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**Submission to the Attorney-General's Department**

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**The National Association of Community Legal Centres' Response  
to the *Consolidation of Commonwealth Anti-Discrimination Laws*  
*Discussion Paper* (September 2011)**

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## Part 1 - Overview of NACLC's Submission

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### INTRODUCTION

This submission is made by the National Association of Community Legal Centre (**NACLC**) in response to the Attorney-General Department's *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (**Discussion Paper**). This submission makes recommendations in relation to each of the 30 questions posed in the Discussion Paper. Additionally, it provides recommendations on issues that are not mentioned in the Discussion Paper but which NACLC consider to be important considerations in the context of the consolidation project.

NACLC welcomes the Government's decision to consolidate Commonwealth anti-discrimination laws. The process represents a significant opportunity to modernise, improve and simplify the anti-discrimination regime, and to address gaps in the current system. We believe that Commonwealth anti-discrimination laws need to be enhanced to enshrine Australia's international human rights obligations into domestic law and to promote substantive equality.

### ABOUT NACLC AND CLCS

NACLC is the peak national organisation representing community legal centres (**CLCs**) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest. CLCs have been advocating for a rights based approach to equitable access to the justice system for over 30 years. CLCs are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

The CLCs that have contributed to this submission have substantial expertise in discrimination law. This submission draws on CLCs' many years of practical experience assisting clients to navigate both the Commonwealth and state or territory systems. CLCs bring particular expertise and understanding of what the barriers are to accessing justice for people who have experienced discrimination as we work every day with clients to overcome these barriers.

### STRUCTURE OF THIS SUBMISSION

This submission is divided into nine parts:

- Part 1 – Introduction
- Part 2 – Summary of recommendations

- Part 3 - Recommendations on issues that are not mentioned in the Discussion Paper but which NACLCL believe to be important considerations in the context of the consolidation project
- Part 4 – Response to questions 1 – 6: ‘Meaning of Discrimination’
- Part 5 – Response to questions 7 – 10: ‘Protected Attributes’
- Part 6 – Response to questions 11 – 19: ‘Protected Areas of Public Life’
- Part 7 – Response to questions 20 – 23: ‘Exceptions and Exemptions’
- Part 8 – Response to questions 24 – 27: ‘Complaints and Compliance Framework’
- Part 9 – Response to questions 28 – 30: ‘Interaction with Other Laws and Application to State and Territory Governments’

## **ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES’ AND ‘ABORIGINAL PEOPLES’**

Throughout this submission, Aboriginal and Torres Strait Islander peoples are referred to as ‘Aboriginal peoples’. NACLCL acknowledges the diversity in culture, language, kinship structures and ways of life within Aboriginal and Aboriginal and Torres Strait Islander peoples, and recognises that Aboriginal peoples and Torres Strait Islander peoples retain their distinct cultures irrespective of whether they live in urban, rural or remote parts of the country. The use of the word ‘peoples’ also acknowledges that Aboriginal peoples and Torres Strait Islander peoples have a ‘collective, rather than purely individual dimension to their livelihoods’.<sup>1</sup>

## **INDIRECT DISCRIMINATION**

NACLCL recommends that the consolidation bill contain a unified definition of discrimination that expressly incorporates what is now understood in Commonwealth anti-discrimination as notions of indirect as well as direct discrimination. However, we note that the term ‘indirect discrimination’ is used throughout the document. The use of the term in this context does not contradict our recommendation for a unified definition, but is used as a descriptor to refer to existing requirements, conditions and practices which appear neutral on their face but which may have a discriminatory impact.

## **GLOSSARY OF TERMS FREQUENTLY USED THROUGHOUT THIS SUBMISSION**

<b>ADA</b>	<i>Age Discrimination Act (Cth)</i>
<b>AHRC</b>	Australian Human Rights Commission
<b>CLCs</b>	Community Legal Centres
<b>DDA</b>	<i>Disability Discrimination Act (Cth)</i>
<b>RDA</b>	<i>Racial Discrimination Act (Cth)</i>
<b>SDA</b>	<i>Sex Discrimination Act (Cth)</i>

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<sup>1</sup> Australian Human Rights Commission, *Social Justice Report 2009* (2009), 6, available at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/index.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html).

## Part 2 - Summary of Recommendations

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### ADDITIONAL RECOMMENDATIONS

- The consolidation bill should have a detailed objects clause that includes the following:
  - a statement of the beneficial nature of the Act;
  - the aim of eliminating discrimination and achieving substantive equality;
  - a reference to Australia's obligations under international human rights conventions;
  - a reference to the need for reasonable adjustments and special measures to achieve substantive equality; and
  - a reference to identifying and removing systemic discrimination.
- The consolidation bill should make vilification based on a protected attribute, or the intersection of two or more protected attributes, unlawful. The prohibition should be based on Part IIA of the *Racial Discrimination Act* and be subject to the defences set out in that Part.
- Vilification should be made a criminal offence. The offence of vilification should be defined as the incitement of hatred towards, or serious contempt for, or severe ridicule of, a person or group of persons on the basis of an attribute protected under the consolidation bill or the intersection of two or more such attributes.
- The consolidation bill should set out a clear process for the referral of a complaint of vilification from the Australian Human Rights Commission to the Australian Federal Police for investigation and prosecution by the Commonwealth Director of Public Prosecutions and a joint investigation framework between the Australian Human Rights Commission and the Australian Federal Police.

### QUESTION 1

- The consolidation bill should contain a unified definition of discrimination.
- The consolidation bill should expressly include indirect as well as direct discrimination.
- The consolidation bill should expressly state that it is not necessary to separately plead direct discrimination and indirect discrimination.
- If the Government does not accept the recommendation to include a unified definition of discrimination in the consolidation bill, the existing test for direct discrimination should be amended so that it does not include a comparator element. The test for direct discrimination should include a detriment test similar to section 8(1)(a) of the *Discrimination Act 1991* (ACT).

- If the Government does not accept the recommendation to include a unified definition of discrimination in the consolidation bill, the existing test for indirect discrimination should be amended so that:
  - there is no requirement that a complainant show that s/he cannot meet the condition as part of the test for indirect discrimination;<sup>2</sup> and
  - it should only be necessary to show that the requirement or the condition has, or is likely to have, the effect of disadvantaging persons with that attribute (rather than establishing that a significantly higher proportion of people with that attribute cannot comply with that condition or requirement) and
  - the requirement of reasonableness be replaced with the requirement that a respondent show that the discriminating behaviour is a reasonable, necessary and proportionate means of achieving a legitimate aim and<sup>3</sup>
  - as in s6(4) DDA, s7C SDA and s15 ADA the burden of proving that a discriminatory action is a reasonable, necessary and proportionate means of achieving a legitimate aim should be placed on respondents for all protected attributes.

## QUESTION 2

- The consolidation bill should provide that once the complainant has raised a prima facie case of discrimination, a rebuttable presumption of discrimination should arise. The respondent must then prove that the conduct was not unlawful.

## QUESTION 3

- The consolidation bill should include a single special measure provision covering all protected attributes. The definition of a special measure should include all the key features set out in the Committee on the Elimination of Race Discrimination's *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*. Additional key features should include that the special measures further the objects of the Act and be beneficial for the affected group.

## QUESTION 4

- The consolidation bill should impose a specific positive duty to make reasonable adjustments to accommodate persons with all protected attributes in all protected areas of life. The duty should be incorporated into a stand-alone provision of the consolidation bill, and expressed as a duty to make reasonable adjustments to enable people with protected attributes to realise substantive equality with others in each protected area of life. Failure to make reasonable adjustments should be an

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<sup>2</sup> SDA s 5(2), ADA s 15(1), DDA s5(2), cf. RDA s9(1A)(b).

<sup>3</sup> Human Rights and Equal Opportunity Commission, *Submission to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008.

independent basis for a complaint to the Australian Human Rights Commission and a cause of action.

- The consolidation bill should define a reasonable adjustment as 'the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship'.
- The consolidation bill should establish a test for unjustifiable hardship that takes into account:
  - the objects of the bill and Parliament's intention to create an environment of substantive equality;
  - the individual and social harm caused by discrimination, and Parliament's intention to eliminate discrimination as far as possible;
  - the overall capacity, including the financial capacity, of a respondent to provide the required adjustment;
  - the availability of financial and other assistance to make the required adjustment; and
  - the reasonableness of the respondent's attempts, if any, to make the required adjustment, or to mitigate the impact of its inability to provide the required adjustment to the full extent.
- The definition of unjustifiable hardship in the consolidation bill should refer to an adjustment that is not reasonable to provide because of an unavoidable or inherent limitation, or the financial capacity of the respondent.
- The consolidation bill should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.
- The consolidation bill should provide that the burden of establishing that a required adjustment constitutes an unjustifiable hardship rests with the respondent.

#### **QUESTION 5**

- A positive duty of equality should be placed on public and private bodies.
- The AHRC should be empowered to facilitate and enforce compliance with a positive obligation without first receiving a complaint.

#### **QUESTION 6**

- The consolidation bill should provide that it is unlawful to harass a person with any protected attribute on the basis of that attribute or the intersection of more than one protected attribute in any protected area of life.
- The consolidation bill should provide that it is unlawful to sexually harass a person with a protected attribute on the basis of that attribute in any protected area of life.
- The consolidation bill should define harassment as a specific, aggravated form of discrimination that includes conduct by a person that a reasonable person, having regard to all the circumstances, would have anticipated would offend, humiliate or intimidate the person harassed.

- The consolidation bill should define sexual harassment in the same terms as currently provided in section 28(A) of the SDA.
- The consolidation bill should provide that the prohibitions against harassment and sexual harassment are not subject to any exception.

#### **QUESTION 7**

- The consolidation bill should include the use of appropriate terminology that captures the whole of the Lesbian, Gay, Bisexual, Transgender and Intersex (**LGBTI**) communities, and people perceived to be part of these communities. It should make specific and appropriate use of the terms homosexuality, lesbianism, bisexuality, gender identity, gender non-conformity, gender expression, intersex and indeterminate sex.

#### **QUESTION 8**

- Discrimination based on the attribute of an associate should be protected in the consolidation bill across all protected attributes. It should include a non-exhaustive definition of 'associate'.

#### **QUESTION 9**

- Consistent with Australia's human rights obligations, the consolidation bill should include a non-exhaustive list of protected attributes and include the ground of 'other status'
- If 'other status' is not fully protected as an attribute, the Australian Human Rights Commission should still be able to receive complaints on this basis. The Commission should monitor new and emerging trends in relation to discrimination on 'other status' and make recommendations to the Government on the inclusion of new attributes in order to ensure the protection of new and emerging attributes as protected attributes.
- The consolidation bill should include 'social status' as a protected attribute. 'social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.
- The consolidation bill should contain provide protection from harassment for people on the basis of sex, sex orientation and gender identity and allow complaints on that basis for malicious and procedural outing.
- The consolidation bill should include irrelevant criminal record as a protected attribute.
- The consolidation bill should include the following as fully protected attributes with legal recourse to the federal court:
  - religious belief and activity; and
  - political belief and/or activity; and
  - industrial activity.
- Family and carer responsibilities should be fully protected both from direct and indirect discrimination across all areas of public life. Discrimination in this area should also include a failure to make reasonable adjustments. The definition should be broadened to include domestic relationships and cultural understandings.

- The consolidation bill should provide for specific recognition of the characteristics of pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer, being accompanied by an assistance animal and family and carer responsibilities.
- The consolidation bill should include status as a victim or survivor of domestic or family violence as a protected attribute.
- The definition of ‘disability’ in section 4 of the DDA (Cth) should be amended to specifically include obesity.

#### **QUESTION 10**

- The consolidation bill should protect against intersectional discrimination. This should be separately recognised as a specific ground, of discrimination.
- The definition of discrimination in the consolidation bill should include discrimination ‘on the basis of the intersection of two or more of these attributes’.
- A finding of intersectional discrimination should be considered by the Courts as having a positive impact on damages awarded to the complainant.

#### **QUESTION 11**

- The consolidation bill should protect the right to equality before the law for all protected attributes.

#### **QUESTIONS 12 TO 17**

- The consolidation bill should provide protection against discrimination across ‘political, cultural, economic, social or any other field of public life’.

#### **QUESTION 18**

- The consolidation bill should prohibit discriminatory requests for information in the manner adopted in Victoria under the *Equal Opportunity Act 2010* (Vic).

#### **QUESTION 19**

- The consolidation bill should retain vicarious liability provisions. The provisions should require that the discriminatory act is ‘in connection with’ the person’s employment or duties.
- The consolidation bill should require companies and employers to take ‘all reasonable steps’ to prevent discrimination in order to defend a vicarious liability claim.

#### **QUESTION 20**

- The consolidation bill should include a general limitations clause that deems discriminatory actions or conduct to be lawful when it is a reasonable, necessary and proportionate means of achieving a legitimate aim subject to the following conditions being met:

1. the general limitations clause must replace all current exemptions; and
2. the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race; and
3. complainants must have access to a no-cost jurisdiction to have their discrimination complaints determined; and

4. the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
  5. the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
  6. the Australian Human Rights Commission have the power to initiate discrimination complaints; and
  7. organisations must must be able to initiate representative complaints; and
  8. the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.
- If the recommended conditions for the introduction of a general limitations clause in the consolidation bill cannot be met by the Government, NACLC does not recommend the introduction of a general limitations clause and recommends that permanent exemptions for religious organisations be removed and religion be introduced as a protected attribute.
  - If exemptions for religious organisations are not removed in the consolidation bill, then NACLC recommends that the scope of the religious exemption be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion and should not be applicable to the protected attributes of race or disability.
  - NACLC recommends that religious exemptions should not apply where the organisation is in receipt of public funding for the provision of goods and services such as aged, care, education or health services.

#### **QUESTION 21**

- The consolidation bill should include a single inherent requirements exception from discrimination in employment.

#### **QUESTION 22**

- The consolidation bill should not provide for religious exemptions in relation to the protected attributes of sexual orientation or gender identity.
- If the consolidation bill does include a religious exemption in relation to sexual orientation or gender identity, we recommend that the scope of the exemption be limited to permit discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of that religion and should not be applicable to organisations or services in receipt of public funding.

#### **QUESTION 23**

- Temporary exemptions should be a publicly transparent process and should be assessed and granted by the Australian Human Rights Commission. They should be granted on a time limited basis. The AHRC should not approve exemptions which are inconsistent with the objects of the Act.

#### **QUESTION 24**

- Voluntary action plans, as they currently exist in the DDA (Cth), should be extended to all protected attributes in the consolidation bill. The development of Action Plans should be encouraged and facilitated by the Australian Human Rights Commission.

- The regulation of Commonwealth anti-discrimination laws should remain with the Australian Human Rights Commission and the courts and not be delegated to the corporate sector through a process of co-regulation.
- The Government should retain existing disability standards and extend legally binding standards to all protected attributes under the consolidation bill.
- The consolidation bill should provide a means for the Australian Human Rights Commission to authorise special measures on application. However, the use of a special measure should not be dependent on receiving such an authorisation.

#### **QUESTION 25**

- A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the Australian Human Rights Commission.
- The consolidation bill should make provision for agreements reached in settlement to be legally binding through registration with the court.

#### **QUESTION 26**

- The consolidation bill should include provision for complaints to be made to the Australian Human Rights Commission and the Federal Court or Federal Magistrates Court by groups or organisations on behalf of, or in the interest of, members.
- The Federal Court and the Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.
- Remedies available in discrimination matters should include corrective and preventative orders, as well as injunctions.
- A complainant (whether individual or a representative group) should be able to make an application for an injunction when necessary.
- A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues.
- The specialist division should develop rules and procedures that increase the ability of self represented litigants to conduct their own cases.
- There should be increased funding to community legal centres and legal aid commissions to provide representation to complainants in discrimination matters.

#### **QUESTION 27**

- The Australian Human Rights Commission Discrimination Commissioners should be given the power to investigate and initiate court proceedings in relation to conduct that appears unlawful, without an individual complaint.
- The role and powers of Australian Human Rights Commission Discrimination Commissioners should be expanded to increase the role of the Australian Human Rights Commission and Commissioners in addressing systemic discrimination. These powers include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament and the public on discrimination matters.

- The Australian Human Rights Commission should be empowered to conduct formal inquiries into matters relating to state and territory laws or practices.
- ‘Human rights’ in the consolidation bill should be defined by reference to the seven core human rights treaties to which Australia is a party, as contained in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
- The ability of the Australian Human Rights Commission to intervene or appear as amicus in discrimination cases should be retained.
- The Australian Human Rights Commission should have the power to commence proceedings in the absence of an individual complaint, to enforce breaches of disability standards. This should include the introduction of civil penalty provisions in the consolidation bill.
- The Australian Human Rights Commission should be empowered to facilitate and enforce compliance with the positive obligation without first receiving a complaint.
- The Australian Human Rights Commission should be adequately resourced to undertake these additional functions.

#### **QUESTION 28**

- Australian Human Rights Commission should be able to investigate potentially discriminatory terms in industrial agreements with or without an individual complaint.
- Fair Work Australia should seek the guidance of the Australian Human Rights Commission on potentially discriminatory terms in industrial agreements.
- Community legal centres should be further funded to provide specialist advice to people experiencing discrimination in employment under the *Fair Work Act 2009* (Cth) and discrimination law in order for people to exercise their rights most effectively.
- The *Fair Work Act* should include a non-exhaustive list of protected attributes which are consistent with the consolidation bill, on the grounds earlier recommended by NACLC. This issue should be considered further during the upcoming review of the *Fair Work Act*.
- That there should be legislative clarification of the relationship between section 351(2)(a) of the *Fair Work Act*, with Commonwealth, state and territory anti-discrimination laws. The Government should consider the issues raised by the discrimination consolidation concerning the operation of federal discrimination law in the review of the *Fair Work Act*.

#### **QUESTION 29**

- The consolidation bill adopt a model which:
  - expresses reliance on article 26 of the International Covenant on Civil and Political Rights; and
  - at a minimum, ensures that state and territory anti-discrimination laws further the objects of relevant international instruments while being capable of providing greater protection, and protection to a greater range of attributes, than is the case under international law.

- That the consolidation bill and the *Fair Work Act* expressly permit an aggrieved individual to make a complaint or initiate proceedings where their initial complaint (whether under the Fair Work Act, state, territory or federal discrimination law) was lodged in the wrong jurisdiction and has been withdrawn or declined.
- The consolidation bill provide no exemption for acts done in direct compliance with state or territory laws for all protected attributes. **Alternative recommendation:**
  - Protection against age discrimination be elevated to the current DDA (Cth) model; and
  - the consolidation bill allow regulations to be made exempting acts done in direct compliance with specified state and territory laws on the basis of disability and age only where justified under a legislative test similar to section 7(2) of the *Victorian Charter of Human Rights and Responsibilities*

### QUESTION 30

- The consolidation bill apply to all state and territory governments and instrumentalities for all protected attributes, as the ADA (Cth), the DDA (Cth) and RDA (Cth) currently apply.

## Part 3 – Additional Recommendations

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NACLC submits two additional recommendations on issues that are not mentioned in the Discussion Paper, but which we believe to be important considerations in the context of the consolidation project: namely, an objects clause and vilification.

### OBJECTS CLAUSE

NACLC notes that the Discussion Paper does not seek feedback on an objects clause for the consolidation bill.

Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that:

in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

NACLC submits that a detailed objects clause, focussed on implementing international human rights conventions and achieving substantive equality, is essential in a consolidated Act. There have been concerns for many years that the courts have interpreted the existing discrimination laws narrowly and not to the benefit of groups with protected attributes.

In NACLC's view an objects clause should include the following at a minimum:

- a statement of the beneficial nature of the act;
- the aim of eliminating discrimination and achieving substantive equality;
- a reference to Australia's obligations under international human rights conventions;
- a reference to the need for reasonable adjustments and special measures to achieve substantive equality; and
- a reference to identifying and removing systemic discrimination.

NACLC supports the proposed objects clause set out in the submission by the Discrimination Law Experts Group. We also suggest that the objects clause in the *Equal Opportunities Act (2010) Vic* provides a good model.

**RECOMMENDATION:** The consolidation bill should have a detailed objects clause that includes the following:

- a statement of the beneficial nature of the Act;
- the aim of eliminating discrimination and achieving substantive equality;
- a reference to Australia's obligations under international human rights conventions;
- a reference to the need for reasonable adjustments and special measures to achieve substantive equality; and
- a reference to identifying and removing systemic discrimination.

## VILIFICATION

NACLC notes that the Discussion Paper does not pose any questions in relation to vilification.

NACLC submits that vilification based on a protected attribute, or the intersection of two or more protected attributes, is a severe, aggravated form of discrimination that should be unlawful in all protected areas of life, and be proscribed criminal conduct.

Vilification is a hate related crime. It is appropriate that there be a joint investigation framework in the consolidation bill. The framework should provide for the referral of incidents from the AHRC to the Australian Federal Police (**AFP**) and for joint investigations of these incidents. In the absence of such a framework, it is unlikely that AFP and Commonwealth Director of Public Prosecutions (**Commonwealth DPP**) will have the expertise and skills necessary to conduct an appropriate investigation or accord these matters the priority they deserve.

**RECOMMENDATION:** The consolidation bill should make vilification based on a protected attribute, or the intersection of two or more protected attributes, unlawful. The prohibition should be based on Part IIA of the RDA and be subject to the defences set out in that Part.

**RECOMMENDATION:** Vilification should be made a criminal offence. The offence of vilification should be defined as the incitement of hatred towards, or serious contempt for, or severe ridicule of, a person or group of persons on the basis of an attribute protected under the consolidation bill or the intersection of two or more such attributes.

**RECOMMENDATION:** The consolidation bill should set out a clear process for the referral of a complaint of vilification from the Australian Human Rights Commission to the Australian Federal Police for investigation and prosecution by the Commonwealth Director of Public Prosecutions and a joint investigation framework between the Australian Human Rights Commission and the Australian Federal Police.

## Part 4 – Meaning of Discrimination

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### 1. QUESTION 1 - WHAT IS THE BEST WAY TO DEFINE DISCRIMINATION? WOULD A UNIFIED TEST FOR DISCRIMINATION (INCORPORATING BOTH DIRECT AND INDIRECT DISCRIMINATION) BE CLEARER AND PREFERABLE? IF NOT, CAN THE CLARITY AND CONSISTENCY OF THE SEPARATE TESTS FOR DIRECT AND INDIRECT DISCRIMINATION BE IMPROVED?

NACLC recommends that the consolidation bill include a unified test for discrimination, which incorporates both direct and indirect discrimination, providing it does not reduce current protections. If this recommendation is not adopted by the Government, we propose a number of amendments to the current definitions of 'direct' and 'indirect' discrimination, including removal of the use of the 'comparator'.

#### 1.1. Unified test

Anti-discrimination law is complex, particularly in relation to the definition of discrimination, which varies across all Commonwealth legislative provisions. In NACLC's experience, our clients are readily able to identify that they have experienced discrimination; however, applying the current legal tests to their experience is often technical and difficult. It is also well documented that the current definitions of direct and indirect discrimination have led to outcomes that are arguably against the objects of anti-discrimination laws.<sup>4</sup>

One option is to replace the existing definitions of 'direct' and 'indirect' discrimination with a unified definition of discrimination. An example of a unified definition is section 9 of the RDA. Another example is the definition of discrimination contained in the South African *Promotion of Equality and Prevention of Unfair Discrimination Act (2000)*, which defines discrimination as:

- any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –
  - a) imposes burdens, obligations or disadvantage on; or
  - b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.

NACLC acknowledges that the question of whether the existing definitions should be replaced with a unified definition is a difficult one. The advantage of adopting a unified definition is that it eliminates the problem of having to plead direct and indirect discrimination separately and reduces technicality in the law. In NACLC's view, a unified definition of discrimination would simplify the application of Commonwealth anti-discrimination law, promote community awareness and education about the nature of unlawful discrimination, and increase accessibility to the law.

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<sup>4</sup> See Dr. Belinda Smith, *From Wardley to Purvis – How far has Australian anti-discrimination law come in 30 years* (2008) 21(1) *Australia Journal of Labour Law*, 3 – 29. See also, Human Rights and Equal Opportunity Commission, *Submission to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008.

However, NACLC recognises that a unified definition may inadvertently lead to a reduction in discrimination protection if it is not sufficiently clear that the law covers indirect as well as direct discrimination. NACLC strongly believes that the consolidation bill must include types of indirect discrimination, such as requirements, conditions and practices which may appear neutral on their face, but which prevent the achievement of equality of particular groups in the community.

In principle, NACLC supports a unified definition of discrimination but only if it can be drafted so as not to reduce current protections for both direct and indirect discrimination.

**RECOMMENDATION:** The consolidation bill should contain a unified definition of discrimination.

**RECOMMENDATION:** The consolidation bill should expressly include indirect as well as direct discrimination.

**RECOMMENDATION:** The consolidation bill should expressly state that it is not necessary to separately plead direct discrimination and indirect discrimination.

### **1.2. Alternative recommendations if the Government does not adopt a unified test**

If the Government does not adopt a unified definition in the consolidation bill, NACLC believes that it is essential that the comparator element is removed from the test for direct discrimination and replaced with the 'detriment test'.<sup>5</sup>

NACLC is concerned that the use of a comparator in anti-discrimination law has limited the potential for discrimination cases to succeed and has distracted the judiciary from the core questions of whether unfavourable treatment has occurred, and the reasons for that treatment. In many cases, there is no comparator, or questions over the characteristics of the comparator become technical discussions on which a case can succeed or fail.<sup>6</sup> In NACLC's view, this is concerning in legislation designed to protect fundamental human rights.

Further, as set out in our response to Question 10, we submit that the comparator test would pose significant challenges to the application of protections against intersectional discrimination proposed for the consolidation bill. Accordingly, NACLC strongly recommends that the comparator test be removed from the definition of discrimination in the consolidation bill.

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<sup>5</sup> See for example, section 8(1)(a) of the *Discrimination Act 1991* (ACT).

<sup>6</sup> See for example, *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR.

**RECOMMENDATION:** If the Government does not accept the recommendation to include a unified definition of discrimination in the consolidation bill, the existing test for direct discrimination should be amended so that it does not include a comparator element. The test for direct discrimination should include a detriment test similar to section 8(1)(a) of the *Discrimination Act 1991* (ACT).

NACLC also recommends that the test for indirect discrimination be made consistent for all protected attributes. In light of the Government's commitment not to reduce existing protections, NACLC recommends that the existing test for indirect discrimination be amended so that:

- there is no requirement that a complainant show that s/he cannot meet the condition as part of the test for indirect discrimination;<sup>7</sup> and
- it should only be necessary to show that the requirement or the condition has, or is likely to have, the effect of disadvantaging persons with that attribute (rather than establishing that a significantly higher proportion of people with that attribute cannot comply with that condition or requirement) and
- the requirement of reasonableness be replaced with the requirement that a respondent show that the discriminating behaviour is a reasonable, necessary and proportionate means of achieving a legitimate aim and<sup>8</sup>
- as in s6(4) DDA, s7C SDA 1984 and s15 of ADA the burden of proving that a discriminatory action is a reasonable, necessary and proportionate means of achieving a legitimate aim should be placed on respondents for all protected attributes.

**RECOMMENDATION:** If the Government does not accept the recommendation to include a unified definition of discrimination in the consolidation bill, the existing test for indirect discrimination should be amended so that:

- there is no requirement that a complainant show that s/he cannot meet the condition as part of the test for indirect discrimination;<sup>9</sup> and
- it should only be necessary to show that the requirement or the condition has, or is likely to have, the effect of disadvantaging persons with that attribute (rather than establishing that a significantly higher proportion of people with that attribute cannot comply with that condition or requirement) and
- the requirement of reasonableness be replaced with the requirement that a respondent show that the discriminating behaviour is a reasonable, necessary and proportionate means of achieving a legitimate aim and<sup>10</sup>

<sup>7</sup> SDA s 5(2), ADA s 15(1), DDA s5(2), cf. RDA s9(1A)(b).

<sup>8</sup> Human Rights and Equal Opportunity Commission, *Submission to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008, 77.

<sup>9</sup> SDA s 5(2), ADA s 15(1), DDA s5(2), cf. RDA s9(1A)(b).

- as in s6(4) DDA, s7C of the SDA and s15 of the ADA, the burden of proving that a discriminatory action is a reasonable, necessary and proportionate means of achieving a legitimate aim should be placed on respondents for all protected attributes.

## 2. QUESTION 2: HOW SHOULD THE BURDEN OF PROVING DISCRIMINATION BE ALLOCATED?

NACLC submits that the current burden of proof requirements under the Commonwealth anti-discrimination law regime places too great an evidentiary burden on the individual complainant. In our experience, the burden of proof is often impossible for complainants to satisfy in the absence of ready access to evidence, which is usually held by the respondent.

NACLC recommends that once the complainant has raised a prima facie case, a rebuttable presumption of discrimination should arise. The respondent must then prove that the conduct was not unlawful. This is consistent with section 136 of the *Equality Act 2010* (UK) and section 261 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). This is important as it would create harmonisation between employment discrimination and all other discrimination matters at the Commonwealth level.

### Case Study

*A CLC received a number of complaints against a bowling club about discrimination on the basis of race. The CLC then acted for an Aboriginal woman in a complaint against the bowling club under the RDA. The woman's membership of the club was suspended because she used minor offensive language. Her membership was then suspended for a further 12 months for no apparent reason.*

*Not only was the punishment completely disproportionate to the breach of the club rules, the woman believed that Aboriginal members of the club received harsher penalties than non-Aboriginal members for the same or similar breaches of the club rules.*

*This type of racial discrimination is very difficult for a complainant to prove. The woman had enough evidence to establish a prima facie case of discrimination but did not have any of the evidence concerning causation. For example, she did not have access to the minutes of the meeting where her membership status was discussed and the decision taken to suspend it. Furthermore, she*

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<sup>10</sup> Human Rights and Equal Opportunity Commission, *Submission to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008, 77.

*did not know about the total number of memberships suspended and the race of the affected members. She only had anecdotal evidence regarding those issues.*

*She decided to settle the matter, partially because of these difficulties with the onus of proof. The onus of proof to provide such evidence should fall on the respondent once the complainant has outlined a prima facie case of discrimination.*

**RECOMMENDATION:** The consolidation bill should provide that once the complainant has raised a prima facie case of discrimination, a rebuttable presumption of discrimination should arise. The respondent must then prove that the conduct was not unlawful.

### **3. QUESTION 3: SHOULD THE CONSOLIDATION BILL INCLUDE A SINGLE SPECIAL MEASURE PROVISION COVERING ALL PROTECTED ATTRIBUTES? IF SO, WHAT SHOULD BE TAKEN INTO ACCOUNT IN DEFINING THAT PROVISION?**

NACLC submits that special measures are an essential component in achieving substantive equality and eliminating discrimination in Australia. However, the meaning and scope of special measures in the current Commonwealth anti-discrimination law regime does not meet international human rights standards, and have been relied on by successive Commonwealth governments to implement a range of discriminatory policies.

NACLC recommends that the consolidation bill include a single special measure provision covering all protected attributes. The definition of special measures should relate to the objects of a consolidated Act.

A special measure is not unlawful discrimination, and should not be described or defined as an exemption or exception. Rather, the definition of special measures should be drawn from international human rights standards – specifically, the Committee on the Elimination of Racial Discrimination’s *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*.

The key features of special measures set out in General Recommendation No. 32 are that the special measure:

- is temporary;
- aimed at achieving substantive equality;
- appropriate, legitimate and proportionate in a democratic society;
- based on accurate data;

- designed and implemented on the basis of need;
- designed in consultation with affected groups;
- implemented with the participation of affected groups; and
- membership of affected groups be self-identified.

NACLC further submits that other key features of special measures should be that they:

- further the objects of the consolidated act; and
- be beneficial for the affected group.

**RECOMMENDATION:** The consolidation bill should include a single special measure provision covering all protected attributes.

The definition of a special measure should include all the key features set out in the Committee on the Elimination of Race Discrimination's *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*. Additional key features should include that the special measures further the objects of the Act and be beneficial for the affected group.

#### **4. QUESTION 4: SHOULD THE DUTY TO MAKE REASONABLE ADJUSTMENTS IN THE DDA BE CLARIFIED AND, IF SO, HOW? SHOULD IT APPLY TO OTHER ATTRIBUTES?**

NACLC considers that the imposition of a duty to make reasonable adjustments to accommodate the needs of people with a protected attribute is of fundamental importance to the realisation of substantive equality and the elimination of discrimination. We submit that there is no principled basis upon which the duty to make reasonable adjustments should be limited to people with a disability. In this respect the current law is unfair, confusing and complex.

The proposed consolidation bill must clearly establish the link between the duty to provide reasonable adjustments and the objective of Parliament to both realise substantive equality for persons with protected attributes, and eliminate discrimination against them as far as possible.

Courts have struggled to interpret and apply the concepts of reasonable adjustment and unjustifiable hardship. NACLC recommends that the consolidation bill include express guidance on the meaning of these concepts. It should also provide express guidance on the extent of the onus imposed on respondents to make adjustments before they are able to claim the relief of an unjustifiable hardship defence.

NACLC further recommends that the tests for reasonable adjustment and unjustifiable hardship in the consolidation bill reflect the remedial and protective public law context within which these concepts operate.

If, contrary to our recommendation in response to Question 1, the consolidation bill retains the comparator test in the definition of direct discrimination, we submit that the

definition make it clear that circumstances are not materially different because a person with a protected attribute requires a reasonable adjustment. Further, the consolidation bill should also provide that the failure to make a reasonable adjustment is, of itself, unlawful discrimination and can be a cause of action. Both recommendations are consistent with the existing provisions of the DDA.

Finally, we recommend that the respondent carry the burden of establishing that an adjustment constitutes an unjustifiable hardship, which is consistent with the remedial and public law context of a consolidation bill.

**RECOMMENDATION:** The consolidation bill should impose a specific positive duty to make reasonable adjustments to accommodate persons with all protected attributes in all protected areas of life.

The duty should be incorporated into a stand-alone provision of the consolidation bill, and expressed as a duty to make reasonable adjustments to enable people with protected attributes to realise substantive equality with others in each protected area of life. Failure to make reasonable adjustments should be a basis for a complaint to the Australian Human Rights Commission and a cause of action.

**RECOMMENDATION:** The consolidation bill should define a reasonable adjustment as ‘the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship’.

**RECOMMENDATION:** The consolidation bill should establish a test for unjustifiable hardship that takes into account:

- the objects of the bill and Parliament’s intention to create an environment of substantive equality;
- the individual and social harm caused by discrimination, and Parliament’s intention to eliminate discrimination as far as possible;
- the overall capacity, including the financial capacity, of a respondent to provide the required adjustment;
- the availability of financial and other assistance to make the required adjustment; and
- the reasonableness of the respondent’s attempts, if any, to make the required adjustment, or to mitigate the impact of its inability to provide the required adjustment to the full extent.

**RECOMMENDATION:** The definition of unjustifiable hardship in the consolidation bill should refer to an adjustment that is not reasonable to provide because of an unavoidable or inherent limitation, or the financial capacity of the respondent.

**RECOMMENDATION:** The consolidation bill should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.

**RECOMMENDATION:** The consolidation bill should provide that the burden of establishing that a required adjustment constitutes an unjustifiable hardship rests with the respondent.

## **5. QUESTION 5: SHOULD PUBLIC SECTOR ORGANISATIONS HAVE A POSITIVE DUTY TO ELIMINATE DISCRIMINATION AND HARASSMENT?**

NACLC submits that proactive steps to prevent discrimination and promote equality are crucial to effectively reducing individual and systemic discrimination. Creating an environment where discrimination does not happen in the first place is good for individuals, organisations and society as a whole. Accordingly, the consolidation bill should include a positive equality duty which:

- places obligations on duty-holders to consult and develop measures to address discrimination and promote substantive equality;
- includes mechanisms to monitor and assess the operation of the positive duty;
- is sustainable and has enforcement mechanisms;
- takes account of the duty holder's size, circumstances and resources; and
- is normative and not merely an exercise in form-filling or box ticking.

The AHRC should be empowered to facilitate and regulate compliance with the positive obligations.<sup>11</sup> The AHRC should also create standards or best-practice guidelines, which would assist in the implementation and assessment of positive duties.<sup>12</sup>

NACLC does not believe that the operation of the positive duty should be limited to public sector organisations. The private sector should also be bound by the positive duty, as it is in Victoria under the *Equal Opportunity Act 2010* (Vic).

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<sup>11</sup> The Federal Government would also ensure that the AHRC was adequately resourced to perform this regulatory role.

<sup>12</sup> The UK's Equality and Human Rights Commission recently issued a series of guides for public authorities on the UK's new public sector equality duty. The guides cover what public authorities should do to meet the duty, including legal requirements and recommended actions. See: <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>.

Examples of how duty holders could discharge the positive duty include:

- a health service introducing an outreach program targeted towards people with certain types of disabilities who are less likely to access existing services;
- a transport company ensuring that young people are specifically consulted in relation to a new ticketing policy; and
- the development of an education program on homophobic bullying in schools.

In addition to the Victorian example, positive duties exist in Northern Ireland, South Africa, Canada and the United States, among others.<sup>13</sup>

#### Case Study

*The Equal Opportunity Act 2010 (Vic) includes a new positive duty aimed at encouraging proactive self-regulation. The Act requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The Victorian Equal Opportunity and Human Rights Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people.*

**RECOMMENDATION:** A positive duty of equality should be placed on public and private bodies.

**RECOMMENDATION:** The AHRC should be empowered to facilitate and enforce compliance with a positive obligation without first receiving a complaint.

#### **6. QUESTION 6: SHOULD THE PROHIBITION AGAINST HARASSMENT COVER ALL PROTECTED ATTRIBUTES? IF SO, HOW WOULD THIS MOST CLEARLY BE EXPRESSED?**

NACLC submits that harassment is, and should be expressly dealt with as a specific, aggravated form of discrimination. Among other things, this will have the effect of establishing a clear linkage between the prohibition against harassment and the objectives of a consolidated Act.

Harassment of a person on the basis of a protected attribute, or a combination of two or more protected attributes, should be made unlawful in all protected areas of life. It is

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<sup>13</sup> s 75 and Schedule 9 *Northern Ireland Act 1998* (UK); *Fair Employment and Treatment (NI) Order 1998* (UK); *Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equality Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equality employment opportunity* (US).

also essential that persons with more than one protected attribute are able to complain of harassment that is based on a combination or intersection of attributes.<sup>14</sup>

NACLC submits that there is no principled basis on which harassment of persons with particular protected attributes is made unlawful and other persons protected by other aspects of anti-discrimination law are not provided with this protection. There is also no principled basis upon which harassment is made unlawful in particular protected areas of life and not others. In this respect the current law is unfair, confusing and complex.

Courts have struggled to interpret and apply the concept of harassment in an equality context. NACLC recommends that the consolidation bill provide express legislative guidance on the meaning of harassment. We also recommend that harassment be defined as conduct by a person that a reasonable person, having regard to all the circumstances, would have anticipated would offend, humiliate or intimidate the person harassed.

NACLC further submits that sexual harassment of a person with a protected attribute on the basis of that attribute should be made unlawful in all protected areas of life. This will ensure that such protection extends to people regardless of gender, sexual orientation or intersex identity. Accordingly, we recommend that the definition of sexual harassment in section 28A of the SDA should be carried forward into the consolidated bill. NACLC also makes specific recommendations about harassment in our response at 9.3.

Finally, we recommend that the prohibitions against harassment and sexual harassment not be subject to any exceptions.

**RECOMMENDATION:** The consolidation bill should provide that it is unlawful to harass a person with any protected attribute on the basis of that attribute or the intersection of more than one protected attribute in any protected area of life.

**RECOMMENDATION:** The consolidation bill should provide that it is unlawful to sexually harass a person with a protected attribute on the basis of that attribute in any protected area of life.

**RECOMMENDATION:** The consolidation bill should define harassment as a specific, aggravated form of discrimination that includes conduct by a person that a reasonable person, having regard to all the circumstances, would have anticipated would offend, humiliate or intimidate the person harassed.

**RECOMMENDATION:** The consolidation bill should define sexual harassment in the same terms as currently provided in section 28(A) of the SDA.

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<sup>14</sup> For example, a woman with intellectual disability may be subject to harassment both on the basis of her gender and on the basis of stereotypical views that she is either less sensible or that she is promiscuous because of her cognitive impairment.

**RECOMMENDATION:** The consolidation bill should provide that the prohibitions against harassment and sexual harassment are not subject to any exception.

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## Part 5 – Protected Attributes

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### 7. QUESTION 7: HOW SHOULD SEXUAL ORIENTATION AND GENDER IDENTITY BE DEFINED?

NACLC supports the use of appropriate terminology in the consolidation bill that captures the whole of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities, and people perceived to be part of these communities. We support the terms ‘sexual orientation, gender identity, gender non-conformity and intersex’. We also support the inclusion of specific protections for LGBTI communities in the consolidation bill.

We submit that gender identity, gender non-conformity, gender expression, sexual orientation indeterminate sex and intersex status be should protected attributes on the basis of self identification or imputed or presumed status. This would protect in situations where discrimination occurs on the basis of assumptions rather than the self-identification of the individual.

NACLC submits that current state, territory and Commonwealth anti-discrimination protections are not appropriate for the LGBTI communities. The lack of any protection in current Commonwealth anti-discrimination law leaves a significant gap in fundamental protections for the LGBTI communities and is contrary to Australia’s obligations under the Yogyakarta Principles.<sup>15</sup>

#### 7.1. Sexual orientation

NACLC supports the protection of sexual orientation under federal discrimination but recommends limitations that restrict the scope of the consolidation bill to homosexuality, lesbianism and bisexuality. We submit that as the dominant group, heterosexual people should not be seen to have a cause of action based on their sexual orientation. Homophobia has a long and institutionally entrenched history in the law, religion and in psychiatry. In our view, general provisions in the consolidation act that protect all people from discrimination on the basis of their sexual orientation would not have the same effect as specific protections for marginalised communities.

#### 7.2. Gender identity and non-conformity

NACLC supports a definition of gender identity that is broad and inclusive. Any definition of transgender communities needs to recognise the potential exclusivity of terms like transsexual and transgender and endeavour to formulate a definition that encompasses the variety of bodies and experiences that make up transgender communities. The drafting of the legislation should not be informed by traditional understandings of the relationship between sex, gender and sexuality; rather,

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<sup>15</sup> *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf). The Principles were developed by the ICJ and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, 6-9 November 2006, attended by among others, the UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, non-government organisations and others.

consideration needs to be given to who is in need of protection from discrimination and vilification.

Gender identity appropriately defined is probably the most inclusive term currently employed. Irrespective of the words used, we do not support any surgical requirement in order for anyone to be recognised under the law, a position that is consistent with Australia's international human rights obligations.<sup>16</sup> Gender identity should refer to a person's self identification, gender expression and gender non-conformity.

NACLC also submits that gender non-conformity is a crossover issue for both the LGB and TI communities. In the LGB communities, examples of gender non-conformity may include 'butch' women, 'femme' boys or 'gender queer' expressions. Gender non-conformity is often a 'tell' or trigger for discrimination. Unless given specific consideration, gender non-conformity may not be captured by definitions of LGBTI. If an individual's identity is not captured neatly by definitions of LGBTI, help may not become available until it is too late, and violence or the threat of violence has escalated.

#### **Case Studies**

*Gloria and Maree were partners who applied to rent a house through a real estate agent. They both had good jobs and rental references and were told informally by the real estate agent that their application looked strong. A few days later their application was refused. When Gloria questioned the real estate agent she stated that the landlord had "conservative opinions". Gloria and Maree strongly felt that they had been denied the property because of their sexuality.*

*Veronica sought assistance from a community legal centre after she had unsuccessfully sought to have gender reassignment surgery funded through Medicare. As this area was not covered by federal discrimination law, Veronica was not able to lodge a discrimination complaint in relation to this denial. Lack of access to discrimination law remedies in this instance impacted directly on Veronica's equality of access to medical services.*

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<sup>16</sup> Article 6 of the ICCPR preserves the right to physical integrity. This right has been interpreted as comprising two components: Firstly, the protection against violation of and offences against the body by others. Secondly, the right to determination over one's own body, the right to self determination (see Smith, J, Male Circumcision and the Rights of the Child found at <http://www.cirp.org/library/legal/smith/> on 6 December 2010). If the state requires transgender people to have surgery as a prerequisite to enjoy legal protections, this is counter to the absolute right to physical integrity. The result being a state created group that is required to be sterilised, medicated and surgically altered, at their own cost, in order to access the same rights as other citizens.

*Emmett is a gay man living in an apartment in the inner city. Emmett likes his house to be beautiful and has spent lots of time decorating it. He cultivates flowers and has them arranged on his front doorstep. Emmett also has fairy statues among the flowers. Emmett loves music and enjoys dancing. Emmett also enjoys baking and is more than happy to share treats with his neighbours. Some of Emmett's neighbours have become more and more hostile calling him female names as well as offensive terms like 'faggot'. The violence escalated until Emmett's life was put at risk.*

Within gender diverse and intersex communities, appearing to have a characteristic from one gender can lead to a person being 'outed'. This 'outing' is often a precursor to actual discrimination. For these reasons, NACLC submits that it is important that the consolidation bill provides specific protections to those discriminated against or vilified because of their gender non-conformity

### **7.3. Intersex**

NACLC recommends that intersex people be covered in the consolidation bill. In defining intersex, NACLC refers to the definition provided by Organisation Internationale des Intersexues Australia, which is as follows:

Intersex people are people who, as individuals, have genetic, hormonal and physical features that may be thought to be typical of both male and female at once. That is, we may be thought of as being male with female features, female with male features, or indeed we may have no clearly defined sexual features at all.

Based on this definition we suggest that both 'indeterminate sex' and intersex are used in the consolidation bill. The reason for this is some people do not identify as any sex – while some people will prefer to identify as intersex.<sup>17</sup>

**RECOMMENDATION:** The consolidation bill should include the use of appropriate terminology that captures the whole of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities, and people perceived to be part of these communities. It should make specific and appropriate use of the terms homosexuality, lesbianism, bisexuality, gender identity, gender non-conformity, gender expression, intersex and indeterminate sex.

<sup>17</sup> Intersex (as opposed to 'intersexed') is always the preferred term, as in 'I am an intersex woman', 'I am intersex', 'I am an intersex man', and so on. The reason for this is that 'intersexed' tends to indicate something has been done to the person and that reinforces the notion of a condition or a disorder. Intersex is about the sex differences and not about gender roles. This distinction should be reflected in the consolidation bill.

## 8. QUESTION 8: HOW SHOULD DISCRIMINATION AGAINST A PERSON BASED ON THE ATTRIBUTE OF AN ASSOCIATE BE PROTECTED?

Consistent with the aims of the consolidation process, discrimination against an associate should be made unlawful across all protected attributes. NACLC supports the adoption of a provision similar to section 7 of the DDA, and the inclusion of a definition which includes a non-exhaustive list of relationships that could be defined as an 'associate'. In order to ensure the effectiveness of the law in this area, courts should be able to determine whether a person is an 'associate' based on the facts of the case, rather than an exhaustive definition.

**RECOMMENDATION:** Discrimination based on the attribute of an associate should be protected in the consolidation bill across all protected attributes. It should include a non-exhaustive definition of 'associate'.

## 9. QUESTION 9: ARE THE CURRENT PROTECTIONS AGAINST DISCRIMINATION ON THE BASIS OF THESE ATTRIBUTES APPROPRIATE?

NACLC submits that the consolidation bill should extend coverage to a broader range of attributes than are currently covered in the four core Commonwealth anti-discrimination laws, as detailed in the paragraphs below. This would eliminate confusion and inconsistency between the new consolidated bill and state and territory anti-discrimination legislation, the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) and the *Fair Work Act*.

The Government should also consider the inclusion of additional attributes where this would be in line with international best practice and human rights law standards and the discrimination faced by particular groups is well-evidenced.

NACLC recommends that the consolidation bill contain a non-exhaustive list of protected attributes which specifically includes the following:

- sexual orientation
- gender identity, gender non-conformity, gender expression
- intersex status and indeterminate sex
- irrelevant criminal record
- homelessness / social status
- status as a victim of family violence
- religious belief / activity
- obesity, in the definition of disability
- political belief / activity
- trade union membership / industrial activity
- family and carer responsibilities
- characteristics which are extensions of other attributes including family and carer responsibilities
- 'other status'

### 9.1. 'Other Status' and non-exhaustive list of attributes

NACLC submits that the list of protected attributes in the consolidation bill should be a non-exhaustive list which specifically prohibits discrimination on the ground of 'other status'. This would be consistent with Australia's obligations under international human rights law and with recognised international best practice.<sup>18</sup> The *International Convention on Civil and Political Rights (ICCPR)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR)* prohibit discrimination on certain grounds which include any 'other status'. Other status' has been found to refer to a clearly definable group of people linked by their common status.<sup>19</sup> Such a mechanism for extending protection to additional attributes would ensure that Australia's anti-discrimination laws are able to respond to social change and new forms of discrimination over time.<sup>20</sup>

NACLC submits that an alternative to adding 'other status' as a fully protected attribute would be to allow complaints on the basis of 'other status' to be received by the AHRC under the AHRC Act but for these complaints not to be a cause of action justiciable in the federal court, similar to complaints currently under the ILO complaints stream in the AHRC Act.<sup>21</sup>

The AHRC should also regularly monitor and report on complaints brought on the ground of 'other status' and make recommendations to the Government for the inclusion of new and emerging attributes as protected attributes.

**RECOMMENDATION:** Consistent with Australia's human rights obligations, the consolidation bill should include a non-exhaustive list of protected attributes and include the ground of 'other status' in order to recommend to Government any further attributes that should be protected.

**RECOMMENDATION:** If 'other status' is not fully protected as an attribute, the AHRC should still be able to receive complaints on this basis. The AHRC should monitor new and emerging trends in relation to discrimination on 'other status' and make recommendations to the Government on the inclusion of new attributes in order to ensure the protection of new and emerging attributes as protected attributes.

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<sup>18</sup> See, for example, Article 5 of the Declaration of Principles on Equality which provide that discrimination based on any other ground (in addition to those enumerated) 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 (accessed at <http://www.equalrightstrust.org/endorse/index.htm>).

<sup>19</sup> The Committee on Economic, Social and Cultural Rights (CESCR) considered the effect of the words 'other status' in their General Comment No. 20, in which they stated that in their view, 'other status' indicated that the list of grounds is not exhaustive and that other grounds may be incorporated into the category. (see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2<sup>nd</sup> ed, 2004) at 689, which discusses the UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status').

<sup>20</sup> See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2<sup>nd</sup> ed, 2004) at 689, which discusses the UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

<sup>21</sup> AHRC Act Part II Division 4.

## 9.2. Homelessness / Social Status

### Case Study

*I have been refused by many real estate agents based on the fact that I was receiving parenting payments from Centrelink. I was told on several occasions by agents specifically that was the reason. I have also been refused from private landlords for the same spoken reason.*

*I was successful in filling out an application for private rental because I presented well until I filled out my income and address details, then nobody wanted me. I was refused private rental because my bond cheque was from the Office of Housing.<sup>22</sup>*

NACLC submits that the consolidation bill should prohibit discrimination and promote equality on the basis of 'social status'. For the purpose of this submission, we use the term 'social status' to include not only persons who are homeless, but also those who are at risk of – or recovering from – a period of homelessness. The term 'social status' should encompass a person's status as homeless, unemployed or a recipient of social security payments.

People experiencing homelessness suffer direct and indirect discrimination on a regular basis. In a 2006 study by the PILCH Homeless Persons' Legal Clinic it was found that amongst the 183 people experiencing homelessness that were surveyed, almost 70 per cent experienced unfair treatment in the area of accommodation, on the grounds of homelessness or social status. A further 60 per cent experienced unfair treatment on the same grounds in the area of goods and services. Discrimination systematically excludes people from access to goods, services, the justice system, health care, housing and employment and by doing so, contributes to the continuing experience of homelessness.<sup>23</sup> In this way, homelessness is both a cause and a consequence of discrimination. The Special Rapporteur on Adequate Housing has stated that:

homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status.<sup>24</sup>

Discrimination on the basis of homelessness is often compounded by other forms of discrimination, such as discrimination on the basis of a person's disability or status as a victim of family violence.

Protecting people experiencing homelessness from discrimination under the law would enable these individuals to access employment, accommodation and other goods and

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<sup>22</sup> Council to Homeless Persons, *Submission to the Scrutiny of Acts and Regulations Committee: Equal Opportunity Bill 2010*, March 2010 (accessed at [http://www.chp.org.au/public\\_library/items/2010/03/00258-upload-00001.pdf](http://www.chp.org.au/public_library/items/2010/03/00258-upload-00001.pdf)), 3.

<sup>23</sup> PILCH Homeless Persons' Legal Clinic, *Discrimination on the Basis of Homelessness: Position Paper of the PILCH Homeless Persons' Legal Clinic*, available at [http://www.pilch.org.au/Assets/Files/HPLC\\_position\\_paper\\_discrimination-homelessness.pdf](http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf).

<sup>24</sup> Kothari M, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc E/CN.4/2005/48, [3].

services on an equal footing with others. It would support the Commonwealth Government's policy priorities of tackling and reducing homelessness in order to increase social inclusion and create a healthier, happier, more productive community. By contributing to the reduction in homelessness, these changes would also deliver economic benefits, given that the costs of an individual remaining homeless can amount to \$34,000 per year.<sup>25</sup>

Whilst there is no protection from discrimination on the grounds of 'social status' (or homelessness or any other similar ground) in any state or territory or at the Commonwealth level, a number of jurisdictions include social status or similar attributes as a protected ground in their anti-discrimination legal framework.<sup>26</sup> These protections have been operating for a number of years in these jurisdictions.

**RECOMMENDATION:** The consolidation bill should include 'social status' as a protected attribute. 'Social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

### 9.3. Sexual orientation and gender identity

In our response to Question 7, NACLC submits that the consolidation bill can strengthen protections against discrimination on the basis of sexual orientation and gender by the use of appropriate terminology that captures the whole of the LGBTI communities, and people perceived to be part of these communities.

NACLC believes that many specific of discriminatory treatment suffered by people on the basis of sex, gender identity and sexual orientation such as the disclosure of that identity or 'outing' would be covered by the definition of discrimination we have recommended. However, in order to ensure protection from this specific form of discrimination, NACLC recommends that the definitions of harassment contained in the consolidation bill be sufficiently drafted to protect people on the basis of sex, sexual orientation and gender identity from:

- malicious outing – in order to prevent the disclosure needlessly, maliciously and without reasonable excuse, a person's sex, sexual orientation or gender identity ; and
- procedural outing – which occurs when an individuals' sex, sexual orientation or gender identity is exposed as part of an administrative process, such as government, employment or in an association.

**RECOMMENDATION:** The consolidation bill should contain provide protection from harassment for people on the basis of sex, sex orientation and gender identity and allow complaints on that basis for malicious and procedural outing.

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<sup>25</sup> City of Sydney and St Vincent's Mental Health Services, *Help the Homeless: Spend Less, Spend Wisely* (accessed at <http://www.mhcc.org.au/images/uploaded/CitySydney-HelpHomeless.ppt#257,2,Overview>).

<sup>26</sup> For example, New Zealand, Canada, the United States, the United Kingdom and Europe.

#### 9.4. Irrelevant criminal record

##### Case Study

*Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told that his services were no longer required because of his prison record. Dimitri was devastated, having completely run his own cleaning business in the past.<sup>27</sup>*

People with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.<sup>28</sup> Having a criminal record can be a significant barrier to obtaining meaningful employment in a wide range of fields as well as presenting barriers in other areas of life, such as housing. The prevalence of this form of discrimination can prevent the rehabilitation of offenders and impede their reintegration into society.<sup>29</sup> Ultimately, by impeding reintegration, this form of discrimination contributes to the increased risk of re-offending, a significant social and economic cost to the broader community.

Research demonstrates that a criminal record is often an unreliable indicator of future behaviour.<sup>30</sup> Unfortunately, despite the lack of reliability as an indicator of future behaviour, there is an increasing reliance on criminal record vetting processes as a risk management tool in relation to any form of paid or voluntary work. Crim Trac, the government agency responsible for providing national criminal history checks for accredited agencies, processed approximately 2.9 million checks to 100 different accredited agencies over a twelve month period, which is a more than a five-fold increase from the reporting period 2000 to 2001.<sup>31</sup>

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<sup>27</sup> Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005, (available at [http://www.jobwatch.org.au/uploaded\\_files/144623crvpr0706.pdf](http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf)), at 28.

<sup>28</sup> Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, at 6-7; Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005, (available at [http://www.jobwatch.org.au/uploaded\\_files/144623crvpr0706.pdf](http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf)).

<sup>29</sup> For example, research in the UK has shown that employment can reduce re-offending by between a third to a half – see, Home Office, *Breaking the Circle: Report on the Review of the Rehabilitation of Offenders Act*, July 2002.

<sup>30</sup> Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, at 6. In 1987, the Australian Law Reform Commission (ALR) stated that ‘an old conviction, followed by a substantial period of good behaviour, has little if any value as an indicator of how the former offender will behave in the future’ (see Australian Law Reform Commission, *Spent Convictions*, ALRC 37, 1987). The Sentencing Advisory Council has similarly stated that ‘research has shown that most serious crimes against the person are committed by offenders who have not previously been convicted of a violent offence, and who will not go on to be convicted for future violent offences’ (see Kelb, K, *Recidivism of Sex Offenders*, Sentencing Advisory Council, 2007, at 1). Further, UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young (see *Criminal careers of those born between 1953 and 1978*, Home Office Statistical Bulletin 4/2001).

<sup>31</sup> Crim Trac Annual Report 2010-11, at 32 (accessed at [http://www.crimtrac.gov.au/documents/CT10-11\\_part3.pdf](http://www.crimtrac.gov.au/documents/CT10-11_part3.pdf)). For example, bus drivers, supermarket attendants and volunteers at community organisations are routinely required to undergo criminal record checks.

Including 'criminal record' as a protected attribute would also simplify as well as strengthen the existing legal framework, which provides partial and inconsistent protection from criminal record based discrimination. Federally, complainants who have experienced discrimination on the basis of their criminal record are able to complain to the AHRC but are unable to enforce their rights through the Federal judicial system. In Victoria, New South Wales, South Australia and Queensland, anti-discrimination laws do not prohibit discrimination on the basis of criminal record. Spent convictions legislation also operates in some Australian states and territories, which, in effect, operates to prevent discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.<sup>32</sup>

Discrimination on the basis of irrelevant criminal record is also prohibited under international law. Australia has ratified the International Labour Organisation Convention III, the Discrimination (Employment and Occupation) Convention 1958 (**ILO 111**) which requires the Australian Government to pursue policies to ensure criminal record-based discrimination is eliminated.<sup>33</sup> International jurisprudence indicates that discrimination on the grounds of criminal record is likely to be protected under the description 'other status'.<sup>34</sup> The European Court of Human Rights (**ECHR**), for example, has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.<sup>35</sup>

For the reasons above, and in order to give effect to Australia's international obligations, NACLC recommends that prohibition on the basis of irrelevant criminal record be prohibited under the consolidation bill.

**RECOMMENDATION:** The consolidation bill should include irrelevant criminal record as a protected attribute.

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<sup>32</sup> In every Australian state and territory, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia, the spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

<sup>33</sup> ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

<sup>34</sup> Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, at 11; *Thlimmenos v Greece*, 6 April 2000, Application No.34369/97.

<sup>35</sup> See, *Thlimmenos v Greece*, 6 April 2000, Application No.34369/97.

## 9.5. Religious belief/activity

### Case Studies

*At a job interview with an insurance company, Mariam, a Muslim, is asked about her religious background. Even though Miriam is the best candidate, the human resources manager tells her he cannot offer her the job because he believes she will have to leave her workstation for prayer several times a day.<sup>36</sup>*

*Nada worked at a mobile phone shop. She wore a hijab and was a Muslim. She started to be subjected to treatment at work that she did not think had anything to do with her work performance. She felt it was because of her religion and the fact that she wore a hijab. This was confirmed when her boss told her that she could not wear her hijab to work. She resisted this and was subject to increased bullying at work. She sought legal advice from a community legal centre that advised her that there was limited protection in relation to this type of discrimination at a federal level. It was likely that the matter could not be successfully resolved legally.*

As is the case with criminal record discrimination and religious discrimination, discrimination against individuals on the basis of political opinion, and industrial activity is covered by ILO 111. These grounds are also enshrined in other international instruments. For example, Article 26 of the ICCPR refers to protection from discrimination on grounds that include religion, political or other opinion and or social origin. These attributes are also protected to differing degrees, under the Fair Work Act and state and territory anti-discrimination laws.

To achieve consistency and harmonisation with Australian laws and compliance with international human rights law, NACLC recommends that these additional attributes be included in the consolidation bill.

**RECOMMENDATION:** The consolidation bill should include the following as fully protected attributes:

- religious belief and activity; and
- political belief and/or activity; and
- industrial activity.

<sup>36</sup> Source, VEOHRC website: [http://www.humanrightscommission.vic.gov.au/index.php?option=com\\_k2&view=item&layout=item&id=682&itemid=545](http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=682&itemid=545)).

## 9.6. Family and carer responsibilities and characteristics extensions

NACLC submits that the consolidation bill should include full protection from discrimination on the basis of family and carer responsibilities. This should cover both direct and indirect discrimination on the basis of family and carer responsibilities across all areas of protected life. Currently there is insufficient protection in this area, especially in relation to indirect discrimination which is how the bulk of discriminatory conduct in this area arises. It is especially important to include family and carer responsibilities as fully protected attributes across all areas of public life in conjunction with the right to bring an action due to the failure to make reasonable adjustments.

In addition, we recommend that the definition of 'carer' and 'family responsibilities' be broadened to include domestic relationships and cultural understandings of family, including kinship groups.

**RECOMMENDATION:** Family and carer responsibilities should be fully protected both from direct and indirect discrimination across all areas of public life. Discrimination in this area should also include a failure to make reasonable adjustments. The definition should be broadened to include domestic relationships and cultural understandings.

NACLC submits that it is important that carer and family responsibilities - and other characteristics associated with sex and disability - be protected under the consolidation bill. In line with the recommendations of the AHRC submission to the Discussion Paper, NACLC recommends that the consolidation bill provide specific recognition for the characteristics of pregnancy or potential pregnancy, family responsibilities, breastfeeding, using an assistive device, being accompanied by an assistant or carer, and being accompanied by an assistance animal.

**RECOMMENDATION:** The consolidation bill should provide for specific recognition of the characteristics of pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer, being accompanied by an assistance animal.

## 9.7. Status as a victim or survivor of domestic or family violence

NACLC supports the inclusion of 'status as a victim or survivor of domestic or family violence' as a protected attribute under Commonwealth anti-discrimination law.<sup>37</sup> In general, NACLC supports the approach set out by Belinda Smith and Tashina Orchiston in their Working Paper, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law*.<sup>38</sup>

Domestic/family violence continues to occur in Australia at alarming rates, with 15 per cent of Australian women experiencing physical or sexual violence from a previous partner and 2.1 per cent from a current partner.<sup>39</sup> Domestic/family violence is the leading preventable cause of death, disability and illness for Australian women under 45 years of age.<sup>40</sup> Further, it is estimated that violence against women and children will cost the Australian economy \$15.6 billion by 2021-2022 unless the rate and extent of violence is reduced.<sup>41</sup>

The Australian Domestic and Family Violence Clearinghouse's (ADFVC) *National Domestic Violence and the Workplace Survey* found that domestic/family violence impacted on workers by limiting their capacity to get to work; exposing them to violence in the workplace through abusive calls and emails, and the abusive person attending the workplace; and resulting in them being tired, distracted, unwell or late.<sup>42</sup>

### Case Study

*Brenda, a young woman experiencing ongoing violence from her ex-boyfriend, was dismissed from her workplace after he turned up at the office, threatened her, and caused a scene in front of clients.*

CLC clients have also reported experiencing domestic/family violence in other areas of public life, such as accessing accommodation. Domestic/family violence continues to be a major cause of homelessness for women.<sup>43</sup> For example, clients have reported

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<sup>37</sup> 'Victim or survivor' is preferred in order to indicate that domestic/family violence is a process of victimisation, but that those who experience it – mainly women – can also survive it and move on with their lives. 'Domestic or family violence' is preferred due to variation among state and territory legislation (e.g. *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2009* (Vic)), and because while 'domestic violence' is the older term, many Aboriginal and Torres Strait Islander people and members of CALD communities prefer the term 'family violence'.

<sup>38</sup> Smith, B and Orchiston, T, 'Domestic Violence Victims at Work: The Role of Anti-Discrimination Laws', Working Paper (12 December 2011), accessed at <http://sydney.edu.au/law/about/staff/BelindaSmith/index.shtml#pubs>.

<sup>39</sup> ABS, *Personal Safety Survey*, 2005.

<sup>40</sup> This figure includes the costs that result from the impact of domestic/family violence on workforce participation (see, VicHealth, *The Health Costs of Violence*, 2004, at 10).

<sup>41</sup> National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and Their Children*, March 2009, at 4.

<sup>42</sup> McFerran, L, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011. A short online survey in late 2011, distributed by the Federation of Community Legal Centres (Vic) and Domestic Violence Victoria among Victorian CLCs and domestic/family violence services produced brief case studies consistent with the results of the ADFVC survey. All case studies in this section are from the unpublished Victorian survey.

<sup>43</sup> For more detail, see Spinney, A and Blandy, S, *Homeless prevention for women and children who have experienced domestic and family violence: innovations in policy and practice*, Australian Housing and Urban Research Institute, June 2011.

that they have had difficulty in obtaining rental accommodation in the public and private rental markets when their status as a victim/survivor of domestic/family violence is known to decision-makers.

### **Case Studies**

*Mary was in a violent relationship and her application for private rental accommodation was denied due to 'personal issues'. She eventually found accommodation elsewhere from a landlord who didn't know about the domestic/family violence.*

*Teresa had been a victim of domestic/family violence in the past, and had great difficulty trying to obtain public housing. Everyone she dealt with believed that she would return to her violent ex-partner or enter into another abusive relationship and so they said there was no point in assisting her with accommodation or reunification with her children. Fortunately, Teresa obtained the support of a local government member who was able to advocate for housing for her.*

NACLC submits that current anti-discrimination law is not sufficient to challenge the barriers to accessing services and employment for victims/survivors of domestic/family violence. For example, even when discrimination against a victim/survivor of domestic/family violence appears to at least in part concern existing protected attributes, there may not be strong enough arguments for successful discrimination claims,<sup>44</sup> particularly when indirect and/or intersectional discrimination are also present.<sup>45</sup>

### **Case Study**

*Magda has three children and speaks English as a second language. She was unable to secure any rental properties when trying to exit a caravan park after fleeing domestic/family violence with her children. She believes that the biggest problem was that she had three young boys in tow when she went to see real estate agents. Luckily Magda was helped by women from her children's play group, even though she didn't know them very well. They looked after her children while she bought new clothes from the op shop and then went to the real estate offices where she was taken more seriously. While Magda's story suggests that she may have been discriminated against on the basis of her*

<sup>44</sup> Smith, B and Orchiston, T, 'Domestic Violence Victims at Work: The Role of Anti-Discrimination Laws', Working Paper (12 December 2011), accessed at <http://sydney.edu.au/law/about/staff/BelindaSmith/index.shtml#pubs>.

<sup>45</sup> For a detailed discussion, and recommendations, on the issues of indirect discrimination and intersectional discrimination, see our response to Question 10.

*family responsibilities, it is unlikely that she would be able to legally prove this without also needing to have recourse to arguments based on her protected status as a victim/survivor of domestic/family violence.*<sup>46</sup>

NACLC further submits that there are several other justifications for a separate ground of discrimination relating to domestic/family violence:

- prohibiting discrimination on the basis of status as a victim of domestic/family violence and, specifically, gender-based violence, is consistent with Australia's international human rights obligations;<sup>47</sup>
- NACLC acknowledges the educative function that prohibiting discrimination on the ground of domestic/family violence could have in the broader community. It would assist in raising awareness in community and business of the impacts of domestic/family violence on other aspects of public life, and would support victim/survivors to disclose violence without fearing repercussions in other areas of their lives; and
- a separate ground is consistent with other current strategies, such as addressing the impact of domestic/family violence on the workplace via enterprise bargaining agreements.<sup>48</sup>

NACLC supports the definition of domestic/family violence that is presented in Smith and Orchiston's Working Paper, which is based on the ALRC and NSW Law Reform Commission's proposed definition. In particular, the definition should reflect the broad range of behaviours that are used to coerce or control others in the domestic/family violence context, as well as the broad types of relationships that fall within the category of domestic/family relationship.

The protection against domestic/family violence discrimination should apply in all areas of public life. It should cover people who have experienced domestic/family violence in the past, who are currently experiencing domestic/family violence or who are adversely treated because of the possible future consequences of domestic/family violence. It should also apply to actual victims or survivors, as well as perceived victims/survivors, and to associates of persons who are victims/survivors.

**RECOMMENDATION:** The consolidation bill should include status as a victim or survivor of domestic or family violence as a protected attribute.

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<sup>46</sup> Magda's example also supports reform of anti-discrimination legislation to more genuinely take account of indirect and intersectional discrimination.

<sup>47</sup> See, CEDAW General Recommendations 12 and 19, ICCPR Articles 2, 3, 7 and 26, and ICESCR Articles 3 and 10. Further, in its 2010 review of Australia, the Committee on the Elimination of Discrimination against Women recommended that Australia develop strategies to prevent homelessness resulting from domestic violence.

<sup>48</sup> NACLC notes that the Australian Labor Party committed to changing anti-discrimination legislation and the Fair Work Act to provide 'appropriate protection to victims of domestic/family violence in the workplace (see Australian Labor Party 46<sup>th</sup> National Conference, 2011, Amendment 448A).

## 9.8 Obesity (included in an amended definition of disability)

The definition of 'disability' in section 4 of the DDA should be amended to include obesity. There is a high incidence of prejudice against obese people in our society and a social stigma attached to being obese. The current definition of 'disability' is inadequate to address this community prejudice and current levels of discrimination.

### Case Study

Maxine works as a cleaner in a shopping centre. Her boss has frequently made negative comments about her weight, and eventually calls her into a meeting where he expresses concern that she is damaging her health by being obese. Maxine denies that she is sick in any way, and points to the fact that she has had no trouble performing her duties at work. Her boss says that her health is still a big worry, and that she is bound to get sick as she is so overweight, and makes her agree to start losing weight, otherwise she will receive a 'warning' at work. She will also not be offered overtime, as her boss believes she would be unable to complete it because of her weight. Maxine is distressed and angered by her boss's behaviour, as she believes she is a good worker and that she is being discriminated against on the basis of her weight.

In this example, Maxine has clearly been treated less favourably by her boss, however it is uncertain whether she would be able to make a complaint of disability discrimination under the DDA. At present, the medical profession in Australia does not consider obesity in itself to be a disability. In the case of a person like Maxine, who is obese but who has not been diagnosed with any illnesses and has no real loss of her bodily functions, it would be difficult to argue that she has been treated less favourably because of a "disability". It may be possible to argue that she has been discriminated on the basis of a future of imputed disability<sup>49</sup> however this would be technically difficult as it is not possible to ascertain what type of disability her boss is assuming she already has or will develop.

**RECOMMENDATION:** The definition of 'disability' in section 4 of the DDA should be amended to specifically include obesity.

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<sup>49</sup> Under parts (j) and (k) or the section 4 definition, DDA.

**10. QUESTION 10: SHOULD THE CONSOLIDATION BILL PROTECT AGAINST INTERSECTIONAL DISCRIMINATION? IF SO, HOW SHOULD THIS BE COVERED?**

NACLC submits that discrimination law in Australia fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination. The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex forms of discrimination.

Intersectional, or compound, discrimination is where a person's identity includes more than one attribute of potential discrimination – for example, a person with a disability who is Indian, or an Aboriginal woman.

**Case Study**

*An Aboriginal elder from northern NSW was forced to leave his community and move to a large town so that he could access dialysis treatment, which he requires three times a week. Many non-Aboriginal people who live outside his town and who require regular medical treatment are able to use community transport services to take them to the hospital and accordingly are able to remain in their communities. However, the community transport service does not travel to many of the Aboriginal communities, including to the Aboriginal elder's town. Unable to drive, the elder had no choice but to leave his community. The man is not being discriminated against because of his disability – as community transport is provided to others who require dialysis. Nor is he being discriminated against because of his race, as other Aboriginal people can access community transport when they are healthier and able to walk or drive to another town. It is really the intersection between these two attributes that have led to the discrimination.*

The current approach Commonwealth anti-discrimination law is to identify a 'ground' of discrimination in an 'area' of life. Where an individual seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation with a comparator without that characteristic.

Using the case study above to illustrate the point, this requires consideration of whether the Aboriginal elder has been discriminated against because of his disability or because of his race. In reality, the discrimination experienced is not merely disability discrimination plus race discrimination. In the absence of an explicit discriminatory comment about one of these attributes, it can be an impossible task to prove that the discrimination was linked to any one attribute in isolation of the others. The experience of discrimination is based on the intersection of multiple identities, and the Aboriginal

elder's experiences cannot therefore be adequately recognised as a complaint that simply identifies disability and race discrimination. As a result, cases such as this often fail.

In NACLC's experience, the definition of direct discrimination and the development of the 'comparator' test has fundamentally constrained the development of discrimination law. The legal test that requires a comparison of the treatment of someone without the particular characteristic has impacted on the ability of people facing complex forms of discrimination where there is no genuine comparator. Furthermore, the exact characteristics attributed to the comparator (often hypothetical) often determine whether a case can succeed or fail. Lack of clarity over the characteristics of the comparator can lead to ambiguity as to whether a case of discrimination is strong. In the context of the costs jurisdiction of the federal court system, this creates further disincentives for complainants to pursue their case.

In order for Commonwealth anti-discrimination law to adequately protect and promote the rights of persons and groups experiencing complex forms of discrimination, it should recognise intersectional discrimination as a separate ground of discrimination. Anti-discrimination law should aim to look at the 'whole person' when considering discrimination and not artificially segment the experience of people experiencing discrimination.

In order to achieve this, NACLC submits that the consolidation bill both removes the comparator test, and recognises that intersectional discrimination is more than 'multiple attribute discrimination' and that it is the effect of the intersection of multiple attributes. NACLC therefore recommends that the consolidation bill include intersectional discrimination as a distinct ground of discrimination.

NACLC further recommends that the definition of discrimination in the consolidation bill include the ability to claim discrimination 'on the basis of the intersection of two or more of these attributes'.

In terms of other legislative models, NACLC suggests that the Canadian Human Rights Act definition is preferred over the definition in the UK Equality Act. However, we would recommend that the definition include the words 'on the basis of the intersection of two or more of these attributes' rather than the term 'combination', to reflect the well established concepts of intersectionality, and the fact that it is not merely the combination of these attributes but the intersecting nature of identities.

Finally, NACLC recommends that as intersectional discrimination often impacts on individuals who are facing systemic disadvantage, a finding of intersectional discrimination should have a positive impact on the awarding of damages to reflect the impact of intersectional discrimination on individuals and to further prohibit such conduct.

**RECOMMENDATION:** The consolidation bill should protect against intersectional discrimination. This should be separately recognised as a specific ground, of discrimination.

**RECOMMENDATION:** The definition of discrimination in the consolidation bill should include discrimination 'on the basis of the intersection of two or more of these attributes'.

**RECOMMENDATION:** A finding of intersectional discrimination should be considered by the Courts as having a positive impact on damages awarded to the complainant.

## Part 6 – Protected Areas of Public Life

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### 11. QUESTION 11: SHOULD THE RIGHT TO EQUALITY BEFORE THE LAW BE EXTENDED TO SEX AND/OR OTHER ATTRIBUTES?

NACLC submits that equality before the law is an important principle of international human rights law.<sup>50</sup> The right to equality before the law requires all individuals to be treated equally by the law and to be afforded equal protection of the law. A comprehensive equality before the law provision is essential to ensure that Australia's laws are non discriminatory in operation or effect.<sup>51</sup> We recommend that that the coverage currently contained in the RDA be extended all other protected attributes.

**RECOMMENDATION:** The consolidation bill should protect the right to equality before the law to all protected attributes.

### 12. QUESTION 12: WHAT IS THE MOST APPROPRIATE WAY TO ARTICULATE THE AREAS OF PUBLIC LIFE TO WHICH ANTI-DISCRIMINATION LAW APPLIES?

NACLC recommends that the consolidation bill protect areas of public life in line with the current application of RDA to areas of public life, namely 'political, cultural, economic, social or any other field of public life'. This approach is consistent with Australia's international human rights obligation to provide comprehensive protection against discrimination.

The broad 'areas of public life' test in the RDA is preferable to the approach of identifying areas of life in terms such as 'goods' or 'services' or accommodation. In our experience, some key areas, such as policing or the security industry, do not clearly fall within the definition of a 'service', and this adds complexity and cost to running a discrimination case. To address this challenge, we recommend that the consolidation bill protect all areas of public life, with a focus on whether the discrimination occurred, rather than whether the respondent falls under a specific area of protected public life.

NACLC submits that discrimination protection in line with the RDA will ensure that a number of areas of life which have not been caught by current Commonwealth anti-discrimination law will be addressed by the consolidated bill. These include:

- employment, including domestic workers and voluntary employees;
- all partnerships arrangements, regardless of size;
- policing and security; and

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<sup>50</sup> Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights": Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) [1]

<sup>51</sup> See *Mabo v Queensland* (1989) 166 CLR 186 per Deane J at 230.

- coverage for all clubs and member-based associations.

**RECOMMENDATION:** The consolidation bill should provide protection against discrimination across 'political, cultural, economic, social or any other field of public life'.

### **13. QUESTION 13: HOW SHOULD THE CONSOLIDATION BILL PROTECT VOLUNTARY WORKERS FROM DISCRIMINATION?**

In our response to Question 12, above, NACLC recommends that protection against discrimination apply across 'political, cultural, economic, social or any other field of public life', which would include voluntary workers. NACLC strongly supports the inclusion of voluntary workers as protected under discrimination law and believes that all employers/ organisations utilising voluntary workers have a responsibility to ensure a discrimination free workplace.

### **14. QUESTION 14: SHOULD THE CONSOLIDATION BILL PROTECT DOMESTIC WORKERS FROM DISCRIMINATION?**

In our response to Question 12, above, NACLC recommends that protection against discrimination apply across 'political, cultural, economic, social or any other field of public life', which would include domestic workers.

### **15. QUESTION 15: WHAT IS THE BEST APPROACH TO COVERAGE OF CLUBS AND MEMBER-BASED ORGANISATIONS?**

In our response to Question 12, above, NACLC recommends that protection against discrimination apply across 'political, cultural, economic, social or any other field of public life', would include clubs and member-based organisation.

### **16. QUESTION 16: SHOULD THE CONSOLIDATION BILL APPLY TO ALL PARTNERSHIPS, REGARDLESS OF SIZE? IF NOT, WHAT WOULD BE AN APPROPRIATE MINIMUM SIZE REQUIREMENT?**

In our response to Question 12, above, NACLC recommends that protection against discrimination apply across 'political, cultural, economic, social or any other field of public life', which would include all partnership arrangements, regardless of size.

### **17. QUESTION 17: SHOULD DISCRIMINATION IN SPORT BE SEPARATELY COVERED? IF SO, WHAT IS THE BEST WAY TO DO SO?**

In our response to Question 12, above, NACLC recommends that protection against discrimination apply across 'political, cultural, economic, social or any other field of public life', this would include sport as a protected area of life under discrimination law.

**18. QUESTION 18: HOW SHOULD THE CONSOLIDATION BILL PROHIBIT DISCRIMINATORY REQUESTS FOR INFORMATION?**

NACLC supports the inclusion of a prohibition on discriminatory requests for information. We recommend the approach taken by the *Equal Opportunity Act 2010* (Vic), which prohibits requests for information that could be used to discriminate. NACLC submits that this approach is simpler than the provisions currently contained in the DDA and would increase the ability of duty holders to comply with the requirement.

**RECOMMENDATION:** The consolidation bill should prohibit discriminatory requests for information in the manner adopted in Victoria under the *Equal Opportunity Act 2010* (Vic).

**19. QUESTION 19: CAN THE VICARIOUS LIABILITY PROVISIONS BE CLARIFIED IN THE CONSOLIDATION BILL?**

NACLC supports the inclusion of vicarious liability provisions for the relationships of employer/employee, principal/agent and company/director/employees and agents in the consolidation bill. In our experience, vicarious liability measures have the positive effect of encouraging principals and employers to take positive steps to prevent discrimination.

We recommend that the consolidation bill adopt the test for vicarious liability contained in the SDA and RDA, namely, that the discriminatory act be 'in connection with' the person's employment or duties.

NACLC also supports the inclusion of a requirement that employers and companies take 'all reasonable steps' rather than merely 'reasonable' steps to prevent discrimination in order to defend a vicarious liability claim. This acknowledges that companies and employers can take significant steps to eliminate discrimination in the workplace, and would impose a positive obligation on them to develop policies, training and work cultures that do not tolerate unlawful discrimination.

**RECOMMENDATION:** The consolidation bill should retain vicarious liability provisions. The provisions should require that the discriminatory act is 'in connection with' the person's employment or duties.

**RECOMMENDATION:** The consolidation bill should require companies and employers to take 'all reasonable steps' to prevent discrimination in order to defend a vicarious liability claim.

## Part 7 – Exceptions and Exemptions

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### **20. QUESTION 20: SHOULD THE CONSOLIDATED BILL ADOPT A GENERAL LIMITATIONS CLAUSE? ARE THERE SPECIFIC EXCEPTIONS THAT WOULD NEED TO BE RETAINED?**

Existing Commonwealth anti-discrimination laws contain numerous inconsistent specific exemptions and exceptions from prohibitions against discrimination that make it difficult for rights-holders and duty-holders to understand their rights and responsibilities. Of particular concern are the permanent exemptions available to religious organisations, which will be discussed in greater detail below.

NACLC submits that permanent exemptions entrench systemic discrimination, as those who are exempt from anti-discrimination laws are not required to consider whether they could achieve the same objective by non-discriminatory means. No human rights are absolute, and when a situation arises where human rights appear to be in conflict, an attempt should be made to strike an appropriate balance between the rights in conflict.

We submit that a general limitations clause, used in the right way, would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced.

NACLC supports a general limitation clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim.

NACLC supports the inclusion of a general limitations clause if the following conditions are met:

1. the general limitations clause must replace all current exemptions; and
2. the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race; and
3. complainants must have access to a no-cost jurisdiction to have their discrimination complaints determined; and
4. the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
5. the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
6. the AHRC must be empowered to initiate discrimination complaints; and
7. organisations must be empowered to initiate representative complaints; and
8. the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.

NACLC submits that unless these conditions are guaranteed, a general limitations clause will diminish the current available protections.

Provided these conditions are met, NACLC recommends the introduction of a general limitations clause.

If these conditions cannot be met, we do not recommend the introduction of a general limitations clause and instead recommend that permanent exemptions for religious organisations be removed and religion included as a protected attribute.

Exemptions for religious organisations permit discrimination against individuals on the basis of age and sex where it is necessary to avoid injury to the sensitivities and susceptibilities of the adherents of a religion.<sup>52</sup> Permanent exemptions compromises rights of vulnerable groups already susceptible to discrimination, such as women, by allowing the right of freedom of religion to prevail over other rights afforded to those individuals by international human rights law, such as the right to live free from discrimination.

We note that a vast range of public social and welfare services are managed by faith-based organisations. These services include aged-care, education, adoption services, employment assistance and child welfare. Religious organisations receive significant government funding in order to provide these essential services. According to a report by the Centre of Independent Studies, 1,127,014 students attended non-government schools in 2009, and 90% of these students were in religious schools<sup>53</sup>. Also in 2009, approximately \$6.3 billion was budgeted to non-government schools, the vast majority of this funding going to religious schools<sup>54</sup>. By allowing publically funded organisations to discriminate against certain groups, the Government sends a message that discrimination is acceptable in our community, which goes to further entrenching systemic discrimination against vulnerable groups of people.

NACLC submits that removing religious exemptions and introducing religion as a protected attribute ensures that freedom of religion is not privileged over and above the other rights but is still adequately protected.

If exemptions for religious organisations are not removed in the consolidation bill, then NACLC recommends that the scope of the religious exemption be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion, for example a priest, and should not be applicable to the protected attributes of race or disability.

NACLC recommends that if a general limitations clause is not adopted a specific exemption should be included for sex discrimination for people involved in personal attendant care, that is personal care provided within the home to people with disabilities or older people.

**RECOMMENDATION:** The consolidation bill should include a general limitations clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim, subject to the

<sup>52</sup> s 35, *Age Discrimination Act 2004 (Cth)*; ss 37 and 28, *Sex Discrimination Act 1984 (Cth)*

<sup>53</sup> Centre for Independent Studies, Jennifer Buckingham, *The Rise of Religious Schools*, 2010 at page 3 (<http://www.cis.org.au/images/stories/policy-monographs/pm-111.pdf>)

<sup>54</sup> Department of Education, Employment and Workplace Relations, *Financial Assistance Provided to Each State in respect of 2009,2010* <http://www.deewr.gov.au/Schooling/RecurrentGrants/NonGovSchools/Documents/GreenReport09.pdf>

following conditions being met:

1. the general limitations clause must replace all current exemptions; and
2. the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race.
3. complainants must have access to a no-cost jurisdiction to have their discrimination complaints determined; and
4. the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
5. the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
6. AHRC have the power to to initiate discrimination complaints; and
7. organisations must be able to initiate representative complaints; and
8. the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.

**RECOMMENDATION:** If the recommended conditions for the introduction of a general limitations clause in the consolidation bill cannot be met by the Government, NACLC does not recommend the introduction of a general limitations clause and instead recommends that permanent exemptions for religious organisations be removed and religion included as a protected attribute.

**RECOMMENDATION:** If exemptions for religious organisations are not removed in the consolidation bill, then NACLC recommends that the scope of the religious exemption be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion and should not be applicable to the protected attributes of race or disability.

**21. QUESTION 21: HOW SHOULD A SINGLE INHERENT REQUIREMENTS / GENUINE OCCUPATIONAL QUALIFICATIONS EXEMPTION FROM DISCRIMINATION IN EMPLOYMENT OPERATE IN THE CONSOLIDATION BILL?**

NACLC recommends that the consolidation bill include a single inherent requirements exception from discrimination in employment. The inclusion of a single inherent requirements exception would make the consolidation bill consistent with Article 2 of the International Labour Organization Convention No 111 and the *Fair Work Act*.<sup>55</sup>

**RECOMMENDATION:** The consolidation bill should include a single inherent requirements exception from discrimination in employment.

**22. QUESTION 22: HOW MIGHT RELIGIOUS EXEMPTIONS APPLY TO DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY**

NACLC submits that while most state and territory anti-discrimination legislation protects against discrimination on the basis of homosexuality and specifically transgender status, religious exemptions available under those regimes have proved to severely compromise and limit the extent of those protections.

**Case Study**

*Toni is a transgender woman living in the inner city. Toni needed to attend a residential drug rehabilitation centre as she had been struggling with alcohol and opiate dependency. Her support worker called the local clinic, this clinic happened to be run by a religious based charity. The clinic informed Toni's support person that there was an opening for Toni and that they would hold a place for her. When Toni presented at the clinic she was refused service. When asking why she was told there was no spot for her. Toni was sure that this refusal was based on the fact that she is a transgender woman.*

NACLC submits that the new protections against discrimination on the grounds of sexual orientation and gender identity in the consolidation bill would be severely compromised if the religious exemptions were to apply.

Accordingly, we recommend that for this reason, and for reasons outlined under Question 20, religious exemptions should not apply to the protected attributes of sexual orientation or gender identity and that a general limitations clause should apply.

If religious exemptions are to apply to the protected attributes of sexual orientation and/or gender identity in the consolidation bill, then NACLC recommends that the scope of the religious exemption be narrowed to allow discrimination only when it is necessary

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<sup>55</sup> Sections 153, 195, 351 and 772.

to fulfil the inherent requirements of a position directly associated with the operation of a religion, for example a priest.

NACLC recommends that religious exemptions should not apply where the organisation is in receipt of public funding for the provision of goods and services such as aged, care, education or health services.

**RECOMMENDATION:** The consolidation bill should not provide for religious exemptions in relation to the protected attributes of sexual orientation or gender identity.

If the consolidation bill does include a religious exemption in relation to sexual orientation or gender identity, we recommend that the scope of the exemption be limited to permit discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of that religion and should not be applicable to organisations or services in receipt of public funding.

**23. QUESTION 23: SHOULD TEMPORARY EXEMPTIONS CONTINUE TO BE AVAILABLE? IF SO, WHAT MATTERS SHOULD THE COMMISSION TAKE INTO ACCOUNT WHEN CONSIDERING WHETHER TO GRANT A TEMPORARY EXEMPTION?**

We recommend that the AHRC should consider whether the temporary exemption is sought as a reasonable, necessary and proportionate means of achieving a legitimate aim. The process for granting temporary exemptions should be public and transparent and we support the recommendations made in the submission on the Discussion Paper by the Discrimination Law Experts' Group.<sup>56</sup>In particular, that in relation to exemptions the AHRC should be required to:

- publish criteria for the granting of an exemption;
- publicly advertise each application for an exemption calling for comment and submissions;
- consider the application and any objections;
- ensure that any exemption is for conduct or condition which are not inconsistent with the objects of the legislation;
- grant an exemption only on a temporary basis for a defined period;
- impose conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation;
- require a renewal of the exemption to go through the application process;
- publish reasons for granting or refusing the exemption;

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<sup>56</sup> Discrimination Law Experts' Group, *Submission: Consolidation of Commonwealth Anti-Discrimination Law*, 13 December 2011, at 18 and Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* 31 March 2011 at 13.

- maintain a public register of applications made and exemptions granted and refused

We also support the recommendation of the Discrimination Law Experts' Group. That the applicant for an exemption should be required to show how they will comply with discrimination law over time.<sup>57</sup>

**RECOMMENDATION:** Temporary exemptions should be publicly transparent process and should be assessed and granted by the AHRC. They should be granted on a time limited basis. The AHRC should not approve exemptions which inconsistent with the objects of the Act.

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<sup>57</sup> Discrimination Law Experts' Group, *Submission: Consolidation of Commonwealth Anti-Discrimination Law*, 13 December 2011, at 18 and Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* 31 March 2011 at 13.

## Part 8 – Complaints and Compliance Framework

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### 24. QUESTION 24: ARE THERE OTHER MECHANISMS THAT WOULD PROVIDE GREATER CERTAINTY AND GUIDANCE TO DUTY HOLDERS TO ASSIST THEM TO COMPLY WITH THEIR OBLIGATIONS UNDER COMMONWEALTH ANTI-DISCRIMINATION LAW?

The Discussion Paper discusses Actions Plans, Co-regulation, Standards and Certification of Special Measures as options to assist businesses in meeting anti-discrimination – each are discussed in turn, below.

#### 24.1. Action Plans

NACLC recommends that voluntary action plans, as they currently exist in the DDA, be extended to all protected attributes in the consolidation bill. The development of Action Plans should be encouraged and facilitated by the AHRC. NACLC agrees with the points made in the Discussion Paper about the potential educative effects on business of preparing an Action Plan.

<p><b>RECOMMENDATION:</b> Voluntary action plans, as they currently exist in the DDA, should be extended to all protected attributes in the consolidation bill. The development of Action Plans should be encouraged and facilitated by the AHRC.</p>
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#### 24.2. Co-regulation

NACLC recommends that the regulation of Commonwealth anti-discrimination laws remains with the AHRC and the courts. The international human rights treaties to which Australia is a party places the obligation to uphold and fulfil the treaties on the Australian Government. We submit that this responsibility cannot be delegated to the corporate sector.

NACLC submits that co-regulation is unlikely to have a significant impact in helping businesses understand and meet their obligations under Commonwealth anti-discrimination law. A review of discrimination cases in Commonwealth and state jurisdictions, and of the conciliation register on the AHRC website, demonstrates that discrimination complaints are made against a very diverse range of government and non-government organisations and individuals, many of whom are small businesses. The review also revealed that a significant majority of complaints arise from personal interactions and perceived prejudices or failures to understand the circumstances of a person with a protected attribute.

These situations are unlikely to be effectively covered by industry codes. The example given in the Discussion Paper (that is, of the banking industry developing minimum standards for the design and placement of Automatic Teller machines to facilitate access by people with a disability) demonstrates the limited circumstances in which co-regulation could operate. The banking industry involves a small number of large

companies providing very similar products and services. The example involves the infrastructure and technology used to provide those products and services.

Accessible infrastructure and technology are very important for people with a disability, and industry codes may be very useful in improving access for people with a disability. However, in the context of the consolidation bill, and the common types of complaints of discrimination, we submit that co-regulation will not be a suitable mechanism for dealing with or preventing most discriminatory conduct.

**RECOMMENDATION:** The regulation of Commonwealth anti-discrimination laws should remain with the AHRC and the courts and not be delegated to the corporate sector through a process of co-regulation.

### **24.3. Disability standards**

NACLC supports the retention of existing disability standards and the extension of legally binding standards to all protected attributes. For the reasons discussed above in relation to co-regulation, we agree with the comment in the Discussion Paper that prescriptive technical standards may not be well adapted to regulating discrimination in relation to attributes other than disability. However, for the sake of consistency, and to allow for future developments in the role of standards, it is preferable to extend the capacity to develop standards to all attributes.

**RECOMMENDATION:** The Government should retain existing disability standards and extend legally binding standards to all protected attributes under the consolidation bill.

### **24.4. Special measures**

NACLC recognises that special measures are essential to achieve substantive equality for groups with a history of discrimination, marginalisation and disadvantage. To encourage the broader use of special measures, we support the recommendation of the Discrimination Law Expert Group Submission that a consolidation bill provide a means for the AHRC to authorise special measures on application, but that the use of a special measure should not be dependent on receiving such an authorisation.

**RECOMMENDATION:** The consolidation bill should provide a means for the AHRC to authorise special measures on application. However, the use of a special measure should not be dependent on receiving such an authorisation.

## 25. QUESTION 25: ARE ANY CHANGES NEEDED TO THE CONCILIATION PROCESS TO MAKE IT MORE EFFECTIVE IN RESOLVING DISPUTES?

### 25.1. Option for conciliation

In the current Commonwealth anti-discrimination system, alternative dispute resolution in the form of conciliation is employed at the first instance. The advantage of alternative dispute resolution is that it is a relatively informal process and minimises the expenses to the parties. However, in NACLC's experience, the conciliation process can disadvantage the complainant. There is often a power imbalance between the complainant and the respondent, who is frequently a company or a government agency. This power imbalance is even more pronounced when the complainant is not represented, usually due to insufficient resourcing of advocacy and legal organisations.

Nonetheless, NACLC submits that the current complaint and voluntary conciliation process should be retained as an option for individuals. The benefits are that it is low cost and informal, it can be empowering, and it allows for flexibility in the resolution of complaints. It can usually take place in a location that is convenient for the parties.

However, in some cases, it is clear that the complaint cannot be resolved by conciliation, or that particular respondents have a fixed position in relation to discrimination complaints. In these cases, the AHRC investigation and conciliation process merely delays eventual consideration by a court and causes 'complainant attrition' where the case drags on so long that the complainant decides not to continue.

**RECOMMENDATION:** A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the AHRC.

### 25.2. Conciliation agreements

In NACLC's experience, although many complainants successfully settle at the AHRC, often the respondents do not comply with the terms of the settlement agreement. This is a significant problem with the Commonwealth anti-discrimination system as there is no effective mechanism to enforce conciliation agreements.

There is also no accurate way of determining in how many 'settled' matters the respondent fails to fully comply with the agreement. CLCs often spend many months chasing the respondent to ensure compliance. In our experience, many matters that 'settled' at the AHRC are never finalised according to the terms agreed.

The effectiveness of discrimination conciliation agreements could be improved if they could be registered with a federal court and enforced as court orders. Many state and territory anti-discrimination statutes provide for a mechanism whereby conciliation agreements are registered with a court or tribunal.<sup>58</sup> The provisions in s 164(3) of the *Anti-Discrimination Act 1991* (Qld) and s 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements.

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<sup>58</sup> See, s 91A(6), *Anti-Discrimination Act 1977* (NSW); s 120, *Equal Opportunity Act 2010* (Vic); s 164, *Anti-Discrimination Act 1991* (Qld); s 76, *Anti-Discrimination Act 1998* (Tas); s 62, *Human Rights Commission Act 2005* (ACT).

The process of enforcing conciliated agreements should be low-cost and straight forward.

**RECOMMENDATION:** The consolidation bill should make provision for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.

### **25.3. Arbitration and mediation**

The Federal Court and Federal Magistrates Court can currently order parties to attend mediation. Therefore, in NACLC's view, having mediation by the AHRC is unnecessary. NACLC also does not support the introduction of voluntary arbitration. Applicants who are unrepresented at conciliation conferences are at a significant disadvantage, particularly when facing a respondent with a well-resourced legal team. The need for legal representation at arbitration is more acute than at conciliation as it is a more formal legal process. Many CLCs already face difficulties in meeting the community need for legal representation at conciliation and would have difficulty meeting the additional demands of attending arbitration. For these reasons, NACLC supports conciliation as the preferred means of alternative dispute resolution in discrimination matters.

### **26. QUESTION 26 – ARE ANY IMPROVEMENTS NEEDED TO THE COURT PROCESS FOR ANTI-DISCRIMINATION COMPLAINTS?**

NACLC submits that there are a number of improvements needed to the court process for anti-discrimination complaints. Each suggestion is discussed in turn below.

#### **26.1. Complaints by organisations**

NACLC supports amendments to allow organisations and advocacy groups to bring complaints in the Federal Court or Federal Magistrates Court on behalf of individuals. Currently organisations and advocacy groups can only bring complaints on behalf of individuals to the AHRC, not to the courts.

Additionally, NACLC supports amendments to allow organisations and advocacy groups to have standing to bring complaints to the AHRC and courts in their own right.

Together, this will assist in addressing systemic discrimination and take some of the pressure off individuals who have been subject to discrimination in going through the court process.

These two amendments would also address the issues raised in the case *Access for All (Hervey Bay) v Hervey Bay City Council*<sup>59</sup> (**Access for All**). In *Access for All*, the Federal Court found that the applicant did not have standing to commence proceedings in the Federal Court because the applicant, an incorporated association, was not a 'person aggrieved' pursuant to s 46P(2) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). Although the applicant was an organisation that

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<sup>59</sup> [2007] FCA 615.

represented people with disability, the Court found that the applicant itself was not affected by inaccessible public transport infrastructure to an extent greater than an ordinary member of the public. The Court found that the applicant needed to establish that it was a 'person aggrieved in its own right'.<sup>60</sup>

The decision in *Access for All* concerned an applicant who was an organisation and the complaint was made by an organisation itself, not on behalf of its members. However, even if the organisation had made the complaint to the AHRC on behalf of its members pursuant to section 46P(2), it would not have been able to continue to represent its members as the applicant to the Federal Court or the Federal Magistrates Court. Section 46PO(1) of the AHRC Act limits making a complaint to the federal courts to any person 'who was an affected person in relation to the complaint'.

In our experience, advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory. It would be of benefit to the community at large that systemic discriminatory behaviour stopped. The lack of an effective mechanism to facilitate this impedes this objective.

#### Case Study

*A disability organisation made a complaint to the AHRC on behalf of a number of individuals across Australia in relation to accessible cinemas. The disability organisation was not able to continue to represent the complainants at the Federal Court. Pursuing the complaints by commencing representative proceedings under Part IV of the Federal Court Act 1976 (Cth) raised questions as to standing and would have been a difficult and uncertain case to run.*

The decision in *Access for All*, together with the inconsistencies between sections 46P(2) and 46PO(1) of the AHRC Act make it very difficult for organisations to bring complaints alleging discrimination unless the organisation itself can prove it has standing, in its own right, to make the complaint. NACLC submits that these strict rules on standing should be amended to make it clear that organisations or groups representing, for example, Aboriginal peoples or people with a disability, can bring complaints on behalf of their members who have suffered discrimination or harassment and in their own right.

**RECOMMENDATION:** The consolidation bill should include provision for complaints to be made to the AHRC and the Federal Court or Federal Magistrates Court by groups or organisations on behalf of, or in the interest of, members.

## 26.2. Litigation costs

The current federal framework for discrimination is complex and creates significant barriers to access to justice. In NACLC's experience, the most significant barrier for

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<sup>60</sup> [2007] FCA 615, at para 58.

people experiencing discrimination is the risk of adverse costs orders in the Federal Court system.

As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints with the AHRC, preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, NACLC's experience is that most cases settle – even very strong discrimination complaints. As a result, courts at a federal level have not developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative and educative role within the community. The system as it presently stands is a war of attrition, where even very strong cases are settled because individual complainants are unable to face the risks and pressure of litigation against well-resourced respondents.

#### **Case Study**

*Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition and therefore did not believe it affected his ability to do his job. Darren's doctor supported this.*

*Darren lodged proceedings with the AHRC which failed to settle. A CLC assisted Darren and told him that his case had the potential to be a test case.*

*Darren lodged proceedings in the Federal Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at the Federal Magistrates Court mediation.*

*Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his house. He wanted to seek justice but felt the risks just seemed too great.*

The experience of many CLCs is that clients find the current Commonwealth anti-discrimination process to be an ineffective means of resolving their complaints. In NACLC's experience, most discrimination cases settle. However, we believe that many settle on terms that do not reflect the seriousness of the discrimination or that result in inadequate compensation to the complainant. Our experience is that compensation offered in conciliation agreements is generally very low (often below \$10,000). The decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the latter could easily be three or four times this amount.

When considering the effectiveness of the current federal discrimination system, the high percentage of conciliated outcomes cannot in itself be seen as a success. In NACLC's view, many matters settle because of the costs jurisdiction that complainants must enter if the matter does not resolve at the AHRC. As a result, many complainants settle on terms that do not reflect the merits of their case.

In addition to costs considerations, there are other barriers to accessing justice within the current discrimination framework – namely, barriers to physical access, and the

psychological costs and the time commitment involved in pursuing litigation (particularly for people with disabilities). It is also difficult for people living outside metropolitan areas to commence proceedings in the Federal Court or Federal Magistrates Court without a solicitor acting on their behalf. These barriers contribute to the dearth of decided cases and expertise among the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This leads to more cases settling and fewer systemic outcomes.

#### **Case Study**

*Mary used a wheelchair and felt she had experienced discrimination from a public transport provider. As a result of their conduct she had been unable to get home and had felt extremely vulnerable. She lodged a discrimination complaint with the AHRC. Her primary focus was to try and ensure that what happened to her did not happen to someone else in the future, but she also sought compensation for pain and suffering. The matter did not settle and as Mary felt passionately about the issue she lodged proceedings in the Federal Court. She received advice that it was a potential test case and a CLC acted for her. The respondents employed a large law firm and a barrister. They fought the claim vigorously and said that Mary's claim had no merit and that they would pursue her for their costs. Although Mary was worried about this, she continued her case.*

*The case settled at Federal Court mediation on the terms Mary had offered at the AHRC, nine months earlier. Tens of thousands of dollars were expended on legal fees. The CLC that assisted Mary believed the matter had not resolved at the AHRC because the respondent did not believe Mary would commence proceedings at Court, and that the matter would simply go away if it did not settle.*

For the purpose of discrimination complaints, the Federal Court and Federal Magistrates Court should become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings, or for unreasonable conduct during proceedings, in line with state and territory discrimination tribunals. A no-costs jurisdiction would also ensure consistency with adverse action claims under the Fair Work Act. This is significant as many discrimination claims relate to employment matters, and so could be brought under the Fair Work Act. Therefore it is important to ensure that in relation to costs, the legislative schemes are consistent.

**RECOMMENDATION:** The Federal Court and the Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.

### 26.3. Remedies

NACLC recommends that the remedies available under s 46PO(4) of the AHRC Act should be expanded to grant the courts the power to make corrective and preventative orders. Although section 46PO(4) provides federal courts broad power and a non-exhaustive list of remedies, courts are reluctant to make injunctive orders that prohibit or compel specified conduct. The power to make corrective and preventative orders will assist in addressing systemic discrimination.

**RECOMMENDATION:** Remedies available in discrimination matters should include corrective and preventative orders, as well as injunctions.

**RECOMMENDATION:** A complainant (whether individual or a representative group) should be able to make an application for an injunction when necessary.

### 26.4. Specialist division

NACLC recommends that the Government consider establishing a specialist division of the Federal Court and Federal Magistrates Court to hear discrimination law matters. Under the current system, the nature of discrimination complaints are very different to other types of matters dealt with by federal level judges, both in terms of the law and the facts. As highlighted in the discussions above, a number of barriers exist that constrain complainants' access to the courts and, as a result, Federal Court and Federal Magistrates Court judges do not generally develop expertise in this area of law.

NACLC therefore recommends that in order to promote discrimination law as a recognised area of expertise, consideration should be given to creating a specialist division to hear discrimination matters. Judicial officers should be recruited based on their expertise in discrimination law and should be required to undertake ongoing professional education in the law, and also training relevant to working with protected groups (for example, disability and cross-cultural awareness training).

Another challenge to the effective handling of discrimination matters at the Federal Court-level is the highly procedural nature of the Federal Court system, which makes it difficult for self-represented litigants (or anyone other than a barrister) to effectively comply with the court rules and procedures. Therefore, NACLC recommends that the Government give consideration to developing a more litigant-in-person friendly specialist court or division where the procedures are relaxed and the processes are more accessible for individuals who conduct their own matters.

**RECOMMENDATION:** A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues.

**RECOMMENDATION:** The specialist division should develop rules and procedures

that increase the ability of self represented litigants to conduct their own cases.

## 26.5. Legal representation

Pursuing a discrimination complaint is a very personal type of litigation that can be emotionally draining and stressful. Without legal advice and representation, many complainants simply do not pursue their complaints. CLCs are not able to meet the current demand for representation in discrimination matters and cannot act on behalf of all potential clients.

The challenge for unrepresented complainants is further compounded by the shift towards a more formal style of conciliation. In the past, conciliations may have been more informal, with neither party represented. However, in NACLC's experience, respondents are increasingly retaining legal representation at the conciliation phase, which significantly disadvantages unrepresented complainants.

### Case Study

*Igor had recently migrated to Australia in order to study. He sought a part time job in a factory. On his first day at work he was called names and racially abused. At the end of his shift, one of his the colleagues who had been abusing him played a 'prank' on him and he ended up falling over and being taken to hospital. Igor had in fact been assaulted. He returned to work some time later and was still subjected to racial taunts. He was later sacked and brought a discrimination complaint. He sought assistance from a CLC. He was still emotionally distressed by what had happened to him as a result of the assault in particular. He said that without legal representation, he did not think he would be able to pursue his claim.*

### Case Study

*Ada had been working in a community organisation. She had been experiencing unwanted sexual advances from a male colleague. These escalated and colleagues warned her that he had done this to other women before. One afternoon, he locked Ada in a room and tried to touch and kiss her. Ada was petrified as she could not escape from the room. After this incident, Ada suffered a very serious mental health breakdown and was hospitalised. She later brought a complaint with the help of a CLC but remained extremely fragile and at times suicidal. Without legal representation she simply could not have continued her claim.*

The consolidation process should ensure that complainants have adequate access to legal advice and representation, at both conciliation before the AHRC and at the

Federal Court and Federal Magistrates Court. The availability of legal aid grants for discrimination matters should be increased and the eligibility criteria under existing Commonwealth legal aid guidelines should be amended so that there is no requirement to show substantial benefit being gained by the public or sections of the public. Funding provided to specialist and low cost legal services, such as CLCs, to assist people to make complaints under Commonwealth anti-discrimination law should be increased.

**RECOMMENDATION:** There should be increased funding to CLCs and legal aid commissions to provide representation to complainants in discrimination matters.

## **27. QUESTION 27 – IS IT NECESSARY TO CHANGE THE ROLE AND FUNCTIONS OF THE COMMISSION TO PROVIDE A MORE EFFECTIVE COMPLIANCE REGIME? WHAT, IF ANY, IMPROVEMENTS SHOULD BE MADE?**

### **27.1. Role of the Commission and Discrimination Commissioners**

As outlined above, current Commonwealth anti-discrimination law relies on individual complaints, which are most commonly resolved through private conciliation. The limitations of this system for dealing with repeat discriminators, and for entrenched practices and systemic discrimination, have been widely discussed.<sup>61</sup>

#### **Case Study**

*Over a period of some years, the same CLC represented a number of women who all complained of discrimination on the basis of pregnancy, family responsibility or sexual harassment against the same large company. None of the women knew each other or of each other's complaints. Each complaint settled at the conciliation stage of the process. The complainants received compensation and a statement of service. While the individual complainants were happy with the outcomes of their case, the CLC recognised there were entrenched problems in the company, and that there is no way to systematically address such problems in the current system.*

NACLC recommends that the various Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and the power to commence court proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

<sup>61</sup> See, for example, Australian Senate, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2009), available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm). See also, Gaze, E, 'The Cost of Equal Opportunity – will changes to HREOC solve the problem of anti-discrimination law enforcement?' (2000) 25:3 *Alternative Law Journal* 125 – 130.

Specifically, the consolidation bill should provide that the role of Commissioners is to:

- regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote all forms of equality;
- monitor duty holders' compliance with the consolidation law, and investigate, report and prosecute parties who repeatedly breach the consolidation law;
- be properly resourced to increase their roles as interveners and as amicus curiae in matters affecting discrimination and equality;
- have the power to commence complaints in court of their own motion and without the need for a specific complaint; and
- report annually to Commonwealth Parliament on equality with a requirement that Parliament respond to such reports.

**RECOMMENDATION:** AHRC Discrimination Commissioners should be given the power to investigate and initiate court proceedings in relation to conduct that appears unlawful, without an individual complaint.

**RECOMMENDATION:** The role and powers of AHRC Discrimination Commissioners should be expanded to increase the role of the AHRC and Commissioners in addressing systemic discrimination. These powers include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament and the public on discrimination matters.

**RECOMMENDATION:** The AHRC's role should include the ability to conduct formal inquiries into matters relating to state and territory laws or practices.

## 27.2. Defining 'human rights' in the AHRC Act

NACLC supports amending the definition of 'human rights' to include the seven core human rights treaties to which Australia is a party. This will ensure consistency with the definition in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This will provide greater human rights protection, albeit limited to inquiries by the AHRC, not individual protection of human rights through the courts.

**RECOMMENDATION:** 'Human rights' in the consolidation bill should be defined by reference to the seven core human rights treaties to which Australia is a party, as contained in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

**RECOMMENDATION:** The ability of the AHRC to intervene or appear as amicus in discrimination cases should be retained.

**RECOMMENDATION:** The AHRC should have the power to commence proceedings in the absence of an individual complaint, to enforce breaches of disability standards. This should include the introduction of civil penalty provisions in the consolidation bill.

NACLC also recommends that the AHRC have power to facilitate and enforce compliance with the positive obligations without first receiving a complaint. The AHRC could also create standards or best-practice guidelines, which would assist in the implementation and assessment of positive duties.<sup>62</sup>

**RECOMMENDATION:** The AHRC should be empowered to facilitate and enforce compliance with the positive obligation without first receiving a complaint.

**RECOMMENDATION:** The AHRC should be adequately resourced to undertake these additional functions.

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<sup>62</sup> The UK's Equality and Human Rights Commission recently issued a series of guides for public authorities in the UK's new public sector equality duty. The guides cover what public authorities should do to meet the duty, including legal requirements and recommended actions. See <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>

## Part 9 – Interaction with Other Laws and Application to State and Territory Governments

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### 28. QUESTION 28: SHOULD THE CONSOLIDATION BILL MAKE ANY IMPROVEMENTS TO THE EXISTING MECHANISMS IN COMMONWEALTH ANTI-DISCRIMINATION LAWS FOR MANAGING THE INTERACTIONS WITH THE FAIR WORK ACT?

NACLC makes limited recommendations in relation to the interaction between anti-discrimination laws and the Fair Work Act. CLCs play a limited role in relation to modern awards and enterprise agreements and in particular whether terms in modern awards and agreements are discriminatory.

NACLC supports the current provisions under the *Fair Work Act* invalidating discriminatory awards and enterprise agreements, and would support the extension of this coverage to all protected attributes under the *Fair Work Act* and in the consolidation bill and to all industrial instruments. NACLC submits that it is crucial that Fair Work Australia is able to review all potentially discriminatory (invalid) terms of industrial instruments, with or without referral from the AHRC.<sup>63</sup>

We believe that there should be stronger interaction between Fair Work Australia and the AHRC in relation to potentially discriminatory industrial agreements with Fair Work Australia drawing on the expertise of the AHRC in matters of discrimination.

The AHRC should be able to investigate potentially discriminatory terms in industrial agreements, with or without an individual complaint. Fair Work Australia should seek the guidance and expertise of the AHRC when terms are being considered for potentially discriminatory effect, with the AHRC able to make submissions on the effect of the provisions

**RECOMMENDATION:** AHRC should be able to investigate potentially discriminatory terms in industrial agreements with or without an individual complaint.

**RECOMMENDATION:** Fair Work Australia should seek the guidance of AHRC on potentially discriminatory terms in industrial agreements.

In relation to the interaction between the *Fair Work Act* and federal discrimination law, NACLC notes that there can be considerable overlap between the *Fair Work Act* and federal discrimination law remedies. This has made it confusing for complainants to

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<sup>63</sup> NACLC understands that, due to complex legislative arrangements, this may not be possible under the current referral process. See *Australian Human Rights Commission Act 1986* (Cth) s 46PW(2). Where the act appears to be discriminatory under the ADA, DDA or SDA, the AHRC must refer the industrial instrument to Fair Work Australia for review. This process does not apply to acts that appear to be discriminatory under the RDA. Further, particular discriminatory terms of modern awards and enterprise agreements may not be referable at all by the AHRC to Fair Work Australia. Our understanding is that, modern award and enterprise agreement terms that are discriminatory within the meaning of the Fair Work Act will be invalid (see ss 136(2)(a), 153, 195 and 253 FWA) which removes them from the referral power of the AHRC (see s 46PW of the *Australian Human Rights Commission Act 1986* (Cth), particularly, the referral pre-requisite of 'direct compliance'; and notes to the ADA, SDA and DDA which state that a person does not comply with a provision of an industrial instrument that has no effect).

work out where to bring proceedings and has made the provision of legal advice in this area more crucial and complex. There are limited opportunities for people faced with discrimination in employment to get free legal advice about their options from specialised practitioners familiar with discrimination law. We believe this lack of expertise has resulted in a lack of discrimination complaints under the *Fair Work Act* provisions. NACLC sees that it is a key role of CLCs to be experts in this area and believes that the further funding of employment law and discrimination law services in CLCs is required in order for people to be properly informed and to access their rights under both the *Fair Work Act* and federal discrimination law.

**RECOMMENDATION:** CLCs be further funded to provide specialist advice to people experiencing discrimination in employment under the Fair Work Act and discrimination law in order for people to exercise their rights most effectively.

In relation to the interaction of adverse action provisions and discrimination law, NACLC notes that this is an area where the law remains considerably complex and unclear. There have been varying decisions under the Fair Work Act, including on the extent to which discrimination law concepts and jurisprudence informs the understanding of adverse actions based on a protected attribute under the Fair Work Act. In particular, it is unclear whether:

- the meaning of protected attributes under the Fair Work Act are capable of being informed by corresponding protected attributes under Commonwealth, state and territory anti-discrimination laws;<sup>64</sup> and
- the phrase 'not unlawful' under section 351(2)(a) of the Fair Work Act refers strictly to express exemptions under Commonwealth, state and territory anti-discrimination laws, or whether that phrase requires elements of discrimination under another jurisdiction to be satisfied prior to establishing adverse action.

NACLC believes that it is not desirable to have widely divergent understandings, definitions and tests of discrimination under the Fair Work system and federal discrimination law. NACLC also believes that some concepts of 'adverse action' under the *Fair Work Act* are wider than concepts under federal discrimination law, while some concepts are considerably narrower.

As part of this consolidation process the Government has been able to critically examine key deficiencies in the operation of federal discrimination law. NACLC believes that the outcome of this process should be used to examine the manner in which discrimination law is expressed and captured under the *Fair Work Act*, and that this should be considered as part of the current review of the *Fair Work Act*. NACLC supports greater consistency across federal legislation in relation to how discrimination is defined and tested in order to ensure better access to justice and increased

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<sup>64</sup> For example, in *Hodkinson v Commonwealth*, *Hodkinson v The Commonwealth* [2011] FMCA 171(31 March 2011) it was held that the ordinary dictionary meaning of the term 'disability' is the appropriate definition of disability for the purpose of the Fair Work Act. The case of *Stephens v Australia Postal Corporation* *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [86]-[87] emphasised that the ordinary definition of 'physical or mental disability' under section 351(1) of the Fair Work Act should be considered in the context of the aims of the Act and therefore include any "inherent and perceived functional impairments or consequences in relation to presentation or work in a workplace" rather than simply the underlying diagnosis [at 90].

accessibility in the law. NACLC supports this as long as it does not reduce current protections contained in the adverse action provisions of the Fair Work Act.

In order to achieve consistency NACLC recommends that the *Fair Work Act* includes a non-exhaustive list of protected attributes with standardised definitions across federal discrimination law and the Fair Work Act, on the grounds earlier recommended.

**RECOMMENDATION:** *The Fair Work Act* should include a non-exhaustive list of protected attributes on the grounds earlier recommended,<sup>65</sup> which are consistent with the consolidation bill.

**RECOMMENDATION:** *The Fair Work Act* review should consider the need for legislative clarification in relation to the relationship between section 351(2) (a) of the *Fair Work Act*, with Commonwealth, state and territory anti-discrimination laws. The Government should consider the issues raised by the discrimination consolidation concerning the operation of federal discrimination law in the review of the *Fair Work Act*.

## **29. QUESTION 29 – SHOULD THE CONSOLIDATION BILL MAKE ANY AMENDMENTS TO THE PROVISIONS GOVERNING INTERACTIONS WITH OTHER COMMONWEALTH, STATE AND TERRITORY LAWS?**

Commonwealth anti-discrimination laws predominantly rely on the constitutional external affairs power which permits the Commonwealth to give effect to Australia's international treaty obligations.<sup>66</sup> With respect to protected attributes that do not have a stand-alone treaty, the explanatory memorandum and the application section of the consolidation bill should express reliance on article 26 of the ICCPR and, specifically, the right to equality and non discrimination on the basis of 'other status'. This would satisfy a constitutional basis for the consolidation bill protecting, for example, older persons and intersex people.

Currently, Commonwealth anti-discrimination laws limit the operation of state and territory laws in varying ways. NACLC emphasises the importance of allowing states and territories to enact anti-discrimination laws that at least further the objectives of, but are not limited by, relevant international laws.<sup>67</sup>

**RECOMMENDATION:** The consolidation bill adopt a model which:

- expresses reliance on article 26 of the ICCPR; and
- at a minimum, ensures that state and territory anti-discrimination laws further the objects of relevant international instruments while being capable of

<sup>65</sup>

<sup>66</sup> Australian Constitution, s 51(xxix).

<sup>67</sup> See for example, the case of *Viskauskas v Niland* (1983) 153 CLR 280, 286-288.

providing greater protection, and protection to a greater range of attributes, than is the case under international law.

### 28.1. Interaction between complaints systems

As outlined earlier, the advent of the *Fair Work Act* has made the law in this area considerably more complex and difficult to navigate. NACLC recommends that provisions be added to allow a complainant to make a complaint or initiate proceedings where their initial complaint was lodged in the wrong jurisdiction (either State or Federal) and has been withdrawn or declined. This should apply in order to promote access to justice, particularly for self-represented litigants who often initiate actions in an inappropriate jurisdiction prior to receiving legal advice. Safeguards can be inserted into the consolidation bill to prevent attempts at 'double dipping' where the claim was correctly decided the first time and for claims which are frivolous, vexatious, lacking merit or constitute an abuse of process.

**RECOMMENDATION:** The consolidation bill and the *Fair Work Act* expressly permit an aggrieved individual to make a complaint or initiate proceedings where their initial complaint (whether under the *Fair Work Act*, state, territory or federal discrimination law) was lodged in the wrong jurisdiction and has been withdrawn or declined.

### 28.2. State and territory laws generally

The consolidation bill must ensure that there is no reduction in protection from racial discrimination and sex discrimination. Neither the RDA nor SDA exempts acts done in direct compliance with state and territory laws from the operation of the respective federal anti-discrimination laws. NACLC submits that, in order to avoid reducing rights protection, this position must be maintained.

NACLC notes that the DDA allows regulations to be made exempting acts done in direct compliance with specified state and territory laws,<sup>68</sup> and that the ADA exempts acts done in direct compliance with all state and territory laws, except for any specified by regulations.<sup>69</sup> NACLC does not support the retention of these exemptions. Each case of discrimination should be considered on a case by case basis. NACLC submits this should also apply to discrimination on the basis of all other protected attributes.

If the consolidation bill allows regulations to be made exempting acts done in direct compliance with specified state and territory laws for disability, NACLC recommends at the least enhancing protection against age discrimination to the current DDA model. Further, NACLC proposes introducing an accountable and transparent test for deciding which state and territory laws shall be specified as exempted. NACLC proposes a test similar to the limitations on human rights within section 7(2) of the Charter of Human Rights and Responsibilities 2006 (Vic). Under this test, human rights may be subject to

<sup>68</sup> DDA s 47(2).

<sup>69</sup> ADA s 39(4). See *Keech v State of Western Australia Metropolitan Health Services t/as King Edward Memorial Hospital* [2010] FCA 1332. NACLC submits that this case demonstrates the unfair operation of this provision.

'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

**RECOMMENDATION:** The consolidation bill provide no exemption for acts done in direct compliance with state or territory laws for all protected attributes.

**Alternative RECOMMENDATION:**

- Protection against age discrimination be elevated to the current DDA model; and
- the consolidation bill allow regulations to be made exempting acts done in direct compliance with specified state and territory laws on the basis of disability and age only where justified under a legislative test similar to section 7(2) of the *Victorian Charter of Human Rights and Responsibilities*.

**29. QUESTION 30: SHOULD THE CONSOLIDATION BILL APPLY TO STATE AND TERRITORY GOVERNMENTS AND INSTRUMENTALITIES?**

The ADA, DDA and RDA currently apply to state and territory governments and instrumentalities without exception.<sup>70</sup> NACLC recommends that state and territory governments and instrumentalities should continue to be bound by Commonwealth anti-discrimination laws for age, disability and race, and should also be bound with respect to all other protected attributes. As the Discrimination Law Experts' Roundtable Report recommended:

The consolidation Act should recognise the important role that governments play as employers and contributors to economic life, and should ensure that the consolidation Act covers both federal and state governments consistently across all grounds.<sup>71</sup>

If the consolidation bill does not bind state and territory governments and instrumentalities, this will severely limit the effectiveness of the consolidation bill, including in key areas such as education, health and employment.<sup>72</sup>

**RECOMMENDATION:** The consolidation bills apply to all state and territory governments and instrumentalities for all protected attributes, as the ADA, DDA and RDA currently apply.

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<sup>70</sup> ADA s 13; DDA s 14; RDA s 6.

<sup>71</sup> Discrimination Law Experts' Roundtable, *Report on Recommendations* (31 March 2011) 16-17.

<sup>72</sup> NACLC notes that, in light of a recent disability discrimination case currently awaiting judgment from the Federal Court (Siewright case) there may be a question as to whether the doctrine of implied intergovernmental immunities limits the extent to which Commonwealth anti-discrimination laws can bind the Crown in right of states and territories. A pending decision or indeed an adverse decision from a single judge of the Federal Court should not hold up an important legislative provision.