of particular note is that the obligation under section 104(1)(c) on organisations that have been the subject of an order under the Act is of a higher order in respect of preventing breaches. The Act requires the organisation to 'ensure' that those associated with it do not 'engage in, repeat or continue' conduct 'of the kind to which the order relates'. This is a stricter obligation than that imposed under section 104(2) that requires the organisation to 'take reasonable steps to ensure' that those associated with it do not engage 'in discrimination or prohibited conduct'.

An important aspect of this provision is that is applies not only to those in an employment relationship, but also those in a membership or governance relationship with an organisation. This means that, in respect of clubs, for example, there is an obligation on the club to ensure its members understand the prohibitions under the Tasmanian Act.

In conjunction with a requirement to undertake positive actions or duties, strong vicarious liability provisions have the potential to significantly reorient federal human rights legislation toward emphasis on the implementation of proactive measures aimed at promoting equality and safeguarding human rights in a transparent way.

Recommendation 19

The OADC recommends that the consolidated legislation include clear provisions that provide for organisational liability for conduct of those associated with the organisation where there has been a failure to comply with positive duties to address and prevent discrimination and other unlawful conduct. The OADC recommends that consideration be given to a higher order obligation on any organisation that has been the subject of orders under the consolidated legislation as is found in section 104(1)(c) of the *Anti-Discrimination Act 1998* (Tas).

Exceptions and exemptions

For the sake of clarity, the OADC understands the term 'exception' to refer to general and specific defences available under anti-discrimination legislation, and the term 'exemption' to refer to a temporary order permitting conduct that would otherwise be discriminatory or unlawful. The OADC is of the view that it would avoid confusion if 'exceptions' were referred to as defences.

The OADC considers there is a need to promote consistent language around these concepts and that further consideration should be given to the purpose and use of general or permanent exceptions included in legislation.

Exemptions are granted to permit temporary non-compliance and should be subject to clearly defined processes and time limits.

Defences relate to more enduring forms of limitation on what would otherwise be unlawful, and include, for example, the inherent requirements defence found in the DDA.

Defences

Part 5 of the Tasmanian Act contains general and specific defences across a number of attributes. It is clear that these operate as defences as the Act provides that 'a person who relies on an exception or exemption referred to in Part 5 as a defence to a complaint is to prove that exception or exemption on the balance of probabilities'.[74]

The differential treatment of people based on their particular attributes and of different duty holders that arises from the diversity of defences provided in the various federal anti-discrimination laws is not, in the OADC's view, either sustainable, justifiable or equitable. While some might argue that all of these defences have been developed from a first principle basis, it is no longer clear that the same principle is being applied to a range of different circumstances. A fairer and more sustainable approach is to remove all of the various defences that have developed under the different federal laws and instead have a general limitations provision that applies to all situations. This is considered in further detail below.

Exemptions

Section 56(1) provides that a person may apply to the Commissioner 'to exempt from the provisions of the Act any conduct or activity which would otherwise contravene' the Act. After considering the application, the Commissioner may grant an exemption unconditionally or on conditions for a period not exceeding three years. The exemption may be renewed for a further period not exceeding three years.

74 *Anti-Discrimination Act 1998* (Tas) s 101.

The OADC supports the adoption of a general limitations clause in place of retention of the range of exceptions (defences) currently provided under the various federal anti-discrimination statutes. The OADC supports the view of the AHRC that exceptions should not be used simply as a basis for allowing discrimination to continue on an ongoing basis.

One benefit of a single general limitations clause is that it ensures that duty holders must consider whether or not their proposed actions are discriminatory and, if so, they are defensible in the particular circumstances.

The OADC is of the view that inclusion of a general limitations clause would greatly simplify the approach taken to permitting otherwise discriminatory conduct and help to place exceptions within a context that makes clear their purpose and within the context of the objects of anti-discrimination legislation.

There are several approaches that could be considered. Discrimination Law Experts suggest that general defence of justification be included in the proposed definition of discrimination.[76] Under this model, the matters to be taken into account in deciding whether discrimination is not unlawful because it is justified include:

(a) the public interest in achieving the objects of the Act; and
(b) the nature and extent of the disadvantage resulting from the discriminatory treatment or imposition of the condition requirement or practice; and
(c) if the discrimination relates to conduct under reasonable adjustments clause, the nature of the adjustment required and the consequences for the complainant if such an adjustment is not made; and
(d) the availability, cost and feasibility of an alternative that is not discriminatory; and
(e) whether the discrimination is justified as a special measure; and
(f) if the discrimination is in a protected area of work, the inherent requirements of the relevant work.

Whilst the OADC supports an approach that includes guidance on what might be considered justified discriminatory behaviour, the approach proposed by the Discrimination Law Experts has the potential to continue to promote a level of complexity and misunderstanding.

The OADC's preferred approach is that which has been adopted in Canada under the *Canadian Human Rights Act 1985*. The Canadian approach sets out several defence provisions.[77] The OADC considers that it is worth examining these in detail.

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76 Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws: Submission* (2011) 9.

77 *Canadian Human Rights Act*, RSC 1985, c H-6 s 15.

Section 15(1) provides that it is not discriminatory practice if:

> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;
> (b) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purpose of this paragraph;
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;
> (d) the terms and conditions of any pension fund or plan established by an employer, employee organisation or employer organisation provide for the compulsory vesting or locking-in if pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the *Pension Benefits Standards Act 1985*;
> (e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;
> (f) an employer, employee organisation or employer organisation grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or
> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is a *bona fide* justification for that denial or differentiation.

Whilst section 15(1) of the Canadian Act goes to issues surrounding special measures as a general defence, the two underlying concepts specified by the Act are a *bona fide* occupational requirement found in section 15(1)(a) and a *bona fide* justification for discriminatory practices in section 15(1)(g). Provision is made for these to be set out in guidelines or standards established by the Commission. Of the remaining clauses in section 15, it is the OADC's view that section 15(1)(b) and (d) should properly be considered particular applications of the *bona fide* occupational requirements or *bona fide* justification defence as it is a *bona fide* requirement to comply with legislative provisions. Section 15(1)(f) is arguably a special measure and should more properly be dealt with in that context.

It is useful to understand how these two defences operate and important to note that, through decisions of the Canadian Supreme Court in 1999[78], the approach to defences to direct and indirect discrimination under Canadian federal anti-

[78] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (the *Meiorin* case) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 (the *Grismer* case).

discrimination law have become unified. This arguably greatly simplifies understanding for both rights and duty holders.

In terms of how the defences operate, it is useful to refer to public materials prepared and published by the Canadian Human Rights Commission. These set out that, once a complainant establishes a *prima facie* case of discrimination, the respondent that seeks to rely on either a *bona fide* occupational requirement or a *bona fide* justification test needs to be able to demonstrate all of the following:[79]

1. The underlying purpose of the conduct, standard, policy or practice is rationally connected to the performance of the job or service at issue. This requires articulation of the purpose of the particular conduct, standard, policy or practice that is alleged to be discriminatory, and the objective requirements of either the job or the functions of the service and of how the purpose relates to those objective requirements of functions.

2. The conduct, standard, policy or practice was adopted in an honest and good faith belief that it was necessary in order to accomplish the respondent's purpose. This requires articulation of, for example, when, how and why the conduct took place, or the standard policy or practice was developed.

3. The conduct, standard, policy or practice is reasonably necessary for the employer or service provider to accomplish its purpose. This requires consideration of whether:
   - the conduct, standard, policy or practice operates to exclude people with particular attributes based on 'impressionistic assumptions';
   - the conduct, standard, policy or practice treats some people to whom it applies differently (and 'more harshly') than others;
   - alternatives were considered, including flexible or individualised arrangements, and if so why they weren't implemented and the approach taken was;
   - the conduct, standard, policy or practice was the least discriminatory means of achieving the purpose;
   - varying approaches could be adopted;
   - the standard, policy or practice was 'designed to minimise the burden on those required to comply';
   - efforts were made to accommodate those people who would be negatively affected because of one or more protected attributes (or the combined effect) and what those efforts were;
   - assistance or expert advice was sought to identify possible accommodations; and
   - whether the respondent would have 'undue hardship' if alternative approaches or individual accommodations were implemented.

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79 Canadian Human Rights Commission, '*Bona Fide* Occupational Requirements and *Bona Fide* Justifications under the *Canadian Human Rights Act*: The Implications of *Meiorin* and *Grismer*' (2010) <http://www.chrc-ccdp.ca/discrimination/occupational-eng.aspx#grismer> at 28 January 2011.

These elements also provide significant guidance on what organisations need to do to ensure that they comply with their obligations to not discriminate.

The inclusion of a general limitations clause would bring discrimination laws into line with other areas of the law and deflect emphasis away from the sector by sector approach, which is one characteristic of current legislation. A broad-based limitations clause, together with clear guidelines on how requests for exemptions are to be treated and assessed, would enable both defences (limitations) and exemptions to be considered equitably and to take account of the particular circumstances. This approach would considerably strengthen the legislation, enable a clearer focus on actions aimed at promoting equality and non-discrimination rights and remove from the legislation the enumeration of a plethora of exceptions which serve only to confuse both duty and rights holders and highlight where discrimination continues to be tolerated for reasons that may not be justifiable.

This is the approach adopted in a number of Commonwealth Acts. For example, the *Equal Opportunities for Women in the Workplace Act 1999* (Cth) has simple exceptions guidelines (organisations less than 100 employees) and the former Minister announced in March 2011 that powers to waive the requirement that a business has to report will be removed from the Act.[80] This approach is backed by provisions that enable the EOWA Agency to provide support and advice to organisations to meet their obligations.

The OADC favours the introduction of a separate special measures provision (see comments on question 3 above), together with a general limitations clause along the following lines:

(1) It is not unlawful to discriminate if the person engaging in the discrimination is able to establish that:

  (a) the discrimination is necessary to achieve direct compliance with state, territory or Commonwealth laws;
  (b) the discrimination is necessary to achieve direct compliance with orders of a commission, court or tribunal;
  (c) the discrimination is based on a *bona fide* occupational requirement; or
  (d) there is a *bona fide* justification for the discrimination.

(2) In determining whether 1(c) or (d) are established, the following must be considered:

  (a) what is the underlying object of the action or requirement;
  (b) in relation to occupational requirements, what are the objective requirements of the position;

[80] The Hon Kate Ellis MP, 'Minister announces the way forward for women in the workplace', (Media Release, 9 March 2011).

(c) in relation to services and facilities, what is the function of that service or facility;
(d) is the underlying object of the action or requirement rationally connected to the objective requirements of the position or the function of the service or facilities;
(e) was the action undertaken or requirement developed in an honest and good faith belief that it was necessary in order to accomplish the underlying object;
(f) how was the action decided or requirement developed;
(g) whether the action is a necessary and proportionate means of achieving the underlying objective;
(h) whether the action or requirement is based in any way on impressionist assumptions of people with any of the protected attributes;
(i) what is the discriminatory impact of the action or requirement on a person or persons with one or more protected attributes or a combination of protected attributes;
(i) whether there are alternative means of achieving the underlying objective that has a less discriminatory impact;
(j) the availability, cost and feasibility of any alternatives, including individualised responses, that are not discriminatory or less discriminatory;
(k) whether any such alternatives were considered and, if so, why they weren't implemented and the action or requirement was;
(l) whether the action or requirement was designed to eliminate in such a way as to eliminate or minimise the burden on those affected;
(m) what, if any, efforts have been made to accommodate those people who would be negatively affected because of one or more attributes and what those efforts were;
(n) whether assistance or expert advice was sought in determining the action or requirement and to identify possible accommodations;
(o) whether the person responsible for the action or requirement would face unjustifiable hardship if alternative approaches or individual accommodations were implemented.

The OADC believes that a general limitations clause as a means to defend discriminatory conduct should be favoured over any attempt to identify specific exceptions for each attribute within the consolidated legislation. Should increased certainty about the application of the general limitations clause to specific situations be desired, the legislation could include examples or the AHRC could be authorised to issue guidelines.

If the consolidated legislation retains exceptions, these should be subject to review and sunset provisions. In this context we note the AHRC's recommendation to the Senate Committee Inquiry into the *Sex Discrimination Act 1984* that all permanent exceptions be subject to a three-year sunset clause.[81]

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81 Australian Human Rights Commission, *Submission into the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Effectiveness of the* Sex Discrimination Act 1984 *in eliminating discrimination and promoting gender equality* (2008) 151.

Further, the OADC considers that a review of existing exceptions should be undertaken prior to being included in the consolidated legislation.

Recommendation 21

The OADC recommends that the consolidated legislation include a single general limitations provision based on that which exists in the *Canadian Human Rights Act 1985.*

21. Inherent requirements and genuine occupational qualifications

Q21: How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

The OADC supports the adoption of a single general limitations clause that includes an exception for *bona fide* occupational requirements in respect of all protected attributes.

22. Exemptions for religious organisations

Q22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

Section 51(a) of the Tasmanian Act enables discrimination in employment based on religion if the participation of a person in the observance or practice of a religion is a genuine occupational qualification. The Act also allows under certain circumstances discrimination in employment in educational institutions on the grounds of religious belief or affiliation.[82]

Section 52 of the Tasmanian Act provides that:

> A person may discriminate against another person on the grounds of religious belief or affiliation or religious activity in relation to:
>
> (a) the ordination or appointment of a priest; or
> (b) the training and education of any person seeking ordination or appointment as a priest; or
> (c) any other act that
> (d) is carried out in accordance with the doctrine of a particular religion
> (e) is necessary to avoid offending the religious sensitivities of any person of that religion.

The nature of the exceptions provided to religious bodies in Tasmania provides a basis for such a body to defend actions that are discriminatory on the basis of a limited range of protected attributes only, being religious belief or affiliation or religious activity. They not make discrimination against people on other grounds defensible. This arguably achieves the appropriate balance between the

[82] *Anti-Discrimination Act 1998* (Tas) s 51(2).

protection of freedom of religious and the right to equality and freedom from discrimination.

The OADC shares concerns that broad exceptions for religious bodies have the capacity to create a 'hierarchy' of protected characteristics' where some attributes are given preference over others.[83]

The OADC is concerned that blanket exceptions of this nature have the capacity to allow discrimination by particular institutions in a way that may not be consistent with international human rights law. The right to equality is a fundamental human right and should only be compromised in situations that are soundly justified and are proportionate to the circumstances.

The OADC is of the view that the inclusion of exceptions for religious organisations should be carefully evaluated, consideration be given to whether the proposed general limitations clause would provide a more appropriate and responsive mechanism for dealing with such exceptions and exceptions should not be retained in respect of activities that are undertaken with government funding or other government support.

An option to be considered is whether provisions providing for the granting of exemptions where particular pre-conditions are met could be an appropriate alternative to maintaining broad-exceptions for religious bodies.

23. Temporary exemptions

Q23: 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?

The OADC considers that the use of temporary exemptions should constitute the primary mechanism for permitting otherwise unlawful discrimination under federal legislation in preference to the use of blanket exceptions that risk further entrenching inequality.

The use of temporary exemptions provides the basis for considering each application on its merits and will help to ensure that any exemption is proportionate, time-limited, reviewable and focused on achieving compliance.

There is a need for careful analysis of the nature of temporary exemptions granted under various Commonwealth and state and territory legislation and a clear understanding of the purpose of exemption-granting powers and how these differ from actions intended to redress the disadvantages experienced by particular groups.

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83 Cambridge Pro Bono Project, *Equality for all: submission on Australia's proposed reform of anti-discrimination legislation* (2011) 60.

Exemptions provisions under various Commonwealth and state and territory Acts are sometimes used as a basis for endorsing special measures. For example, an exemption granted in 2010 under the Tasmanian Act enabled the development of a whole-of-government program to provide employment pathways for graduates with disability.

As noted by the Human Rights Law Centre, this approach negatively frames special measures as a form of conduct, rather than a key mechanism for alleviating inequality.[84]

The OADC considers that matters aimed at providing special measures to assist a section or group or requiring positive duties to promote equality should be addressed under separate provisions in the consolidated legislation (see '3. Special measures' above). This will assist in clarifying the purpose of exemption granting powers.

Current AHRC guidelines for deciding whether to grant an exemption provides a basis for the consideration of exemptions and should provide a starting point for the identification of transparent procedures for assessing applications.[85] Provision should also be made for exemptions to be made subject to terms and conditions, including requirements to undertake actions during the period in which the exemption is granted.

Tasmanian legislation currently allows for a person to apply to the Commissioner to exempt from the provisions of the Act any activity or conduct that would otherwise contravene the Act. Section 57(2)(a) enables the exemption to be granted either unconditionally or on conditions for a period not exceeding 3 years. Section 57(3)(a) enables the exemption to be renewed for a further period not exceeding 3 years. An exemption may be revoked or conditions varied while the exemption is in place.

The OADC is currently developing public guidelines so that potential applicants and others can better understand the process and range of factors that will be considered in assessing a request for exemptions. These guidelines will cover arrangements for seeking information on the purpose, scope and effect of any proposed exemption and any conditions that ought properly apply if the exemption is granted.

One matter being considered for inclusion in the guidelines is a public process for calling for submissions where the proposed exemption raises issues that could potentially limit the rights of those with prescribed attributes.

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84 Human Rights Law Centre, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality* (2011) 24.

85 See, for example, Australian Human Rights Commission, *Temporary exemptions under the* Age Discrimination Act*: Commission Guidelines* (2010).

Under the Tasmanian Act, the Commissioner must give reasons for any decision to refuse or grant an exemption and her decision can be reviewed by the Anti-Discrimination Tribunal.

Complaints and compliance framework

In the absence of a positive duty to promote equality, anti-discrimination laws have historically relied on complaints as the primary mechanism for safeguarding human rights obligations.

Complaint-driven processes are largely reactive and remedies focus largely on addressing individual circumstances rather than the systemic underpinning of inequality.

The OADC considers that introduction of positive duty provisions are critical to moving the focus over time to a more proactive and positive approach to eliminating discrimination.

Under a more balanced package of compliance measures, complaints processes will remain an important tool for the investigation of alleged transgressions and access to justice for those who have been discriminated against. However the focus would shift toward improved awareness of obligations and the adoption of strategic approaches toward ensure obligations are met.

It is important, however, that compliance measures include a mix of both legally binding and voluntary measures and that a balance is achieved between measures that are aimed at assisting organisations meet obligations and enforcement mechanisms, including a robust set of penalties and sanctions, where discriminatory practices continue.

24. Options to assist business in meeting anti-discrimination obligations

Q24: 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?

The Discussion Paper refers to 'voluntary non-binding action plans, co-regulation, standards, and certification of special measures'.[86] These are all positive ways in which greater certainty can be provided to duty holders around their compliance with obligations under anti-discrimination legislation and other inter-related regulatory frameworks.

Action Plans

The option of developing and registering Action Plans under the DDA initially encompassed only plans in relation to service provision. In the first few years after the DDA was enacted, significant focus was put on developing resources to assist organisations to understand their obligations under the Act and to both encourage and educate organisations on the development of action plans. This resulted in a strong focus on action planning in, for example, the local government and the tertiary education sectors.

86 Commonwealth of Australia, Attorney-General's Department, above n1, 43.

This, along with the potential protective effect of a registered and implemented action plan, certainly encouraged organisations to develop a stronger level of understanding of and action on their obligations in relation to ensuring accessibility of service provision for people with disability.

The 2009 amendments to the DDA that resulted in the extension of the action plan approach to all areas of activity were a potentially important development, however, the same level of financial support was not made available to the AHRC to ensure that employers and others understood the new, enhanced provisions or to provide resource materials. Many larger organisations that had submitted action plans prior to the amendments has included strategies to be implemented to improve employment opportunities for people with disability. The very real benefit of the 2009 amendments for organisation do not seem to have been realised as there has been no apparent resurgence of action plan development and registration activity since those amendments.

The OADC supports the inclusion of action plan provisions in the consolidated legislation. Such provisions should permit organisations to develop, lodge and implement action plans in respect of all areas of activity in respect of all protected attributes. The development, lodgement and implementation of an action plan should be relevant to the defence of unjustifiable hardship as it under the DDA. The AHRC should be resourced to provide guidance on development of action plans.

Action planning under the DDA is somewhat similar to a key compliance mechanism under the *Equal Opportunity for Women in the Workplace Act 1998* (Cth), being the development of workplace programs, with the key difference being the voluntary nature of action plans under the DDA for all organisations.

The *Equal Opportunity for Women in the Workplace Act 1998* includes a range of compliance mechanisms to promote the elimination of discrimination in employment against women in organisations covered by the Act.[87] These include:

- a requirement that higher education institutions and organisations employing 100 or more people develop workplace programs to identify strategic approaches to eliminating discrimination;
- a requirement that the development, implementation and review of the workplace program be overseen by senior personnel with authority and status within the organisation;
- improved consultation with staff to develop shared strategies to promote change;
- a requirement to undertake a workplace profile to inform action; and
- mandatory reporting arrangements which promote increased awareness of possible actions and enable compliance to be monitored.

87 *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss 6, 8 and 13.

It is notable that the obligation to develop, implement and review workplace programs is a mandatory obligation on all higher education institutions and organisations with over 100 employees.

In addition, the Equal Opportunity for Women in the Workplace Agency is authorised by the Act to undertake a number of functions to promote the objects of the Act, including:[88]

- working with employers to develop strategic partnerships and offering tailored industry-specific options for promoting change;
- the development of practical resources to assist organisations plan for change across the full employment cycle including the areas of recruitment, training and development, mentoring, career progression and termination; and
- public education, including the reporting of outcomes and the use of awards and citations to recognise and reward good practice.

The Act provides that Agencies or employers that fail to meet the reporting requirements under the Act can be publicly named and under proposed amendments, businesses that do not comply with the Act will be ineligible to receive Government funded grants or access industry assistance.[89]

Another model of requiring the development and implementation of plans in respect of employment is found in Canada under the *Employment Equity Act*[90], which requires federally regulated employers in Canada to provide equal employment opportunity to four designated groups: women, Aboriginal peoples, people with disability and members of visible minorities. Federally regulated employers are: federal government departments, agencies and crown corporations, 'chartered' banks, airlines, television and radio stations, inter-provincial communications and telephone companies, inter-provincial bus and rail transport services, First Nations, and other industries that are federally regulated.[91] Not all federally regulated organisations are caught by the Act, with a threshold of 100 employees applying to certain categories of organisations.[92]

The Act requires each federally regulated employer to (a) determine whether or not the four designated groups are 'fully represented' at every level of the organisation; (b) identify barriers to employment opportunity for members of any

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88 *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 10.

89 The Hon Kate Ellis MP, 'Minister Announces the Way Forward for Women in the Workplace' (Media Release, 9 March 2011).

90 *Employment Equity Act*, SC 1995, c 44.

91 For a full list of those private sector organisations that are federally regulated in Canada see Human Resources and Skills Development Canada, 'LEEP Employers List' (2011) <http://www.hrsdc.gc.ca/eng/labour/equality/employment_equity/private_crown/list/index.shtml> at 15 January 2011.

92 *Employment Equity Act*, SC 1995, c 44, s 4(1) and 3 (definition of 'private sector employer').

of the four designated groups; and (c) work with employees to develop an employment equity plan, being a plan that promotes full representation of all four designated groups.

The Act sets out what content the plan must have, including policies and practices to be implemented, and short-term goals to correct under-representation. Employers are assisted to understand their obligations through guidance provided by Human Resources and Skills Development Canada.

In respect of the employment equity plans, employers are required to:

- provide their employees with information about the purpose of employment equity and the measures they are taking or have planned to implement employment equity;[93] consult with their employees (through representatives) on the plan, reviews and revision, and communication of the plan;[94] and
- maintain relevant records.[95]

Private sector employers are also required to annually report to the Minister on specified data.[96] The Minister is required to provide an annual report to parliament on the consolidated data from these reports and analysis of that data.[97] An equivalent report on public sector employment is required to be tabled annually by the President of the Treasury Board.[98]

The Canadian Human Rights Commission conducts compliance audits of employers (including Crown corporations and federal public sector organisations).[99] Where an audit reveals a non-compliance issue, the Canadian Commission can request the organisation take corrective action.[100] If the organisation fails to do so, the Commission can then impose corrective measures and if non-compliance continues, refer the matter to the Employment Equity Review Tribunal.[101] The Tribunal may confirm an order made by the Commission, vary or rescind such an order or 'make any other order it considered appropriate and reasonable in the circumstances to remedy the non-compliance'.[102]

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93 *Employment Equity Act*, SC 1995, c 44, s 14.

94 *Employment Equity Act*, SC 1995, c 44, s 15.

95 *Employment Equity Act*, SC 1995, c 44, s 17.

96 *Employment Equity Act*, SC 1995, c 44, s 18.

97 *Employment Equity Act*, SC 1995, c 44, s 20.

98 *Employment Equity Act*, SC 1995, c 44, s 21.

99 *Employment Equity Act*, SC 1995, c 44, Pt II.

100 *Employment Equity Act*, SC 1995, c 44, s 25.

101 *Employment Equity Act*, SC 1995, c 44, s 27(2).

102 *Employment Equity Act*, SC 1995, c 44, s 30.

In addition, where private sector employer fails to file a report or fails to include required data, the Minister may impose a financial penalty of up to $10,000 for a single violation, or $50,000 for repeated or continued violations.[103]

The OADC considers that obligations and powers similar to those currently existing and being proposed under the amendments to the *Equal Opportunity for Women in the Workplace Act 1998* (Cth) and those found in the Canadian *Employment Equity Act* applicable to all Government organisations and all private employers and non-government organisations with 100 or more employees should be included in the consolidated legislation as key measures for compliance with positive duty obligations across appropriate attributes. It has been disappointing that, to date, the provisions of the *Equal Opportunity for Women in the Workplace Act 1998* have not been extended to those attributes covered under existing federal anti-discrimination law.

The OADC notes that the Canadian approach has not been to extend the obligations to all protected attributes and submits this approach should be considered on the basis that employment equity provisions need, in the first instance, to focus on achieving employment equity for those who have historically experienced systemic barriers to employment.

An example of the difference between the coverage under anti-discrimination protection found in the *Canadian Human Rights Act* and the employment equity obligations found in the *Employment Equity Act* relates to disability. Under the *Canadian Human Rights Act*:

> "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug[104]

While under the *Employment Equity Act*, the obligation on employers vis à vis people with disability is more limited as the definition of 'persons with disabilities' is:

> "persons with disabilities" means persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who
>
> (*a*) consider themselves to be disadvantaged in employment by reason of that impairment, or
> (*b*) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,
>
> and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace;[105]

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103 *Employment Equity Act*, SC 1995, c 44, ss 35 and 36.

104 *Canadian Human Rights Act*, RSC 1985, c H-6, s 25.

105 *Employment Equity Act*, SC 1995, c 44, s 3.

In addition, the scope of coverage under the *Employment Equity Act* is limited to the four designated groups: women, Aboriginal peoples, people with disability and members of visible minorities (which 'means persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour'[106]); whereas the *Canadian Human Rights Act* provides protection against discrimination on the basis of 'race, national or ethnic origin, colour, religion, age, sex [including pregnancy and child-birth], sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted'.[107]

In order to be effective, such mechanisms in Australian law needs to be supported by effective education and guidance materials and powers and resourcing for compliance auditing and enforcement, with the AHRC being the most appropriate body to take on these roles.

The OADC also supports additional action to promote compliance by Government organisations, including recently announced strategies for the scrutiny of new legislation and the establishment of a Parliamentary Joint Committee on Human Rights to examination legislation and facilitate improved public dialogue on human rights matters.[108] The OADC supports an increased role for the AHRC and related organisations in providing expert advice to the Committee on these matters.

Robust guidelines for the preparation and consideration of compliance plans and other instruments identified in the consolidated legislation will be beneficial in assisting duty holders implement obligations and these should be given standing by inclusion in Regulations made under the Act.

In the Tasmanian context, intensive work is underway in providing training and advice to stakeholders on ways in which they can meet their responsibilities under the Act. Corporate training and public education training courses are made available to a wide variety of organisations each year and this forms a substantive part of meeting the Commissioner's requirement to promote the recognition and approval of acceptable attitudes, acts and practices in relation to discrimination and prohibited conduct. The OADC is supportive of increased action to promote understanding of human rights obligations among employers and other relevant bodies and considers this should also be identified as a key function of the AHRC in the new Act.

106 *Employment Equity Act*, SC 1995, c 44, s 3.

107 *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.

108 The Hon Nicola Roxon MP, 'Human Rights check for new laws' (Media Release, 4 January 2012).

Recommendation 22

The OADC recommends that the consolidated legislation include provision for voluntary development and implementation of action plans in respect of all areas of activity, including employment, by all duty holders, in respect of all protected attributes.

Recommendation 23

The OADC recommends that the consolidated legislation include mechanisms mandating obligations in relation to the achievement of employment equity for those people who have historically faced significant barriers to employment.

Recommendation 24

The OADC recommends that proof of the development and effective implementation of an action plan and/or an employment equity plan should be relevant to the availability of defences under the consolidated legislation.

25. Options for reforming the conciliation process

Q25: Are there changes needed to the conciliation process to make it more effective in resolving disputes?

The OADC supports the adoption of flexible arrangements for achieving resolution of unlawful discrimination complaints, including the use of alternative dispute resolution mechanisms where this has real potential for early and low-cost resolution of discrimination complaints. The OADC notes the importance of such mechanisms to support individuals who alleged discrimination because of the high likelihood that such individuals face economic, social and educational disadvantage and would be significantly disadvantage in formal legal processes.

It should be noted, however, that while early and alternative dispute resolution are often the most appropriate way to proceed with complaints, these processes can be counter-productive for those complaints that raise matters of significant public interest, including systemic discrimination. Undue focus on confidentiality of conciliation outcomes can result in potentially important systemic outcomes being subject to confidentiality clauses.

Some consideration needs to be given to ensuring that appropriate processes are in place to identify and deal with complaints that raise matters of significant public interest, including but not limited to complaints of systemic discrimination, and to considering whether or not agreements to resolve complaints made under the consolidated legislation at any stage in the process prior to hearing ought be subject to approval by the statutory authority.[109]

Complaints processes under the Tasmanian Act

Complaints provisions under the Tasmanian Act have been designed to provide accessible, flexible and affordable dispute resolution procedures for parties. A conciliation model is adopted as the first stage of dispute resolution in the hope that recourse to the Tribunal can be avoided.

[109] See, for example, *Canadian Human Rights Act*, RSC 1985, c H-6, s 48.

The provisions of the Tasmanian Act provide that where a person believes that they have been discriminated against they make a complaint to the Commissioner. The Commissioner is to conduct a preliminary assessment of the complaint and decide whether the alleged conduct, if proven, could amount to discrimination or other prohibited conduct under the Act.[110] If there has been a possible breach, the complaint is accepted for investigation. If the complaint is rejected, the complainant is advised in writing, with reasons for the decision and no further action is taken by the OADC. The complainant may seek a review of the decision to reject the complaint through the Anti-Discrimination Tribunal.[111] If a complaint is accepted, it moves into the investigation stage and the parties are notified.[112] The Commissioner has six months to conduct the investigation[113] and then must make a determination on whether the complaint should be dismissed, referred to conciliation by the OADC or referred to the Anti-Discrimination Tribunal for inquiry.[114]

If the complaint is dismissed at this stage the complainant may seek a review of the decision by the Tribunal.[115] There is no prescribed procedure or method for conducting a review of the decision.

The Act provides that a complaint may be investigated 'in a manner that is appropriate in the circumstances', noting that regard is to be had 'to the desirability of maintaining the confidentiality' of all those involved.[116]

The Act provides that the Commissioner and/or the Tribunal 'may require any person to provide specified information or produce specified documents'.[117] A failure to produce under a section 97 order results in the Commissioner making a report to the Tribunal and a penalty may be imposed. Section 97 orders are used by the Commissioner in a small number of complaints.

In 2011, the OADC moved to increase the use of early resolution approaches in the investigation phase. An attempt is now made with almost all complaints received to bring the parties together early in the investigation stage with a view to early resolution. This process is voluntary and the meeting does not take place until after the complainant(s) have received the initial response from the respondents (via the OADC). As of 31 December 2011, all of the complaints

110 *Anti-Discrimination Act 1998* (Tas) s 64.

111 *Anti-Discrimination Act 1998* (Tas) s 65.

112 *Anti-Discrimination Act 1998* (Tas) ss 64(3) and 67.

113 *Anti-Discrimination Act 1998* (Tas) s 78(2).

114 *Anti-Discrimination Act 1998* (Tas) s 71(1).

115 *Anti-Discrimination Act 1998* (Tas) s 71(3).

116 *Anti-Discrimination Act 1998* (Tas) s 69.

117 *Anti-Discrimination Act 1998* (Tas) s 97.

received in the 2011–12 financial year that have been subject to an early resolution process have resolved.

Currently consideration is being given to a different model of investigation for those cases in which early resolution is not achieved. As with other Australian anti-discrimination jurisdictions, the OADC has traditionally conducted investigation through it facilitating an exchange of correspondence and documents and, in limited circumstances, seeking responses to particular questions. In the past, notification to the respondent(s) of acceptance of a complaint included provision of the complaint, where the complainant consented[118], or a summary, where consent was not given for the complaint to be provided, identification of the alleged breaches of the Act and a request that the respondent provide a response.

As part of the reforms to the process currently being implemented, the OADC notification to both the complainant and respondent includes an outline of those aspects of the complaint that give rise to a potential breach and what the potential breach is. The respondent is asked to respond in particular to these aspects of the complaint. Where the respondent is an organisation, it is also asked to provide information on it compliance with its obligations under section 104 (see above at '19. Vicarious liability').

Many parties expect the investigation of complaints to be more active than that conducted traditionally by the OADC. Consideration is currently being given to implementing a more rigorous investigation process for those complaints that are not resolved through early resolution. This might, for example, include site visits, witness interviews, requests for and detailed review of specified documentary evidence. Such investigation could, in the Commissioner's view, form a stronger basis for the decision at the completion of investigation, as well as provide the parties with a much clearer understanding of all of the circumstances relevant to the complaint prior to formal conciliation or referral to inquiry. It would also assist the Tribunal in its inquiry by providing more relevant material.

More active investigation is a feature of the Canadian Human Rights Commission's processes, of the investigation functions under the *Equality Act 2006* (UK)[119] and of a range of statutory authorities in Australia, such as Ombudsman.

As with investigation, the Tasmanian Act is not prescriptive about the way in which the conciliation process should proceed.

As with other legislation in Australia, the Tasmanian Act provides that the Commissioner may direct attendance of any person at conciliation and a failure to comply with such a direction can result in the imposition of a penalty. Unlike

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118 *Anti-Discrimination Act 1998* (Tas) s 67(c).

119 *Equality Act 2006* (UK) Sch 2.

other jurisdictions, it has been the practice of the Commissioner to direct attendance at all conciliations conducted after the completion of investigation.

A conciliation agreement achieved through a conciliation process of the Commissioner or a delegate is enforceable as if it were an order made by the Anti-Discrimination Tribunal.[120]

Other forms of alternative dispute resolution such as arbitration (where parties agreed to abide by the decision of an arbitrator using a more structured/formal process and legal argument to the arbitrator) and formal mediation procedures (involving the engagement of a dispute resolution mediator to identify issues, develop options, consider alternatives and endeavour to reach agreement) are not options currently open to the OADC for the resolution of disputes.

However, where a complaint has been referred to the Tribunal, the Tribunal may explore the option of further conciliation. The Tribunal's approach to conciliation is governed by the *Alternative Dispute Resolution Act 2001* (Tas) and proposed amendments to the Act will provide that agreements reached through facilitated conciliation are enforceable as if they were orders of the Tribunal.

Proposed amendments in Tasmania

As the Act currently stands where a conciliation process has concluded but has not resolved the complaint, the complaint must be referred to the Tribunal for Inquiry. Amendments to the Tasmanian Act that it is hoped will be introduced in 2012 will enable more flexibility to secure a conciliated outcome by allowing for subsequent investigation and further conciliation if the Commissioner believes this may assist in resolving the dispute.

Other amendments to the Act anticipated in 2012 focus on promoting procedural fairness and the efficient and effective resolution of complaints, these include:

- matters investigated by the Commissioner on his/her own motion to be treated as complaints that may, after investigation, be referred to the Tribunal for determination;
- respondents to have the right to have a full copy of the complaint as well as a summary; and
- the Commissioner to be empowered to direct the parties to early conciliation before or during the investigation of a complaint.

The OADC supports inclusion in the consolidated Bill of flexible dispute resolution provisions that encourage resolution of complaints prior to proceeding to federal courts.

Consideration should also be given to increasing the efficiency of complaints processes, particularly through group actions that have the potential to result in

120 *Anti-Discrimination Act 1998* (Tas) ss 76(4) and 90.

the removal of discriminatory practices for a group or class of people.[121] These arrangements should include changes that enable representative organisations to not only lodge complaints and have them dealt with in accordance with the procedures available to individual complainants at the AHRC, but also to be the complainant ('aggrieved person') for the purpose of proceedings in the federal courts.

The OADC is currently undertaking research into standing provisions with a view to enhancing the capacities of organisations with an appropriate interest to have standing to make complaints on behalf of aggrieved persons.

26. Options to improve the court stage of the complaints process

Q26: Are any improvements needed to the court process for anti-discrimination complaints?

Review of decisions in anti-discrimination cases in Australia readily demonstrates that complainants are at a significant disadvantage in pursuing their claims to a binding decision. While a significant number of complaints do not proceed to hearing, the challenge facing complainants is a matter that needs to be addressed, particularly where the complaint raises public interest and/or systemic discrimination issues.

Representative actions: organisations

A number of stakeholders have argued that representative groups should have standing to pursue complaints in the federal courts on behalf of complainants.

The current complaints provisions under the *Australian Human Rights Commission Act 1986* (Cth) enable a complaint to be lodged 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination'. [122] This provision reflects the now repealed provisions of the DDA that permitted such a complaint.[123]

*Pre-*Brandy *provisions for representative proceedings*

The repealed provisions of the DDA was importantly included in the DDA in recognition that there will often be situations where an individual with disability or group of people with disability are unable to make a complaint on their own behalf and empowered organisations to act in their interests.

If this provision had not existed under the DDA, the important case of *Scott v Telstra; Disabled Persons International v Telstra*[124] would not have been able to

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121 Human Rights Law Centre, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality* (2011) 29–31.

122 *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

123 *Disability Discrimination Act 1992* (Cth) then s 69(1)(c).

124 [1995] HREOC H95/34, H95/51 (19 July 1995).

proceed as challenges to the discriminatory practice of Telstra in respect of the failure to provide teletypewriters (TTYs) to people who are deaf. Instead, Mr Scott would have been alone in his litigation and Telstra could, arguably, have resolved the complaint by providing a single TTY to Mr Scott and the systemic practice would have remained unchallenged.

Effect of the Brandy *changes*

Changes to the legislative framework federally following the decision in *Brandy v Human Rights and Equal Opportunity Commission* [125], resulted in the complaint provisions being removed from each of the federal anti-discrimination laws and incorporated into the (now) *Australian Human Rights Commission Act 1986* (Cth).

Under those provisions, there is no mechanism for 'a person' who has made a complaint under section 46P(2)(c) to lodge proceedings in the federal courts on termination of the complaint. The standing to commence proceedings in the federal courts is set out in section 46PO:

> **46PO Application to court if complaint is terminated**
>
> (1) If:
> (a) a complaint has been terminated by the President under section 46PE or 46PH; and
> (b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;
> **any person who was an affected person in relation to the complaint** may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint. [**emphasis added**]

An 'affected person' is defined in the Act and, 'in relation to a complaint, means a person on whose behalf the complaint was lodged'.[126] This means that a person (or organisation) that lodges a complaint under section 46P(2)(c) cannot make an application to the Federal Court or Federal Magistrates Court under section 46PO.

Sections 46PB and 46PC provide for additional rules in respect of 'representative complaints'. The term 'representative complaint' is defined as 'a complaint lodged on behalf of at least one person who is not a complainant'. As such, complaints made under sections 46P(2)(a)(ii), 46P(b)(ii) and 46P(c) are all representative complaints. The Note following section 46PO states that 'Part IVA of the *Federal Court of Australia Act 1976* allows representative proceedings to be commenced in the Federal Court in certain circumstances'. Section 33C of the *Federal Court of Australia Act 1976* (Cth) provides that 'one or more of those persons' who have

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125 (1995) 183 CLR 245, (1995) 69 ALJR 191, [1995] HCA 10.

126 *Australian Human Rights Commission Act 1986* (Cth) s 3.

claims against the same person may commence proceedings. The next section, section 33D, deals with standing and indicates that:

> A person referred to in paragraph 33C(1)(a) who has sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceedings against that other person on behalf of other persons referred to in that paragraph.[127]

These provisions preclude 'a person' from commencing representative proceedings in the Federal Court unless they are a person with sufficient interest to commence proceedings on their own behalf.

There are no provisions for representative proceedings in the *Federal Magistrates Court Act 1999* (Cth).

There is a case under the post-Brandy arrangements that demonstrates the effect of these changes to the federal jurisdiction and the lack of effective provisions to enable a person or organisation to commence proceedings in the Federal Court based on a complaint that they had lodged under the *Australian Human Rights Commission Act 1986* (Cth) where they are not an affected person. *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*[128] was dismissed by the Federal Court on the basis that the complainant, Access for All Alliance (Hervey Bay) Inc, did not have standing to commence discrimination proceedings in relation to a matter affecting its members. The complaint was made as a representative complaint under section 46P(2)(c) of the *Australian Human Rights Commission Act 1986* (Cth), however, the proceedings in the Federal Court could not continue as representative proceedings because the complainant was not a member of the affected class.

This decision effectively brought to an end the prospect of organisations bringing complaints on behalf of affected members or affected people with whom the organisation works. It contrasts starkly with the standing available to Disabled Persons International in the earlier case against Telstra.

Enabling organisations to bring representative proceedings

It is of significant importance that amendments be made to ensure that the provision for an individual or organisation to bring a complaint under section 46P(2)(c) also enables them to pursue that complaint into the Federal Court with standing. The continuing failure to address this gap in the transition to the Federal Court stands as a significant barrier to systemic discrimination being challenged judicially, particularly where the capacity of those affected by the discrimination is in any way limited financially or intellectually.

Such amendments would assist in cases of systemic barriers to equality, particularly those that are more difficult to challenge effectively through an

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127 *Federal Court of Australia Act 1976* (Cth) s 33D(1).

128 [2007] FCA 615.

individual complaint.[129] While some types of systemic discrimination can be effectively challenged through an individual complaint (although it places a significant burden on the individual) there are a number of circumstances where an individual complaint cannot effectively challenge the systemic nature of the discrimination because the broader effect of the discrimination is beyond the dispute between the parties.

To illustrate this point, the OADC points to two significant disability discrimination cases: *Scott v Telstra; Disabled Persons International v Telstra*[130] (the *Scott* case) and *Cocks v State of Queensland*[131] (the *Cocks* case). The *Scott* case required a representative proceeding to achieve an outcome for individuals beyond Mr Scott who were affected by the discriminatory conduct of Telstra. The *Cocks* case did not.

Mr Scott in his claim against Telstra sought a remedy that removed the discrimination affecting him. That remedy was the provision of a TTY (and potentially compensation to redress the wrong done to him). In order for the remedy to respond to the needs of the whole population of people in Australian who are deaf, it was necessary for a claim to be brought on their behalf (or for the court or tribunal to be required to consider remedies to others affected by systemic discrimination).

In contrast, Mr Cocks in his claim against the State of Queensland sought a remedy that removed the discrimination affecting him, being the failure to provide non-discriminatory access to the newly constructed Brisbane Convention Centre. In achieving a remedy for his claim, Mr Cocks achieved a remedy for all people similarly affected by the lack of access. The State of Queensland could not effectively have responded to Mr Cocks's complaint by creating an access mechanism that only Mr Cocks was permitted to use.

The problem of interest

Some will argue against provisions granting standing to organisations to bring representative complaints on the basis that this will enable 'busy body' litigation. The Hon Michael Kirby writing on barriers to public interest litigation identifies the current approach to standing requirements as one such barrier. His Honour says of the requirement:

> If it had a rational purpose, this was usually justified as that of protecting the court from strangers who would otherwise seek to meddle officiously in the business of third parties or the public interest where the stranger had no relevant special or personal interest, over and above that of other members of

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129 See, for example, Cambridge Pro Bono Project, *Equality for all: Submission on Australia's proposed reform of anti-discrimination legislation* (2011), and Human Rights Law Centre, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality*, (2011) 30.

130 [1995] HREOC H95/34, H95/51 (19 July 1995).

131 [1994] QADT 3 (2 September 1994).

the public.[132]

There are, in the OADC's view, very few people or organisations that have the time or resources to 'seek to meddle officiously' and many people who do have a direct interest in anti-discrimination proceedings do not have the capacity to pursue litigation. This argument is an argument of those who seek to have the mechanisms of law and justice the domain of a privileged few. It is an argument that fails to give due regard to the nature of human rights and the right to equality, rights that affect every human being, rights the breach of which have the capacity to affect every human being.

In order to respond to the argument, however, and still pursue an effective representative complaint mechanism, the OADC supports specific provisions setting out the circumstances in which an organisation will have standing. These could include, for example, that it is an organisation:[133]

- based in Australia;
- that has an object or objects relevant to the protection of the rights or interests of those people whose rights have allegedly been breached; and
- that has undertaken work with and/or in respect of those people whose rights have allegedly been breached in the last two years.

Consideration should be given to similar criteria for an individual bringing a complaint on behalf of others.

The Tasmanian Act

The Tasmanian Act recognises that it is not appropriate to restrict the class of persons who may complain under the Act to those who are personally affected or aggrieved by the conduct. Accordingly a person who is a member of a class of persons against whom alleged discrimination or prohibited conduct was directed, may make a complaint on behalf of a class if the Commissioner is satisfied that a majority of those members are likely to consent.[134] It does not, however, provide an effective mechanism for an organisation to complain on behalf of affected members or on behalf of affected services users or stakeholders. In respect of the Tribunal, the Act provides that it may deal with a complaint as a representative complaint if satisfied that the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed.[135]

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132 Michael Kirby, 'Deconstructing Laws Hostility to Public Interest Litigation' (2011) *Law Quarterly Review* 4.

133 This is based on the provision for extended standing for judicial review under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 487.

134 *Anti-Discrimination Act 1998* (Tas) s 60.

135 *Anti-Discrimination Act 1998* (Tas) s 82.

Collective redress mechanisms at the Federal (and Tasmanian) level will assist in reorienting anti-discrimination legislation away from complaints procedures that focus on individual claims.

The OADC supports provisions being made available under the consolidated legislation to increase the capacity of organisations to pursue representative actions.

Recommendation 25

The OADC recommends that the consolidated legislation include provision for complaints to be made by a person or organisation on behalf of a person or persons affected by an alleged breach or breaches of the legislation and that amendments be made to the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Court Act 1999* (Cth) to give a person or organisation that has made such a complaint standing to commence proceedings under the consolidated legislation in those courts. The consolidated legislation should include criteria for determining where a person or organisation should be granted standing to make such a complaint with the criteria not being overly onerous.

Standing for the AHRC

There are various ways in which the AHRC could have standing that would be beneficial to the achievement of the objects of federal anti-discrimination laws. These include:

- as a complainant in matters of discrimination or prohibited conduct commenced by own-motion investigation;
- as a prosecutor of breaches of Standards;
- as a friend or assistant to the judicial tribunal; and
- as a legal representative of, or provider of legal representation, to an aggrieved person.

As a complainant

Under the Tasmanian Act, the Commissioner may, under his/her own motion, investigate discrimination or prohibited conduct with the lodgement of a complaint.[136] However, it is not clear that the Commissioner can refer that matter to the Tribunal. This was the subject of consideration in the 2009 review of the legislation and a recommendation of that review is to:

> Amend the Act to provide that matters investigated by the Commissioner on his/her own motion be treated as complaints that may, after investigation, be referred to the Tribunal for determination.[137]

As a prosecutor

The development of Disability Standards under the DDA provides an important compliance approach to federal anti-discrimination law. The effectiveness of

136 Anti-Discrimination Act 1998 (Tas) s60(2).

137 Tasmanian Government, Department of Justice, *Review of the Complaints Handling and Dispute Resolution Provisions of the* Anti-Discrimination Act 1998*: Final Report (Recommended Position Paper)* (2009) 5 and 10.

those Disability Standards as a compliance mechanism is, however, hampered by the continuing reliance on individual complainants to pursue failures to comply. Where, as was the case in the Access for All Alliance (Hervey Bay) (the Alliance) case referred to above, a number of failures to comply with a Disability Standard are identified and such failures affect a diverse range of people with disability, an individual complainant is unlikely to have standing to challenge all of those failures.

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*[138], the complainant organisation considered the bus stop infrastructure implemented by the respondent council since the commencement of the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Transport Standards). There were approximately 20 bus stops that were either new or had been significantly modified since the Transport Standards commenced. The Alliance alleged that, in respect of each of those bus stops, the respondent council had failed to comply with a number of requirements of the Transport Standards. These included requirements that affected, for example, people with mobility impairments and people with vision impairments. Because of the multiple failures to comply by the respondent council, a single person with disability would not be able to lodge a claim that encompassed the scope of non-compliance identified.

In other areas of law, failures to comply with a statute or legislated standard can be challenged by a relevant statutory authority. For example, breaches of occupational health and safety obligations, of consumer law protections and of corporations law are prosecuted by the state.

The OADC strongly supports the AHRC having a prosecutorial function in respect of, at minimum, breaches of standards made under the consolidated legislation and under the DDA.

As a friend or assistant

Under the current federal arrangements, the special-purpose Commissioners of the AHRC have standing as *amicus curiae* in the Federal Court or Federal Magistrates Court in specified circumstances and only with leave of the court.[139]

By way of contrast, the Canadian Human Rights Commission is potentially a party in all proceedings. The Canadian Human Rights Tribunal is to notify the following of an inquiry:

> … the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party …[140]

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138 [2007] FCA 615.

139 *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

140 *Canadian Human Rights Act*, RSC 1985, c H-6, s 50(1).

Having given notice, the Tribunal member or panel conducts an inquiry into the complaint and is required to:

> ... give all parties to whom notice has been given a full [which includes the Commission] and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.[141]

The Commission's legal section represents the Commission is those inquiries and is able to provide the Tribunal with consistent legal analysis. This is of particular benefit where a party or parties are unrepresented. There were, for example, 17 cases determined in 2011 by the Canadian Tribunal and the Commission was a party in every one of those cases.

The OADC considers that this model is an effective mechanism for overcoming the difficulties faced by unrepresented parties and judicial officers dealing with cases involving unrepresented parties, without the need to significantly increase the funding available to legal aid to fund legal representation. It has the added benefit of the judicial officer or tribunal being consistently presented with clear and coherent submissions on the application and interpretation of the relevant law. This, in turn, could result in development of a more comprehensive and coherent jurisprudence in respect of federal anti-discrimination.

As a legal representative or provider or representation

The UK Equality Commission, under the *Equality Act 2006*, can assist a person who alleges they are a victim of a breach of the legislation.[142] Such assistance includes providing or arranging for the provision of:

> (a) legal advice;
> (b) legal representation;
> (c) facilities for the settlement of a dispute;
> (d) any other form of assistance.[143]

Similarly, under the *Equal Opportunity Act 1984* (SA):

> … the Commissioner may, at the request of the complainant or respondent, provide representation to the complainant or respondent in proceedings before the Tribunal.[144]

While this is a model that could usefully be considered, it is the OADC's view that it is likely to be highly contentious, with the potential to give rise to a reasonable apprehension of bias.

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141 *Canadian Human Rights Act*, RSC 1985, c H-6, s 50(1).

142 *Equality Act 2006* (UK) c 3, s 28(1).

143 *Equality Act 2006* (UK) c 3, s 28(4).

144 *Equal Opportunity Act 1984* (SA) s 95C.

Consideration should also be given to providing the AHRC powers to initiate representative complaints.[145]

Recommendation 26

The OADC recommends that the consolidated legislation include provision for the special-purpose Commissioner or the AHRC to (a) have standing in respect of all anti-discrimination complaints that proceed to hearing as a party providing assistance similar the role of the Canadian Human Rights Commission under the *Canadian Human Rights Act 1985*; and (b) have standing to prosecute failures to comply with standards made under the consolidated legislation and previous federal anti-discrimination legislation. The OADC also recommends that the AHRC be resourced to take on these roles effectively.

Recommendation 27

That consideration be given to including provisions that would enable the special-purpose Commissioners or the AHRC to have standing as a complainant in matters where the Commission has conducted an investigation into systemic discrimination or prohibited conduct and formed the view that a strong *prima facie* case exists and there is no complainant identified.

Litigation costs

The *Declaration of the Principles of Equality 2008* encourages effective access to judicial and/or administrative processes:[146]

> Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.

Nevertheless, complainants are often deterred from seeking access to the federal courts because of the potential costs of litigation and the risk of costs being awarded against them if they lose.[147] Both of these are arguably 'undue obstacles … to the effective enforcement of the right to equality'.

Complainants rely in the main on self-representation, community legal services, legal aid (in those jurisdictions where legal aid is genuinely available for discrimination matters), conditional fee arrangements (no-win no-fee) with private lawyers, or *pro bono* legal representation from private lawyers. They are litigating against respondents who often have access to far greater financial and legal resources and much greater capacity to deal with the risk of an adverse costs order.

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145 Cambridge Pro Bono Project, *Equality for all: Submission on Australia's proposed reform of anti-discrimination legislation* (2011) 57.

146 Equal Rights Trust, *Declaration of Principles on Equality* (2008) Principle 18.

147 Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: an evaluation of the new regime* (Themis Press, 2010) xvii–xviii; Disability Law Experts Group, *Consolidation of Commonwealth Anti-Discrimination Laws: Submission* (2011) 27.

Discrimination law is highly specialised and it is important that complainants have access to appropriately skilled legal resources. Guaranteeing such access would improve the quality of the anti-discrimination jurisprudence developing in Australia as the judicial decision makers would be dealing with much more comprehensive and comprehensible factual evidence and legal arguments.

Reliance on *pro bono* assistance presumes a level of expertise and capacity that may not always be available and the low level of costs historically awarded in anti-discrimination cases makes them less attractive to those seeking a conditional-fee arrangement.

The OADC notes the existence of the Commonwealth Public Interest and Test Cases Scheme that provides grants of 'financial assistance for legal and related costs in cases involving questions of public importance about Commonwealth law'.[148] It also notes that this Scheme is not referred to in the Discussion Paper and, indeed, is largely unknown to litigants or those legal representatives likely to be assisting litigants in public interest matters. It also notes that from 1 July 2012, this and the other 25 financial assistance schemes will be consolidated into a single scheme.[149]

In the 10 years to June 2009, there had been 194 applications finalised, of which 75 received funding. Of these 24 were family law matters, nine were discrimination/human rights matters, eight were administrative law matters, with the remaining matters spread across a range of federal law matters. In total the scheme had paid out $2,186,400, averaging $29,152 per grant with the highest grant being $252,598 and the lowest $536.[150]

While a scheme of this sort might be an important supplement to legal aid and other forms of legal assistance, it can only be effective if it is widely publicised, makes timely decisions and reports to a public scrutiny body on its decisions.

Gaze and Hunter suggest a number of strategies to address the disparities facing complainants in the court system, including free or low-cost legal representation delivered through legal aid; increased support to community legal services; and/or resourcing of the AHRC and similar bodies to provide legal assistance to run litigation (not merely act as *amicus* or intervener) in selected cases with the potential to enhance human rights enforcement.[151] The OADC sees merit in

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148 Australian Government, Attorney-General's Department, 'Schemes Administered by the Attorney-General's Department (2011) <http://www.ag.gov.au/Legalaid/Pages/SchemesadministeredbytheAttorneyGeneralsDepartment.aspx> at 28 January 2012.

149 Australian Government, Attorney-General's Department, 'Financial Assistance' (2011) <http://www.ag.gov.au/Legalaid/Pages/FinancialAssistance.aspx> at 28 January 2012.

150 Commonwealth, *Parliamentary Debates*, Senate, 13 August 2009, 4962 (Penny Wong).

151 Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699 at 723–24.

examining these approaches as a means of improving access to legal representation.

One factor that can make the provision of legal aid and/or community legal centre assistance difficult is the artificial distinction drawn between federal law and state law matters. When advising a complainant with a potential discrimination claim, a lawyer is under a professional duty to canvas both the federal and state/territory anti-discrimination options as well as related causes of action under industrial law. The decision of the complainant to proceed with one or other cause of action should not be determined by whether or not the legal assistance provider will be able to assist them because it is a federal or state matter. Complainants ought properly be able to make the decision based on matters intrinsic to their claim, such as jurisdiction and remedies available, rather than extrinsic factors such as availability of legal assistance.

Recommendation 28

The OADC recommends that the Federal Government undertake as a matter of urgency research into, and development and implementation of, effective strategies to provide greater support to litigants in anti-discrimination matters including, for example, provision of legal aid across all areas of discrimination and prohibited conduct, and increased targeted support to community legal centres to assist and provide representation in anti-discrimination matters irrespective of whether they are conducted under federal or state/territory anti-discrimination legislation.

Adverse costs orders

There are mixed views on whether or not the transfer of federal anti-discrimination matters into a 'costs' jurisdiction has been beneficial or otherwise to the legitimate pursuit of anti-discrimination complaints. The Anti-Discrimination Commissioner is of the view, based on experience in the federal jurisdiction, that the costs risks associated with a costs jurisdiction have affected the willingness of complainants to pursue their rights under federal anti-discrimination law through the courts.

The Law Council and other bodies favour the inclusion of provisions that presume that each party will be responsible for their own costs.[152] This will assist in addressing concerns that potential complainants may have in pursuing actions. The OADC notes that this was the preferred view of the Productivity Commission in its review of the *Disability Discrimination Act 1992* and is supportive of this approach.[153]

In the event that the costs jurisdiction is retained, consideration should be given to what modifications might be made to reduce the risk on financially disadvantaged litigants, particularly complainants.

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152 Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws*, (2011) 5. This approach is also supported by the Victorian Women Lawyers, *Submission regarding a consolidated federal anti-discrimination law* (2011) 9.

153 Productivity Commission, *Review of the* Disability Discrimination Act 1992 (2004) 396 (Recommendation 13.4).

One mechanism is costs capping. Another is the availability of costs indemnity, which is considered further below.

Costs capping

In 2008, the Federal Court for the first time made an order to cap costs in a human rights matter: *Corcoran v Virgin Blue Airlines Pty Ltd.*[154] The power to impose a cap on the costs to be awarded against an unsuccessful party is founded on the *Federal Court Rules* (Cth) O 62A r 1. While this decision was a significant step forward for litigants in anti-discrimination matters in the federal jurisdiction, at least one of the criteria articulated by Bennett J in her decision is a cause for concern. Her Honour identified that the following factors are relevant to the court's consideration, but not determinative, of a costs-capping application:[155]

- the timing of the application;
- the complexity of the factual or legal issues raised in the proceedings;
- the amount of damages that the applicant seeks to recover and the extent of any other remedies sought;
- whether the applicant's claims are arguable and not frivolous or vexatious;
- the undesirability of forcing the applicant to abandon the proceedings;
- whether there is a public interest element to the case;
- the costs likely to be incurred by the parties in the preparation for, and hearing of, the matter;
- whether the party opposing the making of the order has been unco-operative and/or has delayed the proceedings.

Of these, the third—being the amount of damages and other remedies sought—has been interpreted to mitigate against applications where the complainant is seeking damages. This has resulted in individuals who pursue public interest not pursuing any claim for damages in order to strengthen their argument for a costs cap to be imposed.[156]

Recommendation 29

The OADC recommends that the consolidated legislation provide for a presumptive non-costs jurisdiction with the power vested in the tribunal to order costs against a party in limited circumstances. In the event that the current costs jurisdiction is retained, the OADC recommends that further consideration be given to providing greater guidance to the tribunals on the circumstances in which costs should not be ordered or should be capped.

Adverse costs and costs indemnity

A mechanism that is available to protect against adverse costs orders for litigants in NSW is the provision of an indemnity against costs by Legal Aid NSW under section 47 of the *Legal Aid Commission Act 1979* (NSW). This both

154 [2008] FCA 864.

155 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

156 See, for example, *Haraksin v Murrays Australia Ltd* [2010] FCA 1133.

limits the costs that can be ordered by a NSW court against an unsuccessful party who is in receipt of a grant of legal aid, and indemnifies that party. It has a more limited effect in federal law cases as a result of the decision in *Woodlands v Permanent Trustee Company Limited*.[157] That case determined that the limit on costs that could be ordered did not apply. However, the indemnity still applies for $15,000 of any costs ordered.

Recommendation 30

The OADC recommends that, if the costs jurisdiction is to be retained for federal anti-discrimination law cases, consideration be given to creating a mechanism for costs indemnity for any party receiving a grant of legal aid. Consideration should include how to remove the effect on the NSW Legal Aid grant indemnity of the decision in *Woodlands v Permanent Trustee Company Limited* (1996) 68 FCR 213.

Remedies

The establishment of anti-discrimination laws, with prohibitions against both direct and indirect discrimination, recognise that there are past and often continuing attitudes towards people with particular characteristics based on bias and stereotypes. A continuing underlying purpose of such laws is to challenge those biases, stereotypes and attitudes across the society and to ensure that people have equality of opportunity irrespective of the fact that they belong to a group that share a particular characteristic.

Often the attitudes have become deeply embedded in organisational and cultural practices to such an extent that they have become virtually invisible, other than to those directly disadvantaged by them. Those who establish rules and systems and manage organisations are rarely members of those groups that have historically experienced disadvantage, they are rarely 'other'.

Remedies in anti-discrimination laws are an important aspect of challenging those attitudes and unpicking the practices that rest on them. However, the focus in Australian anti-discrimination legislation on individuals challenging actions and seeking remedies and the barriers to effective representative actions tends to mitigate against the effective use of such remedies to bring about systemic change.

Australia has an obligation under a number of treaties to provide effective remedies where human rights are breached, including where there has been a breach of the right to equality or non-discrimination. For example, Article 2(3) of the *International Covenant on Civil and Political Rights* states:[158]

> Each State Party to the present Covenant undertake: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have

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157 (1996) 68 FCR 213.

158 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976, ratified by Australia 13 August 1980, entered into force for Australia 13 November 1980) ('*International Covenant on Civil and Political Rights*').

> an effective remedy …

The *Declaration of Principles on Equality 2008* states that sanctions for the breach of a right must be effective enough to dissuade any future breaches of rights and include action to address underlying practices or policies which have contributed to discriminatory practices:[159]

> Sanctions for the breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of a right to equality.

It is useful to consider what might be encompassed in the concepts of 'effective', 'proportionate' and 'dissuasive'. Cormack considers the European Court of Justice case law and states:

> To be *effective*, remedies and sanctions must achieve the desired outcome; to be *proportionate*, they must adequately reflect the gravity, nature and extent of the loss and/or harm; and to be *dissuasive*, sanctions must deter future acts of discrimination… sanctions will be none of these if there are not effective, simple, swift and sustained mechanisms for enforcement.[160]

In considering remedies, it is useful to consider perspectives from which remedies or sanctions could or should be assessed. Cormack, in considering this issue in the context of employment discrimination in the European Community, identifies the following perspectives:[161]

- complainant (victim): what harm has been caused to the victim's physical and mental health, career prospects, reputation, income, pension rights etc.
- others affected by discriminatory act: certain practices could disadvantage a number of people, not all of whom will have come forward to complain
- potential future victims: discriminatory practices exposed in one case, if not curtailed, will affect others in comparable situation in the future
- corporate discriminator: the company, establishment, trade union, qualifying body responsible for the act of discrimination. (In Great Britain the anti-discrimination legislation states the vicarious liability of employers for the discriminatory acts of their employees in the course of their employment)
- individual discriminator/harasser: the employee who committed the act of

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159 Equal Rights Trust, *Declaration of Principles of Equality* (2008) Principle 22.

160 Janet Cormack (ed), *Discrimination in working life: remedies and enforcement* (2004) [18–19] Migration Policy Group <http://www.migpolgroup.org/publications_detail.php?id=203> at 30 October 2011.

161 Janet Cormack (ed), *Discrimination in working life: remedies and enforcement* (2004) [18] Migration Policy Group <http://www.migpolgroup.org/publications_detail.php?id=203> at 30 October 2011.

discrimination or harassment
- other employers/qualifying bodies/associations etc: other organisations carrying out similar work or within the same sector – will they be dissuaded from discriminating by sanctions imposed on a parallel organisation?
- specialised body: central part of its mandate
- courts/tribunals: do they have the necessary powers? If so, do they exercise their powers to ensure effective, proportionate, dissuasive sanctions?
- trade unions: how do they use their role within the workplace, in supporting their members and in ensuring lessons are learned?
- general public: generally assumed that the public wants a society based on equal treatment; racism is divisive and harmful to society as a whole.
- public authorities: having committed themselves to equal treatment as provided by the directives, as well as to CERD, CEDAW, ICCPR, ILO Convention 111 and other international instruments, the governments of Member States and accession countries have a vested interest in eradicating discrimination. This should mean not wanting public money spent to support discriminatory practices in either the public or private sector.

The OADC submits that, considering all of these perspectives, remedies under anti-discrimination law in Australia have fallen well short of the international law requirement to be effective or, as articulated in the Equality Principles, 'effective, proportionate and dissuasive'.

Remedies available under the Tasmanian Act

Section 89 of the Tasmanian Act provides that if the Tribunal finds after an inquiry that a complaint is substantiated, it may make one or more of the following orders:

> (a) an order that the respondent must not repeat or continue the discrimination or prohibited conduct;
> (b) an order that the respondent must redress any loss, injury or humiliation suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
> (c) an order that the respondent must re-employ the complainant;
> (d) an order that the respondent must pay to the complainant, within a specified period, an amount the Tribunal thinks is appropriate as compensation for any loss or injury suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
> (e) an order that the respondent must pay a specified fine not exceeding 20 penalty units;
> (f) an order that a contract or agreement is to be varied or declared void in whole or in part;
> (g) an order that it is inappropriate for any further action to be taken in the matter; or
> (h) any other order it thinks appropriate.
>
> If the complaint is against a State Service Officer or State Service employee, the Tribunal may also order the Minister responsible for the Agency in which the officer is employed to exercise powers specified in section 10 of the *State Service Act 2000* (Tas).

Remedies awarded to date in Australia

Whilst under the Tasmanian Act by virtue of section 89(h), the Tribunal is not restricted in the nature of the orders it can make, it is arguable that the current approach to remedies both in Tasmania and other jurisdictions have been ineffective as a means of ensuring compliance with the laws or furthering the objective of eliminating discrimination and related conduct.

Levels of compensation awarded by courts and tribunals have been modest and the focus on compensation to the individual as the primary remedy has done little to encourage measures aimed at addressing underlying or systemic causes of discrimination in the broader community.[162]

Allen argues that in part this can be ascribed to a reactive approach to addressing barriers to equality and to the way complaints are dealt with on a case-by-case basis and largely through informal and private processes.[163]

She asserts that the presumption underlying the current approach to remedies is that actions that result in substantiated complaints are an aberration in an otherwise democratic and equal society and that little recognition is given to underlying or systemic causes of discrimination and very few orders are made that seek to address these causes.[164] In her view to tackle discrimination effectively, Australian anti-discrimination legislation needs to include provisions that require courts and tribunals to include orders requiring actions to address systemic discrimination. This should include the right of complainants to seek remedies that apply beyond the their individual circumstances to address other instances of the discrimination where it arises and broadening of court powers (if necessary) and tribunal powers to enable them to impose such other remedies is are appropriate in the circumstances.

It is arguably not enough, however, to simply empower courts and tribunals in this way. Rather, it may be necessary to require courts and tribunals to turn their attention to any systemic effect of the alleged discrimination and make orders to remove such systemic effect.

The *Australian Human Rights Commission Act 1986* (Cth) currently identifies a range of possible remedies including payment of damages, re-employment, and/or the undertaking of actions to provide redress to the victim.[165]

However the current provisions are neither broad enough nor provide effective approaches to dealing with systemic discrimination. The Senate Standing

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162 Dominique Allen, 'Remedying Discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *University of Tasmania Law Review* 83–110.

163 Dominique Allen, 'Remedying Discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *University of Tasmania Law Review* 83–110 at 103.

164 Dominique Allen, 'Remedying Discrimination: The limits of the law and the need for a systemic approach' (2010) 29(2) *University of Tasmania Law Review* 83–110.

165 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

Committee on Legal and Constitutional Affairs in its review of the *Sex Discrimination Act 1984* (Cth), recommended that amendments be introduced to the AHRC Act to include explicit provisions to enable corrective and preventative orders.[166]

Alternative or additional approaches

Broad-ranging remedies contained in South Africa's *Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa)*, highlight how a shift toward more corrective and preventative orders may be put into practice.[167]

The Guiding Principles of the South African Act, require the need recognise and take into account 'the need to take measures at all levels to eliminate such discrimination and inequalities'.[168] This approach is supported by the inclusion of objectives in the Act which require the promotion of equality and the facilitation of measures to eliminate unfair discrimination. Aside from orders requiring payment or apology to the complainant, orders made by South Africa's Equality Court can include making available specific opportunities and privileges unfairly denied to the complainant, a requirement to implement special measures to address unfair discrimination; a requirement to undertake reasonable accommodation of a group or class of persons by the respondent; suspension of licenses; follow up audits and reporting arrangements; and, in the case of persistent contravention of the law, the Court may refer the matter to another body for further investigation.[169]

The South African Act also requires that 'all persons, non-government organisations, community-based organisations and traditional institutions must promote equality in their relationship with other bodies and in their public activities', thereby endorsing a social commitment by all persons to promote equality.[170]. This includes a requirement for companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality.

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166 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Report on the effectiveness of the* Sex Discrimination Act 1984 *in eliminating discrimination and promoting gender equality* (2008) recommendation 23.

167 *Promotion of Equality and Prevention of Unfair Discrimination Act (*2000) (South Africa) s21(2).

168 *Promotion of Equality and Prevention of Unfair Discrimination Act (*2000) (South Africa) s4(2)(b).

169 *Promotion of Equality and Prevention of Unfair Discrimination Act (*2000) (South Africa) s21(2) and (4).

170 *Promotion of Equality and Prevention of Unfair Discrimination Act (*2000) (South Africa) s(27).

Hong Kong's Sex Discrimination Ordinance (SDO) provides another model.[171] Under the SDO in addition to providing redress to the complainant, the court is also to consider actions that will deter others who may be engaging in similar behaviour. Options include awarding aggravated compensatory damages and punitive or exemplary damages. Aggravated damages are over and above ordinary compensation payments and are made on the basis unusual hurt and injury and the harm or outrage it has caused the complainant.[172] Punitive or exemplary damages are:[173]

> … awarded if the court forms the opinion that the defendant's conduct in committing the wrong was so reprehensible as to require that he should not only compensate the plaintiff for what [the plaintiff] has suffered but should be punished for what he has done in order to discourage him and others from acting in the same fashion.

In addition, the Hong Kong District Court has the capacity to impose a range of remedies to victims of sexual harassment. This includes the ability to grant an injunction against the defendant requiring them to refrain from any acts that constitute sexual harassment and prevents any further contact with the victim. Breach of this order is a contempt of court for which the defendant can be imprisoned.[174]

Examples also exist in the United States of innovative remedies, including the capacity to award monetary compensation in the form of 'front pay' based on the estimate of future earnings foregone and retroactive seniority where discriminatory practices have resulted in workers being placed in less senior positions.[175] Capacity also exists to award damages for intangible harms such as 'loss of enjoyment of life'.[176]

One area of remedies that appears to provide particular challenges to courts and tribunals is the area of injury to feelings. A mechanism for improving the approach to such remedies is that found in UK. In 2003, the UK Court of Appeal in *Vento v Chief Constable of West Yorkshire Police*[177], set bands for this type of

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171 D K Srivastava and Scarlet Tsao, 'Remedies for Sexual Harassment' (2001) 10(1) *Asia Pacific Law Review* 141.

172 D K Srivastava and Scarlet Tsao, 'Remedies for Sexual Harassment' (2001) 10(1) *Asia Pacific Law Review* 146.

173 D K Srivastava and Scarlet Tsao, 'Remedies for Sexual Harassment' (2001) 10(1) *Asia Pacific Law Review* 147.

174 D K Srivastava and Scarlet Tsao, 'Remedies for Sexual Harassment' (2001) 10(1) *Asia Pacific Law Review* 151.

175 Margaret Thornton, 'Anti-Discrimination remedies' (1984) 9 *Adelaide Law Review* 240

176 Ibid.

177 *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. Considered again in 2009 in *Da'Bell v NSPCC* [2009] UKEAT 0227_09_2809and the upper end of each band was amended to £6,000 rather than £5,000, £18,000 rather than £15,000 and £30,000 rather than £25,000.

compensation, treating it as separate to psychiatric injury. The decision sets out three bands for injury to feelings: (a) the top band being normally between (at that time) £15,000 and £25,000 to be awarded in the most serious cases, such as where there has been a lengthy exposure to or 'campaign of discriminatory harassment'; (b) the middle band being normally between (then) £5,000 and £15,000 to be awarded in serious cases that 'do not merit an award in the highest band'; and (c) the lower band being normally between (then) £500 and £5,000 to be awarded for less serious cases, such isolated or one-off occurrences.

The OADC notes that there has been a more recent updating of the ranges for the three bands.

The OADC also notes that the approach taken to non-financial loss compensation in the area of defamation law is quite different in terms of both quantum and the proof required of harm. Further work could usefully be done to identify whether the approaches taken in other areas of law that involve non-financial harms could usefully guide the development of approaches to remedies in anti-discrimination law.

Recommendation 31

The OADC recommends that the consolidated legislation include provisions relating to remedies that expressly require consideration to be given to the systemic effect of any discrimination or prohibited conduct that has been found proven and require remedies in respect of any systemic effect.

Recommendation 32

The OADC recommends that in the consolidation process consideration be given to guidance on quantum of remedies for injury to feelings and that such guidance be developed having regard to compensating non-financial injury in comparative areas of law, such as defamation damages for injury to reputation.

Recommendation 33

The OADC recommends that the consolidated legislation include remedies provisions that provide decision makers with sufficient flexibility to order remedies that are broad-ranging, restorative and address structural or underlying causes of discrimination.

27. Options for reform of the roles and functions of the Australian Human Rights Commission

Q27: 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?

Consolidation of federal legislation provides an opportunity to modernise human rights law and introduce new proactive approaches and practices. Consistent with this focus, the powers of the Australian Human Rights Commission will require considerable strengthening, including the capacity to actively promoting and address matters related to systemic change.

The OADC considers there should be a package of new measures aimed at improving the level of compliance with human rights obligations at the national level.

The announcement by the current Government that a new National Human Rights Action Plan will be developed during the course of the current Parliament provides a platform on which to base a range of new actions. We consider that the package of measures should include:

- A robust National Human Rights Action Plan, that includes agreed timetables and targets against which progress can be measured. The Plan should be endorsed by First Ministers through the Council of Australian Governments and include appropriately resourced actions aimed at meeting Australia's international obligations within a defined timeframe.
- Regular reporting to Parliament on the implementation of Australia's human rights obligations, including progress in implementation of the National Human Rights Action Plan;
- A requirement that State and Territory Government's also contribute to the national report on matters within their jurisdictional responsibility in a similar manner to reports prepared by the Steering Committee for the Review of Government Service Provision, which under the auspices of the Productivity Commission is required to report on annually Government service delivery.
- A coordinated and well resourced national communication strategy aimed at improving awareness and compliance with human rights obligations.

These actions should be supplemented by a more rigorous compliance framework at the Commonwealth level, including the following:

- Mandatory reporting arrangements, similar to that under the *Equal Opportunity for Women in the Workplace Act 1999* for all organisations with over 100 employees.
- Measures to enable and encourage the development of compliance action plans across all attributes, including the capacity to have these certified by the AHRC, publicly registered and progress toward implementation monitored.
- Greater capacity for the AHRC to undertake formal inquiries into matters that impact on the implementation of human rights obligations.
- Enhanced review arrangements, including the powers to initiate an assessment of an organisation's programs and practices.
- The introduction of powers to enable the AHRC to initiate enforcement proceedings in the Federal Court or Federal Magistrates Court, in circumstances where there is no individual complainant or where claims involve systemic discrimination.
- Capacity to initiate 'own motion' investigations regarding alleged breaches of the Act, particularly where systemic issues may be raised.
- Provisions that enable and encourage a more substantial suite of possible remedies where breaches of the Act are substantiated, including the capacity to require actions that address systemic discrimination or require ongoing

actions to address unlawful discrimination within a workplace or organisation.
- Provisions that provide greater capacity for the AHRC to intervene in legal proceedings raising human rights issues.

The AHRC will have a key role in facilitating these actions and overseeing their implementation and should be supplied with the appropriate skills and resources to undertake these functions.

Provisions under the Tasmanian Act that enable the Commissioner to investigate matters relating to discrimination and prohibited conduct on her own motion provides an important avenue to investigate issues that are not subject to complaint.[178] This is particularly important where there is evidence of discrimination because of entrenched bias. Own-motion investigations enable the Commissioner to scrutinise systemic discriminatory practices. Proposed amendment to the Tasmanian Act in 2012 will provide that matters investigated by the Commissioner on his/her own motion be treated as complaints that may after investigation be referred to the Tribunal for determination.

In addition to providing the AHRC with capacity to initiate own motion investigations, provisions that increase the powers of the AHRC to intervene and/or assist in cases with potential to enhance the promotion and enforcement of human rights obligations should be included in the consolidated Bill, including:

- Arrangements to enable the AHRC to facilitate improved access to legal services in selected cases.
- The introduction of provisions that would enable the AHRC to exercise *amicus curiae* functions as a right and extends this function to any consequent appeals.
- Greater powers to enforce compliance with undertakings agreed as a result of investigation, including the capacity to apply to a court for an order requiring compliance.

178 *Anti-Discrimination Act 1998* (Tas) s 6.

Interaction with other laws and application to state and territory governments

28. Commonwealth laws

Q28: 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?

Exemptions for direct compliance with other Commonwealth laws

States and territories avoid inconsistencies between anti-discrimination laws and other laws within their own jurisdictions and with Commonwealth laws by exempting things necessarily done to comply with commonwealth and state legislation, subordinate legislation, or orders of a court or tribunal.[179] This approach is simple, but can disguise discrimination unless there is a rigorous policy assessment and advisory function and commensurate resources provided to respective human rights agencies to examine new and existing statutes or proposed amendments to existing legislation.

Section 24 of the Tasmanian Act provides that a person may discriminate against another person if it is 'reasonably necessary to comply with':

(a) any law of this State or the Commonwealth; or
(b) any order of a commission, court or tribunal.

Importantly, however, section 6(g) of the Tasmanian Act provides the Commissioner with the function of examining any legislation and reporting to the Minister, being the Attorney-General, 'as to whether it is discriminatory or not'. This provides an important safeguard against the introduction or retention of discriminatory provisions in Tasmanian legislation. However, the capacity to undertake this function is limited by the resources available to the OADC and inconsistent referral of proposed legislation to the OADC for review and report. There are also inherent limitations in reporting to a Minister rather than independently advising parliament on these matters.

The OADC welcomes recent legislation enacted at the Commonwealth level to take greater account of the human rights implications of new Bills and/or disallowable instruments.[180] The establishment a new Parliamentary Joint Committee on Human Rights and the requirement to include a Statement of Compatibility with Human Rights in the legislative package accompanying new Bills are measures that will promote improved assessment of new legislation.

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179 See, for example, *Anti-Discrimination Act 1998* (Tas) s 24.

180 The Hon Nicola Roxon MP, 'Human Rights check for new laws' (Media Release, 4 January 2012). *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This should ensure that any discriminatory provisions in new or amended Federal legislation are identified to the Parliament prior to the passage of the legislation.

A stronger mechanism is, however, needed to ensure a review of existing Commonwealth legislation to confirm that such legislation either doesn't contain provisions with necessary discriminatory effect or such effect is expressly authorised by the Parliament.

A possible approach would be, if constitutionally possible, to limit any exemption in the Consolidated Legislation for actions necessary to comply with a Commonwealth law to prescribed laws as is found in the DDA in respect of compliance with 'a prescribed law'.[181] This would mean that Ministers across all portfolios would need their agencies to review existing legislation to determine what, if any, legislation needs to retain discriminatory provisions or provisions with discriminatory effects to achieve the purpose of the legislation and seek to have that legislation prescribed through regulation. This would ensure a level of parliamentary scrutiny of the retention of any discriminatory legislation.

Attention needs, however, to be given to effect of those laws passed after the passage of the SDA, DDA and ADA and before the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and those with specifically discriminatory provisions whenever enacted, because of the effect of the interpretive rules:

- *generalia specialibus non derogant* ('the general does not detract from the specific': where there is a conflict between general and specific provisions, the specific provisions prevail, even where the specific provision came into effect earlier in time) as anti-discrimination provisions are necessarily general to encompass the breadth of areas of activity covered; and

- *leges posteriores priores contrarias abrogant* ('subseqent laws repeal those before enacted to the contrary': where two statutes conflict, the more recently enacted statute prevails).

Both rules and their interaction were considered in the context of anti-discrimination law in the case before the Human Rights and Equal Opportunity Commission of *Ward, Belford, Sinclair and Woodforth v Repatriation Commission*[182] and in the context of employment law in the High Court case of *Ferdinands v Commissioner for Public Employment*[183]

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181 *Disability Discrimination Act 1992* (Cth) s 47(2).

182 [1997] HREOCA 19 (22 April 1997).

183 [2006] HCA 5; (2006) 225 CLR 130; (2006) 224 ALR 238; (2006) 80 ALJR 555 (2 March 2006) per Gleeson CJ at [105]–[116]

Fair Work Act 2009 (Cth)

The interaction between the *Fair Work Act 2009* (Cth) and anti-discrimination laws provides a basis for the referral of discriminatory instruments to Fair Work Australia and enhanced protection against discrimination in employment.

However the provisions of Commonwealth anti-discrimination laws extend well beyond traditional employment relationships and the *Fair Work Act* does not allow claims for discrimination in employment to be brought in multiple jurisdictions.

Improvements to mechanisms that enable the AHRC to ensure compliance with anti-discrimination laws across a broader range of Commonwealth laws and instruments are supported. This should include providing the AHRC with the capacity to provide advice to Government on potentially discriminatory provisions in all new or amended statutes.

29. State and territory anti-discrimination laws

Q29: Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

Constitutional provisions give prevalence to Commonwealth law in situations where these are incompatible with a law of a state.

Provisions contained within Commonwealth anti-discrimination laws preserve the effect of state or territory anti-discrimination laws that are capable of operating concurrently and, in the case of the RDA and SDA, further the objects of the relevant international instrument.[184]

With the ratification by Australia of the *Convention on the Rights of Persons with Disability* (CRPD) on 17 July 2008, it would be beneficial to ensure that the consolidated legislation makes reference to concurrent jurisdiction of state and territory laws that further the objects of the CRPD.

Reaffirmation of the requirement of state and territory laws to be consistent with international law in the consolidated legislation will provide an additional measure of compliance with relevant international treaties. Provisions that promote the consistency of common purpose are supported.

30. Crown in the Right of the States

Q30: Should the consolidation Bill apply to state and territory governments and instrumentalities?

The OADC is supportive of the inclusion of provisions in the consolidated legislation that would apply to the Crown in the right of the states and territories without exception. This will ensure that the same levels of protection under Commonwealth law irrespective of the character of the duty holder.

184 *Racial Discrimination Act 1975* (Cth) s 6A(1); *Sex Discrimination Act 1984* (Cth) s 11(3).

Summary of Recommendations

Recommendation 1 The OADC recommends that the consolidated legislation provide that the burden of proof on complainants should be limited to establishing, on the balance of probabilities, that the alleged conduct took place and that it was conduct *prima facie* within the definition of discrimination. The burden of establishing a valid, non-discriminatory reason for the treatment or effect and the availability of a defence should rest on the respondent.

Recommendation 2 The OADC recommends that the consolidated legislation include a separate, stand-alone special measures provision that clearly specifies that special measures are aimed at achieving substantive equality and do not constitute discrimination.

Recommendation 3 The OADC recommends that the consolidated legislation include a separate, stand-alone duty to make adjustments in respect of all protected attributes in all areas of activity that clearly specifies that a failure to make adjustments is a form of discrimination.

Recommendation 4 The OADC recommends that the consolidated legislation include a separate, positive duty on all organisations to take all reasonable and proportionate steps to eliminate discrimination and other forms of conduct prohibited under the legislation.

Recommendation 5 The OADC recommends that the consolidated legislation expressly make it unlawful to harass in all areas of activity on the basis of one or more protected attributes or a combination or attributes, with all attributes protected. Further the OADC recommends that the consolidated legislation include a definition of harassment that expressly includes conduct that is offensive, humiliating, intimidating, insulting or ridiculing.

Recommendation 6 The OADC recommends that sex or sexual characteristics, gender identity and sexual orientation be separately defined in the consolidated federal Act and that intersex be included as a separate attribute.

Recommendation 7 The OADC recommends that the consolidated legislation association with a person with any other protected attribute as a protected attribute and that associates be protected against discrimination and all other forms of conduct prohibited in the legislation.

Recommendation 8 The OADC recommends that the consolidated legislation protect against discrimination and other forms of prohibited conduct on the basis of all of the attributes currently protected under the various federal and state and territory anti-discrimination laws.

Recommendation 9 The OADC recommends, in addition to the attributes previously recommended for inclusion, the consolidated legislation provide protection on the basis of homelessness, place of residence and social status

(including source of income being social security or emergency assistance and other social support, such as public housing).

Recommendation 10 The OADC recommends that the consolidated legislation include the following definition:

> For the purposes of this Act, discrimination includes:
>
> (a) any distinction, restriction, exclusion or preference that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the civil, political, economic, social, cultural or any other field of public life on the basis of one or more protected attributes or on the effect of a combination of protected attributes; and
>
> (b) harassment on the basis of one or more protected attributes or on the effect of a combination of protected attributes.
>
> Without limiting the generality of subsection (1)(a), a person discriminates against another person if:
>
> (a) the person treats or proposes to treat the other person unfavourably on the basis of one or more protected attributes or on the effect of a combination of protected attributes; or
> (b) the person imposes or proposes to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person, or a group of people, on the basis of one or more protected attributes or on the effect of a combination of protected attributes;
> (c) the person fails or proposes not to make adjustments if the effect is that a person experiences unfavourable treatment under (a) or a detriment under (b).
>
> The conduct in (a) and (b) is not mutually exclusive.
>
> Without limiting the generality of subsection (1)(b), a person harasses another person if the person engages in conduct that is offensive, humiliating, ridiculing, intimidating or insulting on the basis of one or more protected attributes or on the effect of a combination of protected attributes.

Recommendation 11 The OADC recommends that the consolidated legislation define protected attributes to include, where relevant, past, present and future attributes, and:

(a) characteristics related to the protected attribute;
(b) characteristics imputed to that attribute; and
(c) imputed attributes; and
(d) imputed characteristics related to a imputed protected attribute.

Recommendation 12 The OADC recommends that the consolidated legislation include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law. Equality before the law provisions should extend to all protected attributes.

Recommendation 13 The OADC recommends that the consolidated legislation should provide protection from discrimination and harassment by or

against a person engaged in, or undertaking any, activity in connection with civil, political, economic, social, cultural or any other field of public life including but not limited to: accommodation; clubs and associations; education and training; disposal of land; access to premises; employment and employment-related areas; provision of facilities, goods and services (including services relating to superannuation, entertainment, refreshment and recreation), local, state, territory and Federal laws, programs and functions; statutory powers, services and functions; and sport.

Recommendation 14 The OADC recommends that the consolidated legislation provide protection from discrimination for paid, voluntary and unpaid workers (including, for example, interns and work placement participants). Such protection should not be limited to protection against discrimination in employment.

Recommendation 15 The OADC recommends that the consolidated legislation not provide an exception for domestic workers.

Recommendation 16 The OADC recommends that the consolidated legislation extend coverage to membership and activities of all clubs and associations, whether licensed or not.

Recommendation 17 The OADC recommends that the consolidated legislation extend coverage to partnerships regardless of size.

Recommendation 18 The OADC recommends that the consolidated legislation expressly prohibit requests for information that could be used to discriminate against a person on the basis of a protected attribute.

Recommendation 19 The OADC recommends that the consolidated legislation include clear provisions that provide for organisational liability for conduct of those associated with the organisation where there has been a failure to comply with positive duties to address and prevent discrimination and other unlawful conduct. The OADC recommends that consideration be given to a higher order obligation on any organisation that has been the subject of orders under the consolidated legislation as is found in section 104(1)(c) of the *Anti-Discrimination Act 1998* (Tas).

Recommendation 20 The OADC recommends that the consolidated legislation include a single exemption provision, supplemented by guidelines and codes of practice outlining how the provision is to be applied. Such a provision should not permit any reduction in the nature and scope of protection against discrimination provided in respect of race under the *Racial Discrimination Act 1975* (Cth).

Recommendation 21 The OADC recommends that the consolidated legislation include a single general limitations provision based on that which exists in the *Canadian Human Rights Act 1985.*

Recommendation 22 The OADC recommends that the consolidated legislation include provision for voluntary development and implementation of action plans in respect of all areas of activity, including employment, by all duty holders, in respect of all protected attributes.

Recommendation 23 The OADC recommends that the consolidated legislation include mechanisms mandating obligations in relation to the achievement of employment equity for those people who have historically faced significant barriers to employment.

Recommendation 24 The OADC recommends that proof of the development and effective implementation of an action plan and/or an employment equity plan should be relevant to the availability of defences under the consolidated legislation.

Recommendation 25 The OADC recommends that the consolidated legislation include provision for complaints to be made by a person or organisation on behalf of a person or persons affected by an alleged breach or breaches of the legislation and that amendments be made to the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Court Act 1999* (Cth) to give a person or organisation that has made such a complaint standing to commence proceedings under the consolidated legislation in those courts. The consolidated legislation should include criteria for determining where a person or organisation should be granted standing to make such a complaint with the criteria not being overly onerous.

Recommendation 26 The OADC recommends that the consolidated legislation include provision for the special-purpose Commissioner or the AHRC to (a) have standing in respect of all anti-discrimination complaints that proceed to hearing as a party providing assistance similar the role of the Canadian Human Rights Commission under the *Canadian Human Rights Act 1985*; and (b) have standing to prosecute failures to comply with standards made under the consolidated legislation and previous federal anti-discrimination legislation. The OADC also recommends that the AHRC be resourced to take on these roles effectively.

Recommendation 27 That consideration be given to including provisions that would enable the special-purpose Commissioners or the AHRC to have standing as a complainant in matters where the Commission has conducted an investigation into systemic discrimination or prohibited conduct and formed the view that a strong *prima facie* case exists and there is no complainant identified.

Recommendation 28 The OADC recommends that the Federal Government undertake as a matter of urgency research into, and development and implementation of, effective strategies to provide greater support to litigants in anti-discrimination matters including, for example, provision of legal aid across all areas of discrimination and prohibited conduct, and increased targeted support to community legal centres to assist and provide representation in anti-

discrimination matters irrespective of whether they are conducted under federal or state/territory anti-discrimination legislation.

Recommendation 29 The OADC recommends that the consolidated legislation provide for a presumptive non-costs jurisdiction with the power vested in the tribunal to order costs against a party in limited circumstances. In the event that the current costs jurisdiction is retained, the OADC recommends that further consideration be given to providing greater guidance to the tribunals on the circumstances in which costs should not be ordered or should be capped.

Recommendation 30 The OADC recommends that, if the costs jurisdiction is to be retained for federal anti-discrimination law cases, consideration be given to creating a mechanism for costs indemnity for any party receiving a grant of legal aid. Consideration should include how to remove the effect on the NSW Legal Aid grant indemnity of the decision in *Woodlands v Permanent Trustee Company Limited* (1996) 68 FCR 213.

Recommendation 31 The OADC recommends that the consolidated legislation include provisions relating to remedies that expressly require consideration to be given to the systemic effect of any discrimination or prohibited conduct that has been found proven and require remedies in respect of any systemic effect.

Recommendation 32 The OADC recommends that in the consolidation process consideration be given to guidance on quantum of remedies for injury to feelings and that such guidance be developed having regard to compensating non-financial injury in comparative areas of law, such as defamation damages for injury to reputation.

Recommendation 33 The OADC recommends that the consolidated legislation include remedies provisions that provide decision makers with sufficient flexibility to order remedies that are broad-ranging, restorative and address structural or underlying causes of discrimination.

Appendix 1: Declaration of Principles on Equality

Introduction

The right to equality before the law and the protection of all persons against discrimination are fundamental norms of international human rights law. But in the year which marks the 60th anniversary of the adoption of the Universal Declaration of Human Rights, the recognition and enjoyment of equal rights still remains beyond the reach of large sections of humanity.

In the second half of the 20th Century international human rights law emerged as a major legal framework for the protection of individual rights and freedoms. However, most countries in the world lack effective legal protection against discrimination and legal means to promote equality. Even in countries where such provisions are in force, much remains to be done to ensure the realisation of the right to equality.

In certain national and regional legal systems, equality legislation has evolved in the last few decades. It contains legal concepts, definitions, approaches and jurisprudence, some of which have taken the protection against discrimination and the realisation of the right to equality to a higher level. However, the disparity between international human rights law and national as well as regional approaches to equality hinders progress. Therefore, a major effort is required to modernise and integrate legal standards related to the protection against discrimination and the promotion of equality.

The Principles on Equality were agreed by a group of experts in several stages of consultations. They were discussed at a conference entitled 'Principles on Equality and the Development of Legal Standards on Equality', organised by The Equal Rights Trust on 3 – 5 April 2008 in London. Participants of different backgrounds, including academics, legal practitioners and human rights activists from all regions of the world took part in this event. Participants debated a version of the draft that had incorporated their comments on an earlier document. They subsequently contributed comments. A number of further experts participated in various stages of drafting and deliberation.

The result, the Declaration of Principles on Equality, reflects a moral and professional consensus among human rights and equality experts. This publication seeks to broaden the consensus, generate interest and debate and thus contribute to reaffirming and developing the right to equality. The principles formulated and agreed by the experts are based on concepts and jurisprudence developed in international, regional and national legal contexts. They are intended to assist efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality. They might serve as a compass to orient legislative, judicial and policy efforts towards a more progressive set of equality norms and policies in the 21st century. Ultimately, it is hoped that the formulation of universally applicable principles on equality will encourage further efforts to fulfil equality as a fundamental human right enjoyed by everyone.

Bob Hepple, Chair
Dimitrina Petrova, Executive Director
The Equal Rights Trust

WE, THE UNDERSIGNED HUMAN RIGHTS ADVOCATES AND EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW AND EQUALITY LAW

Preamble

Recalling the principles proclaimed in the *Charter of the United Nations* which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world;

Recalling Article 1 of the *Universal Declaration of Human Rights* proclaiming that all human beings are born free and equal in dignity and rights;

Recalling that the United Nations, in the *Universal Declaration of Human Rights* and in the International Covenants on human rights and other universal treaties, has proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, committing States to take all possible measures to ensure non-discrimination in the enjoyment of all human rights;

Noting the recognition, in Article 26 of the *International Covenant on Civil and Political Rights*, of the right to non-discrimination as an autonomous human right and the correlative obligation of States to realise this right;

Observing that discrimination by its nature harms human capabilities in unjust ways, creating cycles of disadvantage and denials of freedom which hinder human development;

Recognising the importance of combating every form of discrimination, including the need to take appropriate action to enable people who are disadvantaged to realise their full potential, and contribute to their full participation in economic, social, political, cultural and civil life;

Convinced that comprehensive anti-discrimination legislation and its effective enforcement are necessary to promote equality and eliminate discrimination;

Concerned that the vast majority of States do not have effective legal protection, including comprehensive legislation, to promote equality and combat discrimination;

Understanding that States may need guidance and assistance in introducing effective legal protection, including legislation, to promote equality and combat discrimination;

Noting that while legal provisions relating to equality should provide legal certainty, those responsible should be willing to improve and interpret legislation in order to reflect the changing experiences of all people disadvantaged by inequality;

Resolved to take further steps to promote the equality of all persons through the effective enforcement of prohibitions of discrimination in international human rights law as well as in national legislation;

Aiming to eliminate unjust inequalities and to promote full and effective equality;

HAVING PARTICIPATED IN A MEETING HELD IN LONDON, IN THE UNITED KINGDOM, FROM 2 TO 5 APRIL 2008 AND/OR IN SUBSEQUENT CONSULTATIONS FACILITATED BY THE EQUAL RIGHTS TRUST, HEREBY ADOPT THE FOLLOWING

Part I: Equality

1 The Right to Equality

The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.

2 Equal Treatment

Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

3 Positive Action

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

Part II: Non-discrimination

4 The Right to Non-discrimination

The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality.

5 Definition of Discrimination[i]

Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social

origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An act of discrimination may be committed intentionally or unintentionally.

6 Relationship between the Grounds of Discrimination

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.

7 Discrimination and Violence

Any act of violence or incitement to violence[ii] that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of

violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

Part III: Scope and Right-holders

8 Scope of Application

The right to equality applies in all areas of activity regulated by law.

9 Right-holders

The right to equality is inherent to all human beings and may be asserted by any person or a group of persons who have a common interest in asserting this right.

The right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State.

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.

Part IV: Obligations

10 Duty-bearers

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.

11 Giving Effect to the Right to Equality

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must

(a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;

(b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;

(c) Promote equality in all relevant policies and programmes;

(d) Review all proposed legislation for its compatibility with the right to equality;

(e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;

(f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;

(g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

12 Obligations Regarding Multiple Discrimination

Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground. Particular positive action measures, as defined in Principle 3, may be required to overcome past disadvantage related to the combination of two or more prohibited grounds.

13 Accommodating Difference

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.

14 Measures against Poverty

As poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in the pursuit of full and effective equality.

15 Specificity of Equality Legislation

The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

16 Participation

All persons, particularly those who have experienced or who are vulnerable to discrimination, should be consulted and involved in the development and implementation of laws and policies implementing the right to equality.

17 Education on Equality

States have a duty to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right.

Part V: Enforcement

18 Access to Justice

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.

19 Victimisation

States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

20 Standing

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

21 Evidence and Proof

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (*prima facie* case), it shall be for the respondent to prove that there has been no breach of the right to equality.

22 Remedies and Sanctions

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.

23 Specialised Bodies

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

24 Duty to Gather Information

To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. States must not use such information in a manner that violates human rights.

25 Dissemination of Information

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. States must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

Part VI: Prohibitions

26 Prohibition of Regressive Interpretation

In adopting and implementing laws and policies to promote equality, there shall be no regression from the level of protection against discrimination that has already been achieved.

27 Derogations and Reservations

No derogation from the right to equality shall be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, shall be null and void.

Available online and in PDF at:
http://www.equalrightstrust.org/endorse/index.htm

[ii] Throughout this Declaration the term "discrimination" is used as defined in this Principle and the term "prohibited grounds" refers to the ground or combination of grounds described in this Principle.

[ii] Certain signatories have endorsed the Principles on the basis that "incitement to violence" means "incitement to imminent violence".

Appendix 2: Grounds of protection

The following table summarises the protections against discrimination and related conduct under Commonwealth, state and territory laws [i185]

Key to ACTS

Commonwealth

RDA – *Racial Discrimination Act 1975*
SDA – *Sex Discrimination Act 1984*
DDA – *Disability Discrimination Act 1992*
ADA – *Age Discrimination Act 2004*
FWA – *Fair Work Act 2009*

State and Territory

ADA (NSW) – *Anti-Discrimination Act 1977* (NSW)
ADA (Qld) – *Anti-Discrimination Act 1991* (Qld)
EOA (SA) – *Equal Opportunity Act 1984* (SA)
RVA (SA) – *Racial Vilification Act 1996* (SA)
ADA (Tas) – *Anti-Discrimination Act 1998* (Tas)
EOA (Vic) – *Equal Opportunity Act 2010* (Vic)
RRTA (Vic) – *Racial and Religious Tolerance Act 2001* (Vic)
EOA (WA) – *Equal Opportunity Act 1984* (WA)
CCC (WA) – *Criminal Code Compilation Act 1913* (WA)
DA (ACT) – *Discrimination Act 1991* (ACT)
ADA (NT) – *Anti-Discrimination Act 1994* (NT)

	RDA	SDA	DDA	ADA	FWA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)
Protected Attributes																
Age				14-15		49ZYA 49ZV	7(1)(f)	85A		16(b)	6(a)		66V-66ZL		7(1)(l)	19(1)(d)
Ancestry							7(1)(g), Dictionary				4, 6(m)					4, 19(1)(a)
Breastfeeding		7AA				24(1)(C)	7(1)(e)	85T(5) 87B		16(h)	6(b)		10A		7(1)(g)	19(1)(h)
Colour	9(1)					4, 7	7(1)(g), Dictionary	5, 51		3, 16(a)	4, 6(m)		4, 36-49		2, 7(1)(h)	4, 19(1)(a)
Country of origin								5, 51								
Criminal record										16(q)					7(1)(o)	19(1)(q)

[185] This table updates the table found in Chris Ronalds and Rachel Pepper, *Discrimination Law in Practice* (2004) 239–241.

	RDA	SDA	DDA	ADA	FWA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)
Descent	9(1)					4, 7	7(1)(g), Dictionary	5, 51		3, 16(a)	4, 6(m)		4, 36-49		2, 7(1)(h)	4, 19(1)(a)
Disability or impairment			5, 6		351	49B	7(1)(h)	66 88 88A		16(k)	6(e)		66A-66P		7(1)(j)	19(1)(j) 21
Disability: use of/reliance on aids or equipment			8, 9			49B	7(1)(h), Dictionary				7				9	4, 19(1)(j) 21
Disability: guide dog			8, 9				7(1)(h), Dictionary				7		66A		9	4, 19(1)(j) 21
Disability: hearing or assistance dog			8, 9				7(1)(h), Dictionary				7		66A		9	
Disability: assistance animal			8, 9					66							9	
Disability: assistance person, carer, interpreter, etc			8, 9								7					
Employment Activity					408						6(c)				7(1)(m)	
Ethnicity or Ethnic origin	9(1)					4,7	7(1)(g), Dictionary			3, 16(a)	4, 6(m)		4, 36-49		2, 7(1)(h)	4, 19(1)(a)
Ethno-religious origin						4,7				3, 16(a)						
Family responsibility		7A			351	49T	7(1)(o)			16(j)			35A-35J		7(1)(e)	19(1)(g)
Gender / Sex		5			351	24	7(1)(a)	29(2)		16(e)	6(o)		8		7(1)(a)	19(1)(b)
Gender Identity							7(1)(m)			16(c)	6(d)				7(1)(c)	
HIV/AIDS status															65	
Identity of a spouse or domestic partner								85T(3)								
Immigration status or status of being or having been an immigrant	5*									16(a)						4, 19(1)(a)
Intersex						38A(c)**	7(1)(m)**	29(2a)**		***	6(d)**		7(1)(c)**			
Lawful sexual activity							7(1)(l)			16(d)	6(g)					
Marital status		6			351	39	7(1)(b)	85T(2)		16(f)	6(h)		9		7(1)(d)	19(1)(e)

	RDA	SDA	DDA	ADA	FWA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)
Medical record										16(r)						19(1)(p)
Nationality and national origin	9(1)					4,7	7(1)(g), Dictionary	5, 51		3, 16(a)	4, 6(m)		4, 36-49		2, 7(1)(h)	4, 19(1)(a)
Parental status		7A				49T	7(1)(d)			16(i)	6(i)		35A-35J		7(1)(e)	19(1)(g)
Physical Features											6(j)					
Political belief or activity					351		7(1)(j)			16(m) 16(n)	6(k)		53-65		7(1)(i)	19(1)(n)
Pregnancy or potential pregnancy		7			351	24(1B)	7(1)(c)	85T(4)		16(g)	6(l)		10		7(1)(f)	19(1)(f)
Race	9(1)				351	7	7(1)(g)	51	4	16(a)	6(m)	3	4, 36-49		2, 7(1)(h)	4, 19(1)(a)
Relationship status										16(fa)					7(1)(d)	
Religious activity or belief					351		7(1)(i)			16(o) 16(p)	6(n)	8	53-65		7(1)(i)	19(1)(m)
Religious appearance or dress								85T(7)								
Sexuality or sexual orientation					351	49ZG	7(1)(n)	29(3)		16(c)	6(p)		35O-35-ZC		7(1)(b)	19(1)(c)
Sharing accommodation with a child								87A								
Trade union or industrial activity					408		7(1)(k)			16(l)	6(f)				7(1)(k)	19(1)(k)
Transsexuality						38B	7(1)(m)	29(2a)		16(c)	6(d)		35AA-35AR		7(1)(c)	4(1) 19(1)(c)
Association with a person with a protected attribute			7			7 race 24 sex 49B dis	7(1)(p)	29(2)(d) 29(2a)(e) 29(3)(d) 51(d) 66(f) 85A(d) 85T(2)(d) 85T(4)(d) 85T(6)(d) 85T(7)(d)		16(s)	6(q)				7(1)(n)	19(1)(r)

	RDA	SDA	DDA	ADA	FWA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)
Other prohibited conduct																
Aiding and permitting	17		43	56		52	122-123	90		21	105-106	15-16			73	27
Disability harassment			35-39													
Incitement - race	17		43	56			124A 131A	90		19	105-106	15-16		77-78		27
Incitement - disability			43				124A 131A	90		19	105-106	15-16		77-78		27
Incitement – sexual orientation							124A 131A	90		19	105-106	15-16		77-78		27
Incitement – lawful sexual conduct							124A 131A	90		19	105-106	15-16		77-78		27
Incitement – religious belief, affiliation, activity							124A 131A	90		19	105-106	15-16		77-78		27
Offensive conduct										17(1)						
Sexual harassment		28A				22A 22B	118	87		17(2) 17(3)	92-102		24-26		58-64	22(1) 22(2)
Racial hatred	18c					20C	9 10 124A		4	19 22(2)		7 24		77-80	66	
Racial vilification	18c					20C	124A		4			7 24			65-67	
Transgender vilification						38S	124A 131A								66	
HIV/AIDS vilification						49ZXB									66	
Homosexuality vilification						49ZT	124A 131A								66	
Religious vilification							124A 131A					8 25				
Vicarious liability	18A 18E	105 106	122, 123	57		53	114-116 132-33	91		104	109	17	161-162		121A	105
Victimisation		94	42	51		50	129-131	86		18	103-104	13-14	67		68	23

* RDA provides protection on the basis of immigration status for certain activities, but does not include immigration as an attribute under anti-discrimination provisions of the Act (section 9)
** The term 'person of indeterminate sex' is used
***Tasmania to introduce in 2012