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Consolidation of Commonwealth Anti-Discrimination Laws

DISCUSSION PAPER

RESPECT • PROTECT • FULFIL

CONSOLIDATION OF COMMONWEALTH ANTI–DISCRIMINATION LAWS

DISCUSSION PAPER

September 2011

Attorney-General's Department

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EXECUTIVE SUMMARY

2. The consolidation of federal anti-discrimination laws provides an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community.

3. Clearer and more consistent anti-discrimination legislation will make it easier for both individuals and business to understand rights and obligations under the legislation.

4. Commonwealth anti-discrimination law is currently found in four separate pieces of legislation, each of which deals with different grounds of discrimination:

- *Racial Discrimination Act 1975* (RDA)
- *Sex Discrimination Act 1984* (SDA)
- *Disability Discrimination Act 1992* (DDA), and
- *Age Discrimination Act 2004* (ADA).

5. A fifth Act, the *Australian Human Rights Commission Act 1986* (AHRC Act), establishes the Australian Human Rights Commission and regulates the processes for making and resolving complaints under the other four Acts. There are also provisions relating to discrimination in employment in the *Fair Work Act 2009*.

6. Many of the provisions in the legislation set out above implement Australia's obligations under the seven core human rights treaties to which Australia is a party:

- International Convention on Civil and Political Rights
- International Convention on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities (CRPD), and
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

7. For example, the RDA is directed to implementing obligations under CERD. Australia's international law obligations provide support for the constitutional basis for the consolidation bill. Together with the external affairs power, other heads of power are also available.

8. The current Commonwealth anti-discrimination laws have been drafted over a period of nearly 40 years and consequently there are significant differences in the drafting and coverage of protections under each Act. These differences range from definitional inconsistencies to more significant issues such as different approaches to the tests for discrimination and to provisions relating to vicarious liability. Many of these differences are unnecessary and add to the complexity and regulatory burden of the legislation. We also have the benefit of 40 years experience with anti-

discrimination legislation to consider if there are more appropriate mechanisms to describe and address discrimination in areas of public life.

9. The Government has decided, as part of Australia's Human Rights Framework[1] and as a Better Regulation Ministerial Partnership between the Attorney-General and the Minister for Finance and Deregulation,[2] to consolidate existing Commonwealth anti-discrimination legislation into a single, comprehensive law. As part of this project, the Government is also delivering on its commitment to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity. In addition, the Government has also committed to consider, as part of this project, a number of the recommendations made by the Senate Legal and Constitutional Affairs Committee in its inquiry into the effectiveness of the SDA.

10. The Government has made it clear that this exercise will not lead to a reduction in existing protections in federal anti-discrimination legislation. In considering options for reform, the Government will keep the following principles in mind:

- a reduction in complexity and inconsistency in regulation to make it easier for individuals and business to understand rights and obligations under the legislation
- no reduction in existing protections in federal anti-discrimination legislation
- ensuring simple, cost-effective mechanisms for resolving complaints of discrimination, and
- clarifying and enhancing protections where appropriate.

11. Importantly, this discussion paper also considers the mechanisms in place to assist business in understanding and carrying out their obligations. There has been some criticism that business does not have adequate support in meeting their obligations under Commonwealth anti-discrimination laws. To address this, business may require guidance and assistance to establish policies and procedures that address discrimination issues. The discussion paper discusses possible reforms to establish or strengthen the mechanisms to assist business to meet their obligations.

12. The Government considers that enhanced protection of human rights and better outcomes for businesses should not be conflicting objectives in considering the development of a consolidated set of anti-discrimination laws.

13. The potential benefits of adopting or extending mechanisms to assist compliance with laws should be balanced with the implementation and ongoing costs of administering each mechanism for business and Government.

14. This discussion paper does not address the issue of same-sex marriage as the consolidation project will not alter the government's position on this issue.

[1] Australia's Human Rights Framework is the Government's response to the National Human Rights Consultation. More information about the Framework can be found at www.ag.gov.au/humanrights.

[2] The Government's Better Regulation Agenda focuses on reforming Commonwealth and Commonwealth-State regulation to reduce costs and, more generally, improve interaction between government and the public. More information can be found at www.finance.gov.au/deregulation/index.html.

Overview of this paper

15. The discussion paper raises a number of questions around the existing framework, including a number of technical issues around the operation of the legislation. The following issues have been identified:

- **Meaning of discrimination** – this section includes consideration of the current tests to establish direct and indirect discrimination, whether direct and indirect discrimination should continue to be separate concepts and how special measures should interact with the definition(s). This section also considers issues relating to the burden of proof for the various elements of the test of discrimination, the duty to make reasonable adjustments and other positive duties and the best way to prohibit harassment based on a person's protected attribute/s.
- **Protected attributes** – this section includes consideration of the Government's election commitment to include protections against discrimination on the grounds of sexual orientation and gender identity, whether other grounds of discrimination should be covered and whether protection should extend to discrimination on the basis of association with a person who has a protected attribute. This section also considers the issue of intersectional discrimination to determine whether our laws should better address situations where a person is discriminated against on the basis of more than one ground.
- **Protected areas of public life –** anti-discrimination laws cover a range of areas of public life, including discrimination in employment, education, the provision of goods and services or requests for information. This section considers if there could be improvements made to how these areas of public life are covered, particularly for partnerships, sport and clubs, as well as examining protection for voluntary workers and domestic workers. This section also provides a discussion on vicarious liability of employers and statutory office holders.
- **Exceptions and Exemptions –** anti-discrimination laws provide a framework to establish complaints of unlawful discrimination. However, not all discrimination is unlawful and there may be circumstances where it is appropriate to discriminate between people on the basis of attributes which would otherwise be protected. This section looks at key issues relating to exceptions and exemptions, including the use of a general limitations clause, inherent requirements and genuine occupational qualifications, religious exemptions and temporary exemptions.
- **Complaints and compliance framework** – this section looks at the current discrimination complaints process and considers issues such as improved alternative dispute resolution processes, representative actions for discrimination complaints and the availability of appropriate remedies for unlawful discrimination. It also examines other options to assist business and other people to not discriminate, including the use of co-regulatory approaches. Finally, it considers some issues that have been raised relating to the role and functions of the Australian Human Rights Commission.
- **Interaction with other laws and application to State governments** – the final section of the paper examines the interaction between the anti-discrimination laws and other Commonwealth, State and Territory laws, including how the laws should apply to State and Territory Governments and their agencies.

How to make a submission

16. The Government invites comments on the issues raised in this discussion paper from organisations and individuals with an interest in the consolidation of Commonwealth anti-discrimination law. Comments may address any one or more of the questions which appear throughout the discussion paper or any other matters relevant to discrimination law, and may be made by writing to:

Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Fax: 02 6141 4925
E-mail: antidiscrimination@ag.gov.au (preferred)

17. Submissions are requested no later than **1 February 2012**.

18. All submissions will be treated as public, and may be published on the Attorney-General's Department website, unless the author clearly indicates to the contrary. Only submissions provided in electronic formats can be published on the website. A template for submissions can also be found on the website. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act. The Attorney-General's Department will also conduct stakeholder seminars during the consultation period.

19. Organisations and individuals with an interest in this project are encouraged to regularly visit the Attorney-General's Department website to access further related information and project updates. Comments and queries about the consolidation project or discrimination law generally can also be emailed to antidiscrimination@ag.gov.au or sent to the address above.

Next steps

20. The Government will prepare exposure draft legislation for the new consolidated law, taking into account the issues raised in the submissions received and stakeholder consultations. The exposure draft legislation will be released for public consultation in early 2012.

MEANING OF DISCRIMINATION

21. At present, unlawful discrimination under Commonwealth anti-discrimination laws is either direct or indirect discrimination. Direct discrimination relates to actions which are on their face discriminatory – for example, where an employer decides not to hire a person because of their sex. Indirect discrimination arises where an apparently neutral condition has the effect of disadvantaging a group of people with a particular attribute, such as family responsibilities. An example of this is a refusal to give an employee access to flexible hours to permit them to pick up children from school. Where such arrangements can reasonably be accommodated, inflexibly requiring all employees to be at work until 5pm may be indirectly discriminatory as having a disproportionate impact on people with family responsibilities.

22. The definitions of direct and indirect discrimination currently used in Commonwealth anti-discrimination laws have been criticised as being inconsistent, complex and uncertain.[3] These inconsistencies make the legislation unnecessarily complex. Laws should be clear and simple so that businesses, governments and other people with obligations under the legislation understand their obligations and implement systems to prevent discrimination. Likewise, clearer laws make it easier for individuals to know their rights and for complaints of discrimination to be resolved fairly and consistently.

23. The Government will not adopt any change to the meaning of discrimination which diminishes protections. However, the Government considers there to be a number of key issues relating to the meaning of discrimination which would benefit from further consideration:

- the test for direct discrimination
- the test for indirect discrimination
- whether a unified test for discrimination (combining direct and indirect discrimination) should be adopted
- how special measures should be treated
- the duty to make reasonable adjustments
- how the burden of proof for direct discrimination should be allocated, and
- the coverage of attribute-based harassment.

Test for direct discrimination

24. Direct discrimination occurs where a person is treated less favourably than another person in the same (or materially the same) circumstances on the ground of their protected attribute. For example, a club that imposes a policy that no people of an apparently Middle Eastern ethnicity are permitted entry would directly discriminate against a number of racial groups.

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[3] Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) ('SDA Report'), paragraph 11.12.

25. At present, there are three major Australian models for defining direct discrimination. These are:

- the 'comparator' test used in the ADA, DDA and SDA, and (in various forms) in the majority of the States
- the 'detriment' test used in the ACT and Victoria, and
- the test used in subsection 9(1) of the RDA (the RDA test).

26. **Comparator test:** The comparator test focuses on establishing discrimination by comparing the treatment of the complainant to the treatment of others who lack their protected attribute. Under this test, a complainant must prove:

- there has been differential treatment (by reference to a person in comparable circumstances without the attribute)
- the complainant has experienced detriment or disadvantage because of the differential treatment, and
- the differential treatment was caused by their protected attribute.[4]

27. Significant difficulties have arisen in applying the comparator test because of the requirement that a person in materially the same circumstances as the person alleging discrimination ('the comparator') must be identified to prove there has been differential treatment. In many cases, there will not be a suitable comparator for the complainant, and courts have therefore relied on identifying a hypothetical comparator, and reconstructing how the discriminator might have treated them. Cases regularly turn on a particular judge's view as to what the material circumstances were, and how the discriminator might have treated a hypothetical person without the protected attribute in those circumstances. Results are unpredictable and have created significant uncertainty.

28. **Detriment test:** The detriment test that is used in the ACT and Victoria more simply provides that discrimination occurs where a person is treated *unfavourably* on the ground of their protected attribute.[5] The elements of this test are:

- the unfavourable treatment must cause the complainant to experience detriment or disadvantage, and
- the treatment must have been caused by the complainant's protected attribute.

29. The provision is more concise than the usual formulations of the comparator test and does not require identification of a comparator.[6] However, it is still necessary to prove that the detrimental treatment complained of was caused by the protected attribute. As such identification of a comparator may still be useful in proving causation.

30. Although the detriment test is a departure from the complexity of the comparator test with its explicit focus on comparison, there is some risk that courts might interpret the test in substantially

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4 See generally Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text Cases and Materials* (2008), section 4.2; Chris Ronalds *Discrimination Law and Practice* (3rd edition, 2008), page 33ff.

5 See subsection 8(1) of the ACT Act. Although the SA Act at first appearances seems to follow this model, 'unfavourable treatment' is defined in section 6 in line with the comparator test.

6 See *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379 (Full Court of the Federal Court of Australia) paragraph 54 per Beaumont ACJ (Higgins and Gyles JJ concurring).

the same way as the comparator test.[7] This would preserve the disadvantages of uncertainty and complexity associated with the comparator test. However, Recommendation 5 of the SDA Report is that the detriment test be adopted in the SDA because the Senate Committee considered that the test is 'both simpler and more in keeping with the purpose of the Act'.[8]

31. **RDA test:** Subsection 9(1) of the RDA takes a considerably different approach, largely adopting the definition of discrimination in Article 1(1) of CERD and combining the test for discrimination with substantive coverage.[9] In encapsulating a test for discrimination recognised under international law, it is arguable that this test would also apply to indirect discrimination.[10] However, subsection 9(1A) was enacted in 1990 to expressly cover indirect discrimination. Unique features of the RDA test are the requirement that the discrimination nullify or impair the enjoyment of a human right, and specification that discrimination is prohibited in any field of public life.

32. All three tests require the complainant to have experienced **detriment** and this detriment to be because of or **caused** by their protected attribute. The principal differences arise in relation to:

- **Comparator test — establishing differential treatment:** although the comparator test is intended to have the same policy outcome as the detriment or RDA tests, it is significantly more complex and there is often difficulty and divergent views between parties as to identifying and constructing a relevant comparator, and
- **RDA test — nullification or limitation of enjoyment of a human right:** the RDA includes an additional element requiring the complainant to demonstrate that the treatment they suffered has nullified or limited their enjoyment of a human right.

Elements of the different tests for direct discrimination

Comparator Test (used in ADA, SDA, DDA, most States)	**Detriment Test** (used in ACT, Victoria)	**RDA Test** (used in RDA)
• Detriment • Causation • Differential treatment (established by a real or hypothetical comparator)	• Detriment • Causation	• Distinction, exclusion, restriction or preference • Causation • Effect of nullifying or impairing enjoyment on an equal footing of a human right

7 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004) ('Productivity Commission Report'), page 307.

8 SDA Report, page 147; see also Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, recommendation 1 (that the Government should undertake further consultation on whether the detriment test should be adopted in the DDA).

9 A similar test is used for the purposes of the equal opportunity in employment complaints stream in Division 4 of Part II of the AHRC Act: see the definition of 'discrimination' at subsection 3(1) of the AHRC Act. This is based on the test used in based on the International Labour Organization Convention No. 111 on Discrimination (Employment and Occupation).

10 See *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 71 and 74.

33. **Comparative models**: In overseas jurisdictions, the two main approaches to the definition of direct discrimination are comparator models[11] and simply leaving discrimination undefined.[12] Generally, the way in which the meaning of discrimination has evolved in the case law of the latter jurisdictions extends to behaviour which would be characterised in Australia as direct and indirect discrimination.

Test for indirect discrimination

34. Indirect discrimination occurs where an apparently neutral condition or requirement is imposed which has the effect of disadvantaging a group with a particular protected attribute and which is not reasonable in the circumstances. For example, a shop imposing a 'no headwear' policy would *indirectly* discriminate against members of religions that require its adherents to wear head coverings, such as Sikhs. Indirect discrimination recognises that apparently neutral conditions can have significant detrimental effects on, and be barriers to full participation for, some sectors of the community. There is scope for the test for indirect discrimination to be made simpler, easier to understand and more consistent across protected attributes.

35. The main elements of the test for indirect discrimination are broadly consistent across Australian anti-discrimination laws. However, some variations do exist. There are two main groups of provisions, summarised in the table below.

Elements of the different tests for indirect discrimination

DDA, RDA, NSW, Queensland, WA, SA	ADA, SDA, Victoria, Tasmania, ACT
Indirect discrimination occurs where: • a duty holder requires people to comply with a condition, requirement or practice • the requirement disadvantages members of a group who share a protected attribute • the complainant does not or cannot comply, and • the requirement or condition is not reasonable in the circumstances.	Indirect discrimination occurs where: • a duty holder requires people to comply with a condition, requirement or practice • the requirement disadvantages members of a group who share a protected attribute, and • the requirement or condition is not reasonable in the circumstances.

36. Elements which are common to both groups are:

- there is a 'condition, requirement or practice' with which the complainant must comply
- the condition, requirement or practice must disadvantage members of a group with a protected attribute (being a group to which the complainant belongs), and
- the condition, requirement or practice is not reasonable in the circumstances.

[11] See, for example, UK Act subsection 13(1), and EU Directive 2000/78/EC, Article 2(2)(a).

[12] For example, Canadian and United States anti-discrimination law does not define discrimination, instead leaving up to case law.

37. The SDA provides additional guidance on when a condition, requirement or practice will be reasonable by providing an indicative list of factors to be taken into account when determining reasonableness.[13]

38. The DDA and the RDA, as well as some State Acts, include a fourth step – that the complainant does not, or cannot, comply with the condition, requirement or practice. There is no clear policy reason for the inclusion of this requirement in the DDA and RDA but not the ADA and SDA. Case law has indicated that this requirement may be satisfied not only where the complainant is incapable of complying, but also where compliance would inflict 'serious disadvantage' on the complainant[14] or where the complainant is not 'practically able' to comply.[15] In practice, this version of the test imposes a condition which is more stringent on its face than is supported by the case law and is likely to mislead users of the legislation who are not familiar with the case law.

39. Comparative international models for defining indirect discrimination are generally consistent with Australian approaches in prohibiting neutral conditions which have a disproportionate impact on a group with a particular protected attribute. However, it is rare to include the requirement that people with the protected attribute be unable to comply with the condition. The tests used in determining which conditions are 'reasonable' despite their disproportionate impact also differ considerably.

40. The main models for the latter include:

- in the United States, indirect discrimination can be justified if it is job related and consistent with business necessity[16]
- in the United Kingdom, indirect discrimination can be justified if it is a 'proportionate means of achieving a legitimate aim',[17] and
- in Canada, discrimination (including indirect discrimination) can be justified if it is a '*bona fide* occupational requirement' (that is, it is rationally connected to the performance of the job, adopted in an honest and good faith belief that it was necessary and it is in fact reasonably necessary to achieve the legitimate work related purpose). [18]

41. Recommendation 6 of the SDA Report is that the 'reasonableness' element of the definition of indirect discrimination should be replaced with a 'legitimate and proportionate' element, similar to the test used in the United Kingdom.

42. One option is to apply the current ADA/SDA 'reasonableness' test for indirect discrimination for all protected attributes. This test uses familiar concepts used in all Australian anti-discrimination legislation. However, the model is not consistent with the most common international practice in relation to indirect discrimination, and does not address criticisms of the complexity and uncertainty involved in analysing the current test. To aid interpretation and make obligations clearer to duty holders an indicative list of factors relevant to determining

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[13] Subsection 7B(2): matters which must be taken into account include (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition of the condition, requirement or practice, (b) the feasibility of overcoming or mitigating the disadvantage and (c) whether the disadvantage is proportionate to the result sought by the person imposing the condition, requirement or practice.

[14] *Hurst v Qld* (2006) FCR 562.

[15] *Mandla v Dowell Lee* [1983] 2 AC 548 (House of Lords).

[16] See, for example, the US *Civil Rights Act of 1991*.

[17] UK Act, section 19.

[18] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at paragraph 54 per McLachlin J (the *Meiorin* case).

reasonableness (such as whether the policy is legitimate and proportionate, the feasibility of overcoming the disadvantage, and the nature and extent of the disadvantage imposed) could be included.

43. An alternative option is to adopt a 'legitimate and proportionate' test as used in the UK (and outlined above), which provides that acts or conduct which constitute a proportionate means of achieving a legitimate aim do not constitute discrimination. More clearly expressing the circumstances in which indirect discrimination can be justified would help business and complainants to more clearly understand and analyse obligations under the prohibition of indirect discrimination.

A unified test for discrimination?

44. There have been some suggestions that the distinction between direct and indirect discrimination should be eliminated.[19] Some argue that the development of two different categories is artificial and has unnecessarily complicated anti-discrimination laws.

45. The international human rights instruments implemented by the Commonwealth anti-discrimination laws do not explicitly refer to direct or indirect discrimination, although these concepts have been used by international human rights treaty bodies. These concepts have evolved in the courts and been incorporated into Australian law to describe the different ways in which unlawful discrimination arises.

46. Adoption of a unified test would avoid the confusing and difficult distinction between direct and indirect discrimination, make obligations under the consolidation bill clearer and more closely align Commonwealth anti-discrimination law with international law.

47. However, no Australian jurisdiction uses a unified test for unlawful discrimination. In addition, adoption of a fundamentally revised test may give rise to uncertainty as to the scope of the test, given the lack of Australian jurisprudence on its meaning and scope. There is also a risk of diminution of protections as it is unclear whether the test encompasses all conduct currently prohibited as indirect discrimination (although international jurisprudence on similar tests at international law would support coverage of indirect discrimination by the test). The risk of diminution of protection could be minimised through avoidance of doubt provisions, legislative examples, or appropriate statements of intention in extrinsic materials such as the Second Reading Speech and the Explanatory Memorandum.

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?**

[19] Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, page 6, available at <http://sydney.edu.au/law/about/staff/BelindaSmith/DiscrimExpertsRoundtableReport.pdf>; Dr Belinda Smith, Submission 12 and Law Council of Australia, Submission 59, to the SDA Report (available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm>; see also Article 1 of CEDAW.

Burden of proof

48. Under the tests for direct discrimination in all Commonwealth, State and Territory anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant. In contrast, for indirect discrimination, once a complainant has established the discriminatory impact of a condition, requirement or practice, a number of Australian anti-discrimination laws shift the burden of proving that the discriminatory condition was reasonable to the respondent.[20]

49. The Fair Work Act takes a different approach to burden of proof for direct discrimination. Once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.[21] The Fair Work Act model is of particular significance because for most protected attributes, employment is the most common area of anti-discrimination complaints.[22]

50. Few overseas jurisdictions follow the Australian approach of imposing the full burden of proof on the complainant. For example:

- In the United Kingdom, European Union and Canada, the burden of proof shifts to the respondent once the complainant has established a *prima facie* case of discrimination.[23]
- In the United States, case law has established a framework of shifting burdens of proof. [24] The three steps of this scheme are:
  - the plaintiff has the burden of establishing a prima facie case of discrimination
  - if the plaintiff establishes a prima facie case, the defendant must provide evidence which could support a finding that it had a legitimate and non-discriminatory reason for its action, and
  - if the respondent produces such evidence, the plaintiff must prove the reasons provided by the defendant were mere pretexts for discrimination.[25]

51. Recommendation 22 of the SDA report is that the SDA should take an equivalent approach to that taken in the UK, as outlined above.

52. Allocating the full burden of proof to the complainant is consistent with the existing approach in Commonwealth anti-discrimination laws, and anti-discrimination laws in the States and Territories. It is also consistent with traditional approaches to the allocation of the burden of proof. However, allocating the burden of proving causation in direct discrimination to the complainant requires the complainant to prove matters relating to the state of mind of the respondent, which may

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[20] ADA, subsection 15(2); SDA, section 7C; DDA, subsection 6(4); ACT Act, section 70; Queensland Act, section 205; Victorian Act, subsection 9(2).

[21] Fair Work Act, section 361.

[22] In 2009–2010, 44% of race discrimination complaints, 88% of sex discrimination complaints, 36% of disability discrimination complaints and 65% of age discrimination complaints arose in the context of employment. This represented the highest number of complaints for each attribute other than disability (37% of disability complaints related to the provision of goods, services and facilities). See Australian Human Rights Commission, *Annual Report 2009-2010*, pages 79–86.

[23] EU Directive 2000/78/EC, Article 31; UK Act, section 136; *Meorin* case, above n 22, at paragraphs 69 and 70 (McLachlin J).

[24] *McDonnell Douglas Corp v Green* (1973) 411 US 792.

[25] See, for example, *Marcantel v State of Louisiana Department of Transport and Development* 37 F.3d 197 (5th Cir, 1994); see Rees et al, *Australian Anti-Discrimination Law*, above n 6, pages 148–150.

be both difficult and unfair. Further, this allocation of the burden of proof is not consistent with practice in the Fair Work Act or many overseas jurisdictions.

53. Any provision allocating part of the burden of proof to the respondent would be a departure from existing Commonwealth anti-discrimination law. Both models identified above would require the respondent to demonstrate that there was no discriminatory reason for their actions once the complainant has made out the other elements of direct or indirect discrimination. In doing so, these models are likely to make it easier in some circumstances for complainants to successfully argue cases of unlawful discrimination. However, both the UK and Fair Work Act models have now been in operation in their respective jurisdictions for some time and do not appear to have created significant problems in practice. Modelling a provision on the Fair Work Act approach would harmonise the burden of proof for employment discrimination at the Federal level and would enable case law about both provisions to develop together.

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

Special measures

54. Special measure provisions recognise the need for positive actions to be taken in some circumstances to promote substantive equality or achieve equality of opportunity for marginalised groups. This is particularly important where a group within the community has suffered from historical and entrenched discrimination and disadvantage. Examples of special measures include employment assistance programs, education and training programs, scholarship programs and adopting quotas to achieve greater representation of certain persons in particular activities.

55. The concept of special measures is recognised under the international conventions to which Australia is a party. There is no single definition of special measures at international law, but the various provisions share many of the same elements. Special measures are generally aimed at accelerating or achieving substantive equality and will only be authorised so long as the objective of substantive equality has not been achieved (or so long as the measure is 'necessary'). Special measures do not constitute discrimination.

56. At present, each of the four Commonwealth anti-discrimination laws provide for taking special measures with similar underlying objectives, although the provisions are inconsistent.[26] All State and Territory anti-discrimination Acts also contain provisions allowing special measures, as do the UK[27] and Canadian Acts.[28]

Question 3.	**Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?**

[26] ADA, paragraph 33(c); DDA, paragraph 45(1)(a); RDA, subsection 8(1); and SDA, section7D.

[27] UK Act, sections 158 and 159 (referred to as 'positive action').

[28] Canadian Act, section 16 (referred to as 'special programs'). Subsection 16(2) further provides that the Canadian Human Rights Commission may make recommendations concerning special programs and advice and assist with the preparation of special programs.

Duty to make reasonable adjustments

57. The duty to make reasonable adjustments is a positive obligation on duty holders to take practical steps to address disadvantage experienced by someone with a certain attribute, such as a disability. Examples of reasonable adjustments include installing audio announcements in a lift so that people with vision impairment can access a building or providing flexible work arrangements for a person with family responsibilities.

58. The DDA is currently the only Commonwealth Act to contain an explicit duty to make reasonable adjustments. It currently appears in the tests for direct[29] and indirect discrimination.[30] While the DDA is the only Act to contain an explicit duty, the other Acts contain an implicit duty to make reasonable adjustments in the tests for indirect discrimination, which prohibit apparently neutral conditions having an unreasonable impact on a group of people with a particular attribute.

59. The consolidation bill provides an opportunity to review the expression of the reasonable adjustments duty and to consider whether it is clearly and consistently expressed for both people with protected attributes and for duty holders. Some stakeholders have suggested that the location of the reasonable adjustment duty in the tests for discrimination is not easy to understand and apply and that this complexity creates significant uncertainty which may lead to misinterpretation.[31]

60. One option is to express the duty to make reasonable adjustments as a standalone positive duty. The consequence of taking this approach is that a failure to make reasonable adjustments would be a separate type of discrimination or action to direct and indirect discrimination and a complainant would not have to prove the other elements of those tests. The duty would still, however, be balanced by the concept of 'reasonableness' and the defence of 'unjustifiable hardship'.

61. An example of a standalone reasonable adjustment duty is in the Victorian Act, in relation to employment, education, the provision of goods and services and access to buildings.[32] These duties are not linked to direct and indirect discrimination. However, a contravention of one of these duties enables a complaint of discrimination to be made.[33]

62. It has also been suggested that the explicit duty to make reasonable adjustments should be extended to all protected attributes in order to clarify the legislation.[34] This approach has some precedent in overseas jurisdictions. The Canadian Act, for example, explicitly provides that all individuals protected under the Act must have their needs accommodated.[35] The defence of unjustifiable hardship (called 'undue hardship') is also available. However, anti-discrimination legislation in the United Kingdom,[36] European Union[37] and United States[38] only require reasonable adjustments or accommodations to be made for people with disabilities.

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29 DDA, subsection 5(2).

30 DDA, subsections 6(2), (3) and (4).

31 See Sub 16 Australian Human Rights Commission, Sub No. 20 Human Rights Law Resource Centre, Sub No. 23 Kate Eastman and Ben Fogarty and Sub No. 27 NSW Disability Discrimination Legal Centre to Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (submissions available at <http://www.aph.gov.au/senate/committee/legcon_ctte/disability_discrimination/index.htm>).

32 Victorian Act, sections 20, 33, 40, 45, 56.

33 Victorian Act, paragraph 7(1)(a).

34 Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, above n 23, page 3.

35 Canadian Act, section 2.

36 UK Act, section 20.

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

Positive duties

63. Generally, the Commonwealth anti-discrimination laws do not impose positive duties to eliminate discrimination or promote equality. Instead, they impose a negative duty to 'not discriminate' in the regulated areas of public life. Breaches of this obligation can only be enforced by individuals who believe that they have experienced unlawful discrimination.

64. A number of submissions to the SDA inquiry recommended that positive duties be introduced to apply to the public sector and/or private sector in order to address systemic discrimination and to promote substantive equality. However, concerns were also expressed in other submissions that new positive duties would place unnecessary regulatory burden on duty holders and might not achieve their aims. For example, the Australian Chamber of Commerce and Industry expressed concern about imposing a positive duty on the private sector to eliminate and promote equality, noting that it may be difficult for employers to know exactly what their legal obligations to implement positive duties are and how to comply with them.[39]

65. At the conclusion of the SDA inquiry, the Committee recommended that there should be further consideration of whether the SDA (or the *Equal Opportunity for Women in the Workplace Act 1999*) should be amended to provide for positive duties for public sector organisations to eliminate sex discrimination and sexual harassment and to promote gender equality.[40] The public sector equality duty imposed by the UK Act is one model of such a provision.[41]

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

Attribute-based harassment

66. Harassment of a person based on their protected attribute is unlawful discrimination because it causes detriment to the person because of their protected attribute. For example, a pattern of abusive language directed at a particular employee because of their sex or race will be discriminatory because it would subject the employee to a detriment not suffered by other employees.

67. Explicit provisions relating to harassment vary considerably amongst Australian jurisdictions. The ADA, RDA and SDA do not explicitly prohibit attribute-based harassment, but case law indicates that harassment will be discrimination where it is based on a protected attribute.[42]

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37 Article 5 of EU Directive 2000/78/EC.

38 42 USC §12112(b)(5)(A) and (B).

39 SDA Report, page 120.

40 SDA Report, page 164.

41 UK Act, Part 11, Chapter 1.

42 See Rees et al, *Australian Anti-Discrimination Law*, above n 6, sections 5.34.24 and 8.7.3 for discussion of case law on this point. The SDA prohibits sexual harassment, but this differs from sex-based harassment because it is limited to cases where there has been an unwelcome sexual advance or unwelcome conduct of a sexual nature.

The DDA explicitly prohibits disability harassment in employment, education and the provision of goods and services.[43] Tasmania prohibits harassment on the basis of gender, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities, in addition to prohibiting sexual harassment.[44] Western Australia prohibits race-based harassment.[45] Other Australian jurisdictions do not explicitly prohibit attribute-based harassment.

68. In contrast, a more consistent approach has been adopted in Europe. The EU anti-discrimination directives require EU member states to deem harassment to be a form of discrimination,[46] which has been implemented in most EU member states.[47]

69. One option for reform is to extend the prohibition on harassment to include all protected attributes, in all specified areas of public life in which unlawful discrimination is prohibited. This could be achieved through a standalone prohibition or by clearly including attribute-based harassment within the meaning of discrimination. This approach would reduce complexity in drafting and remove uncertainty about general coverage of harassment in the DDA. It would also make obligations clearer in relation to all other protected attributes.

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

[43] DDA, sections 35–37.
[44] Tasmanian Act, subsection 17(1).
[45] WA Act, sections 49A–49C.
[46] See, for example, Article 2(3) of EU Directive 2000/78/EC.
[47] European Commission, *Developing Anti-Discrimination Law in Europe* (2009), page 29.

PROTECTED ATTRIBUTES

70. The prohibition of discrimination under Commonwealth anti-discrimination laws is limited to certain protected attributes. Protected attributes are personal characteristics of an individual which the Government, based on community support, has determined should be protected from discrimination.

71. The four core Commonwealth anti-discrimination laws cover a number of attributes:

- race (including attributes such as colour, descent and national or ethnic origin)
- that a person is or has been an immigrant
- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- disability (including carers and associates), and
- age.

72. The consolidation bill provides an opportunity to address inconsistencies in the regulation of discrimination against people who associate with a person with a protected attribute and discrimination on the basis of more than one or a combination of attributes (also known as intersectional discrimination) which exist due to the separation of protected attributes into the four Acts.

73. The Government committed during the 2010 election to introducing sexual orientation and gender identity as new protected attributes in the consolidation bill. This project provides the opportunity to consider whether other attributes should be covered in the federal legislation, including those attributes protected under the Fair Work Act or at the State or Territory level.

Sexual orientation and gender identity

74. Each of the States and Territories cover sexual orientation as a protected attribute to some extent. Sexual orientation is generally defined as heterosexuality, homosexuality, lesbianism and bisexuality. An alternative way to define sexual orientation is by using a conceptual definition – rather than referring to 'labels', such a definition would encompass the broad concept of person's sexual attraction to, and sexual activity with, people of a particular gender. An inclusive definition of this nature would include the terms outlined above but also include circumstances which may fall outside those terms, if appropriate.

75. Gender identity is a complex concept. Most State and Territory jurisdictions[48] define the concept to:

- apply equally to:
  - males who identify as female
  - females who identify as male, and
  - intersex people (ie people born of indeterminate sex)[49] who identify as male or female
- apply to people who genuinely identify as a member of a particular sex, including by assuming characteristics of that sex, whether medically, by style of dress or otherwise, or by living, or seeking to live, as a member of that sex, and
- apply regardless of whether a person is legally recognised as a member of the sex with which they identify.

76. The *Crimes Act 1914* contains a similar definition in the context of recognising how transgender people are to be treated for the purposes of collecting forensic material.[50]

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

Associate discrimination

77. Associate discrimination refers to discrimination experienced by a person because they are an associate of person(s) who have a protected attribute. At the Commonwealth level, the DDA[51] and RDA[52] protect associates of a person with a protected attribute. All States and Territories cover associates, with the exception of Western Australia and South Australia. The Fair Work Act and ILO discrimination provisions under the AHRC Act do not cover associates.

78. If the status quo is maintained, only associates of people with a disability or of people of a certain race, colour, national or ethnic origin or immigrant status will be covered. Existing protections would not be diminished although complexity will be retained, particularly as the associate provisions in the DDA and RDA are expressed differently.

79. Extending the coverage of associates to all protected attributes under one provision will create consistency and clarity in the consolidation bill.

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

[48] NSW, Victoria, Queensland, SA, ACT and Tasmania (within the definition of 'sexual orientation'). WA only prohibits discrimination on the basis of first category, where a person has legally changed their sex. The NT Act prohibits discrimination on the basis of 'transsexuality' as part of 'sexuality', but does not define the concept.

[49] The *Legislation Act 2001* (ACT) defines an 'intersex person' as 'a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female'.

[50] Subsections 23(6) and (7).

[51] DDA, section 7. 'Associate' is defined to include partners, relatives, carers and people in business, sporting or recreational relationships with a person with disability.

[52] RDA, sections 11-18. 'Associate' is not defined in the RDA.

Attributes covered by States and Territories, the Fair Work Act and the AHRC Act

80. The State and Territory anti-discrimination laws, the Fair Work Act and the AHRC Act provide coverage for a range of attributes that are not currently protected by the ADA, DDA, RDA or SDA. The consolidation bill provides an opportunity to consider whether any of these attributes should be protected from unlawful discrimination in order to simplify the application of anti-discrimination law and reduce inconsistent protection between jurisdictions.

81. In particular, one aspect of the Commonwealth anti-discrimination laws which creates significant regulatory overlap is the ILO discrimination complaints stream under the AHRC Act.[53] The Commission has the function of seeking to conciliate complaints of discrimination in employment. This process does not include the option to proceed to the federal courts – if the Commission cannot conciliate the matter and considers that a discriminatory act has occurred, it must report to the Attorney-General who must table the report in Parliament.[54] This process gives effect to Australia's obligations under International Labour Organization (ILO) Convention No. 111.[55]

82. ILO discrimination applies to a broader range of attributes than those covered by unlawful discrimination under the ADA, DDA, RDA and SDA. The additional attributes are:

- religion[56]
- political opinion[57]
- industrial activity[58]
- nationality[59]
- criminal record, [60] and
- medical record.[61]

83. These grounds are limited to **employment** only. Exemptions for inherent requirements of the job and religious belief also apply.

84. Some of the attributes listed above relating to ILO discrimination are also covered extensively by the States and Territories and the Fair Work Act. In particular, political belief, industrial activity and nationality are covered by almost all of these jurisdictions. Extending coverage to these attributes is likely to have only a modest impact on the private sector beyond existing obligations

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53 AHRC Act, Part II, Division 4.

54 AHRC Act, subsection 31(b).

55 Schedule 1 to the AHRC Act.

56 In 2009–2010, the Commission received 21 complaints related to discrimination in employment on the basis of religion (16.8% of the total number of ILO complaints under the AHRC Act) - see Australian Human Rights Commission, *Annual Report 2009-2010,* page 88.

57 In 2009–2010, the Commission received only 1 complaint related to discrimination in employment on the basis of political opinion (0.8% of total number of ILO complaints under the AHRC Act), see id.

58 In 2009–2010, the Commission received 14 complaints of discrimination in employment on the basis of industrial activity (11.2% of total number of ILO complaints under the AHRC Act), see id.

59 In 2009–2010 the Commission received no complaints related to discrimination in employment on the basis of medical record, see id.

60 In 2009–10 the Commission received 67 complaints related to discrimination in employment on the basis of criminal record (53.6% of total number of ILO complaints under AHRC Act), see id.

61 In 2009–2010 the Commission received no complaints related to discrimination in employment on the basis of medical record, see id.

where this protection already exists in the States and Territories. There may be a larger impact on the private sector in those jurisdictions where these grounds are not covered or where inconsistent protections apply.

85. Initial submissions on the consolidation bill have also recommended that victims of domestic violence should be protected from unlawful discrimination, particularly in the areas of employment and accommodation. There is currently no specific protection for victims of domestic violence in either Commonwealth or State and Territory anti-discrimination law. However, domestic violence is a significant problem in Australia. For example, it is estimated one in three Australian women will experience physical violence over their lifetime and a significant proportion of this violence is perpetrated at home.[62] Suggestions for how such an attribute could be described in the consolidation bill include 'domestic violence victim status'[63] or 'victim or survivor of domestic violence'.[64]

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

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

86. Intersectional discrimination is discrimination experienced by a person because of two or more aspects of their identity. For example, a woman from a non-English speaking background may experience discrimination because of both her sex and race or an elderly man with a hearing impairment may experience discrimination because of both his age and disability.

87. It has been suggested that intersectional discrimination should be explicitly covered by the consolidation bill in order to provide better protection against discrimination based on multiple grounds. For example, submissions to the SDA inquiry suggested that some victims of discrimination may be deterred from making complaints or litigating because their experience of discrimination does not clearly fit within one of the protected attributes.[65]

88. An example of a provision addressing intersectional discrimination is section 3.1 of the Canadian Act which clarifies that any discriminatory practice under the Act includes a practice based on one or more prohibited grounds. Section 14(1) of the UK Act also prohibits direct discrimination on the basis of a combination of two protected characteristics.

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

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[62] Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021 citing *Personal Safety Survey*, ABS Cat. No. 4906.0, Commonwealth of Australia, Canberra (2005), <http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/background/Pages/p2.aspx#37>

[63] Equality Rights Alliance, Gender Equality Roundtable Submission to the Consolidation Project, page 5, <http://www.equalitylaw.org.au/_literature_48131/Gender_Equality_Roundtable_Submission_to_the_Consolidation_Project>

[64] National Association of Community Legal Centres, Areas for increased protection in discrimination law: Consolidation *of Federal Discrimination Legislation*, page 11 <http://www.rlc.org.au/admin/spaw2/uploads/files/Paper2.pdf>

[65] Associate Professor Beth Gaze, Submission No 50 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, SDA report, 2.

PROTECTED AREAS OF PUBLIC LIFE

89. Anti-discrimination legislation has traditionally been concerned with regulating 'public' activities such as work, education, the provision of goods and services, the provision of accommodation and public administration. The Government considers that it is appropriate to focus on areas of public life and seeks input on inconsistency in coverage of these areas, including:

- equality before the law
- coverage of discrimination in all areas of public life
- protection of voluntary workers
- protection of domestic workers
- regulation of partnerships
- regulation of clubs and other member-based associations
- regulation of sport
- vicarious liability, and
- requests for information.

90. Achieving consistent coverage of protected attributes of public life will be a key consideration in simplifying and harmonising protections under the consolidation bill. These considerations, however, will need to be balanced against possible increases in regulatory burden.

Equality before the law

91. Section 10 of the RDA provides for a general right of equality before the law for people of different racial or ethnic groups.[66] It does not prohibit discriminatory acts, practices or conduct, but rather guarantees equal enjoyment of rights by all persons under the law. As a result, the principal effect of section 10 is on governments rather than individuals or businesses. There is no equivalent to section 10 in any other Commonwealth, State or Territory anti-discrimination law.

92. Section 10 operates by modifying any law of the Commonwealth, States or Territories which denies or limits the rights of people of a particular race, colour or national or ethnic origin. To bring a claim under section 10, it is necessary to show that persons of a particular group do not enjoy a right (or enjoy a right to a more limited extent) that is enjoyed by persons of another race by reason of a Commonwealth or State or Territory law. Where a law fails to confer a right on persons of a particular racial or ethnic group, section 10 operates to confer that right on persons belonging to that group,[67] or, where this is not possible (for example where a State law is expressly designed to limit or deny the rights of persons of a particular race) to render the law inoperative under section 109 of the *Constitution*.[68]

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[66] Section 10 implements Article 5 of CERD to 'guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law'.

[67] *Gerhardy v Brown* (1985) 159 CLR 70 at 09 (Mason J).

[68] *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1.

93. The SDA Report[69] and a number of other inquiries focusing on gender equality[70] have recommended introducing a similar right to equality before the law in relation to sex. It would also be consistent with Article 15 of CEDAW. A general right to equality before the law in relation to sex could serve as an important statement of principle to guide the actions of Government and policy and law makers. However, a right to equality before the law in relation to sex may have limited practical impact at the Commonwealth level. There are likely to be few Commonwealth laws that would be directly affected, as reflected in the relatively small number of Commonwealth laws currently covered by exceptions under the SDA. It is already possible to challenge a State or Territory law that requires a person to engage in conduct that would be unlawful under the SDA.[71]

94. Further extending the right to equality before the law to people with disabilities would assist in implementing Article 5 of the CRPD.[72] The Productivity Commission Report concluded that there are practical limits to achieving equality before the law for people with disabilities (particularly for people with cognitive disabilities).[73] The Productivity Commission noted that the original Disability Discrimination Bill included equality before the law provisions which were later dropped due to concerns about the possible effect on special legal regimes for people with disabilities, such as guardianship and mental health legislation.[74]

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

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

95. The most common approach to coverage of Commonwealth anti-discrimination law is to make discrimination unlawful in specific activities (such as hiring and firing in employment) in specific areas of public life (such as work, education, provisions of goods and services and the administration of Commonwealth laws and programs). This approach is adopted by the ADA, DDA and SDA. For example, the SDA makes it unlawful for employers to discriminate in the terms or conditions of employment they afford to employees.

96. Section 9 of the RDA adopts a different approach by making it unlawful to do a discriminatory act based on race which interferes with the enjoyment of 'any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. This definition of discrimination is closely based on the definition of 'racial discrimination' contained in Article 1 of CERD. The RDA also contains other specific provisions prohibiting discrimination in various areas of life, such as access to places and facilities, provision of goods and

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69 SDA Report, recommendation 9, was that the SDA be amended to include a general equality before the law provision modelled on section 10 of the RDA.

70 See House of Representatives Committee, *Half Way to Equal*, pages xlvi–xlvii and 260; and Australian Law Reform Commission, *Equality before the Law: Justice for Women*, ALRC 69, Part 1, recommendation 3.1.

71 See for example *McBain v Victoria* [2000] FCA 1009. Limitation applies to challenging a State law that only applies to States, State instrumentalities and their employees because the SDA does not apply to in those circumstances.

72 Article 5 of CRPD requires states to recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

73 Productivity Commission Report, page 288.

74 Productivity Commission Report, page 280.

services and employment, similar to the other Commonwealth Acts.[75] The RDA makes it clear that these succeeding provisions do not limit the generality of section 9.

97. The breadth of subsection 9(1) of the RDA makes it difficult to describe the precise scope of the provision or to determine which activities it encompasses. Courts have generally preferred a broad interpretation of subsection 9(1)[76] and it is generally thought to cover a broader range of areas and activities than other Australian anti-discrimination laws.[77] For example, subsection 9(1) would provide for coverage of areas where gaps currently exist under the other Commonwealth Acts including voluntary workers, small partnerships and member based organisations (including clubs).

98. Subsection 9(1) of the RDA also requires that the discriminatory act has the purpose or effect of impairing the enjoyment of 'any human right or fundamental freedom'. Courts have had considerable difficulty with interpreting this aspect of section 9 and the equivalent provision in section 10 of the RDA.[78] However, it would be possible for the consolidation bill to apply broadly to all areas of public life without relying on this concept.

99. The SDA Report recommended that the SDA be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the RDA.[79] The Report found the current scope of coverage of the SDA limited the effectiveness of the Act and that adopting coverage of any area of public life would remove unnecessary complexity from the operation of the Act.[80]

100. A third approach may be found in the Tasmanian Act, which takes a simpler, less prescriptive approach to other jurisdictions by prohibiting discrimination by or against a person engaged in *any* activity, as long as it is 'in connection with' specific areas of public life.[81] The Act contains an exhaustive list of the areas of public life to which it applies, including work, education and training, provision of facilities, goods and services, accommodation and membership and activities of clubs.

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

Protection of voluntary workers from discrimination

101. Voluntary workers make a significant contribution to the Australian economy and society. While in some circumstances voluntary workers may be considered 'agents' of an employer for the purposes of the vicarious liability provisions, the protection of voluntary workers from unlawful discrimination and sexual harassment in the workplace is inconsistent across Australian jurisdictions. Voluntary workers are not protected from discrimination in the workplace by the ADA, DDA and SDA as they do not fall within the statutory definition of 'employment'. Similarly, relevant protections under the Fair Work Act do not cover voluntary workers as they do not fall

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75 RDA, sections 11 to 18.

76 *Baird v State of Queensland* [2006] FCAFC 162.

77 Rees et al, *Australian Anti-Discrimination Law*, above n 6, page 199.

78 See, for example, *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37.

79 SDA Report, recommendation 9.

80 SDA Report, paragraphs 11.20-11.23

81 Tasmanian Act, subsection 22(1).

within the ordinary meaning of 'employee'.[82] Conversely, voluntary workers are likely to be able to bring claims under section 9 of the RDA. Queensland, South Australia, Tasmania and the ACT also protect voluntary workers against discrimination and sexual harassment in the workplace. The Victorian Act protects voluntary workers from sexual harassment in the workplace but not from discrimination. The NT Act provides some protection in relation to sheltered workshops and guidance/vocational training programs. The NSW and WA Acts do not protect voluntary workers.

102. A significant proportion of the Australian community participate in voluntary work. In 2006, 5.2 million people engaged in voluntary work in Australia with a diverse range of organisations. Most of these organisations were in the not-for-profit sector (84 per cent) and the government sector, such as schools and emergency services (14 per cent). The most common types of organisation for which people volunteered were sport and physical recreation, education and training, community, welfare and religious groups.[83]

103. The SDA Report recommended that the SDA be amended to explicitly protect voluntary workers from discrimination and sexual harassment.[84] Recent State and Territory reviews have made similar recommendations.[85]

104. Concern has been raised that the protection of volunteer workers would place an unreasonable burden on organisations with a significant voluntary workforce.[86] Conversely, providing protection may encourage volunteerism, which would have significant economic benefits. Extending protections to volunteer workers under Commonwealth legislation is unlikely to place an additional burden on organisations in jurisdictions where protections already exist at the State or Territory level. Any changes in jurisdictions where little or no protections exist may have a more significant impact.

Question 13.	**How should the consolidation bill protect voluntary workers from discrimination and harassment?**

Protection of domestic workers from discrimination

105. The Commonwealth laws currently contain exceptions to the prohibition against discrimination for domestic duties or employment in a private dwelling.[87] The exceptions apply in relation to determining (including arrangements for determining) who should be offered employment. No exception is provided for termination or discrimination during employment. The term 'domestic duties' is not defined in the Acts.

106. The SDA also contains specific exceptions in relation to employment involving the residential care of children. The exception allows discrimination on the grounds of sex or marital status,

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82 Section 335 of the Fair Work Act provides that the terms 'employee' and 'employer' have their ordinary meanings for the purpose of Part 3-1 of the Act.

83 Australian Bureau of Statistics, *Voluntary Work, Australia, 2006* (2007), page 3.

84 SDA Report, recommendation 10.

85 Department of Justice (Victoria), *An Equality Act for a Fairer Victoria, Equal Opportunity Review Final Report* (2008); Equal Opportunity Commission (WA), *Review of Equal Opportunity Act 1984,* Report, May 2007.

86 Department of Justice (Victoria), *Equal Opportunity Review,* above n 96, page 105.

87 ADA, subsection 18(3); DDA, subsection 15(3); RDA, subsection 15(5); and SDA, subsection 14(3).

although the latter ground is only permitted in limited circumstances where the spouse of the person is also employed by the same employer.[88]

107. There are similar exceptions in most State and Territory anti-discrimination Acts, generally applying in relation to a broad range of protected attributes. For example, in NSW, exceptions are provided for discrimination in relation to employment for the purposes of a private household.[89]

Question 14.	**Should the consolidation bill protect domestic workers from discrimination? If so, how?**

Regulation of clubs and other member-based associations

108. All clubs, voluntary bodies and incorporated or unincorporated associations are prohibited from discriminating against the general public in relation to provision of goods, services and facilities under the general provisions of each of the Commonwealth anti-discrimination laws. Some of the Commonwealth anti-discrimination laws also explicitly prohibit or except discrimination against members and prospective members, or even provide overlapping prohibitions and exceptions (as in the SDA).

109. These provisions are particularly complex due to inconsistent coverage and exceptions between the Acts, as well as differing and overlapping terminology: 'voluntary bodies' (ADA and SDA), 'incorporated associations' (DDA) and 'clubs' (DDA and SDA). The table below sets out the current coverage of member based associations.

Coverage of member-based associations in Commonwealth anti-discrimination law

Act	Specific coverage?	Conduct covered	Exceptions
RDA	No specific coverage	• Any discriminatory conduct which would impair enjoyment of a human right in public life (subsection 9(1))	• None
ADA	No specific coverage	• Any conduct which falls within a specified area of public life • Does not specifically cover membership activities or benefits	• Discrimination by voluntary body (defined to include all not-for-profit organisations) in connection with: - admission of members; or - provision of benefits, facilities or services to members

[88] SDA, section 35.

[89] See, for example, NSW Act, subsections 8(3), 25(3), 38C(3), 40(3) and 49D(3).

Act	Specific coverage?	Conduct covered	Exceptions
SDA	Clubs	• Any conduct which falls within a specified area of public life • Actions in connection with membership • Denying or limiting a member's access to any benefit • Subjecting a member to any detriment	• Discrimination by voluntary body in connection with: - admission of members; or - provision of benefits, facilities or services to members - *but not* extending to clubs with 30 or more members, which sell or supply liquor. • Membership of a club may be restricted to one sex only • Discrimination on ground of sex where it is not practicable for a benefit to be used or enjoyed simultaneously or to the same extent by both sexes
DDA	Clubs and incorporated associations	• Any conduct which falls within a specified area of public life • Actions in connection with membership • Denying or limiting a member's access to any benefit • Subjecting a member to any detriment	• Membership of a club or incorporated association may be restricted only to persons who have a particular disability

110. The extent of the prohibitions of discrimination against members and prospective members under the DDA and SDA differ due to the different definition of 'club' under those Acts. Under the DDA, 'club' is defined broadly to include associations (whether incorporated or not) that provide and maintain their facilities from the funds of the association. The SDA definition of 'club' is much narrower, essentially only covering licensed clubs.[90] Many community associations, such as sporting and recreation, youth, volunteer and social associations are unlikely to fall within this definition, although many would be covered under the expansive DDA definition of 'club'.

[90] Section 4 of the SDA defines 'club' as an association of at least 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities from the funds of the association and sells or supplies liquor for consumption on its premises.

111. All States and Territories prohibit discrimination in relation to clubs or associations. The precise definition of 'club' or 'association' varies across jurisdictions. The NSW and ACT Acts apply only to clubs that hold a club licence (ie clubs that sell or supply alcohol). The Victorian, Western Australian, Northern Territory and Tasmanian Acts use a similar definition to the SDA definition of club (this includes most licensed clubs). The South Australian Act applies to 'associations', which is left undefined. Under the Queensland Act, 'club' is defined to include for-profit associations. All State and Territory Acts also provide for a range of exceptions.

112. Overseas, the UK Act prohibits discrimination by associations with 25 or more members who select their members, that is, associations with formal or informal rules regulating who can become a member. The Act does not apply to associations of people who share a protected attribute, such as single-sex clubs or clubs for people of a particular race.[91] However, there is no equivalent to the 'voluntary body' exception found in the Commonwealth anti-discrimination laws.

113. The SDA Report recommended that the definition of 'clubs' in section 4 of the SDA be expanded to cover a broader range of organisations.[92] It was also recommended that the automatic exception permitting single sex clubs be extended to these organisations, and that the exception for voluntary bodies be removed.[93]

114. One option is to adopt the DDA approach of covering clubs and incorporated associations, broadly defined, in relation to all protected attributes. This approach excludes very small social clubs which do not provide and maintain facilities from the funds of the association, but would cover organisations such as local RSL clubs, rotary and lions clubs, sports clubs and volunteer groups (such as surf lifesaving and emergency services). However, this approach would also expand protection against discrimination in relation to sex to unlicensed clubs and clubs with fewer than 30 members and would generally provide a broader coverage of clubs than under most State and Territory Acts.

115. An alternative option is to adopt the SDA approach of covering only licensed clubs with 30 or more members in relation to all protected attributes would adopt a more restricted approach. This option would result in a diminution of protection in relation to disability. However, it would be consistent with the approach of most State and Territory Acts.

116. Regardless of the option chosen, consideration will need to be given to what, if any, exceptions should be provided, consistent with the objectives of anti-discrimination legislation.

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

Regulation of partnerships

117. Partnerships are one of the main areas of inconsistency under the current Commonwealth anti-discrimination laws. There is also inconsistency between State and Territory laws in this area. The policy rationale for these inconsistencies is obscure. Establishment of uniform coverage would allow simplification of provisions relating to partnerships.

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[91] Schedule 16 to the UK Act.
[92] SDA Report Recommendation 26.
[93] SDA Report, paragraph 11.68

118. All jurisdictions, with the exception of the Northern Territory, expressly prohibit discrimination in the formation of partnerships and by partners in a partnership against potential and existing partners. Some jurisdictions exclude partnerships below a certain size from regulation. The table below sets out the different coverage of partnerships:

Coverage of partnerships

Partnerships covered	Act
More than 6 partners only	ADA, SDA, NSW, Queensland, WA
More than 3 partners only	DDA
All partnerships	RDA, Victoria,[94] SA, ACT, Tasmania

119. The SDA Report recommended that the SDA apply to partnerships regardless of their size.[95] The Commission's submission to the inquiry suggested that the current size limitation is arbitrary and unnecessary, pointing out that there is no equivalent restriction for small companies or other small employers.[96]

120. Excluding small partnerships from the coverage of the consolidation bill may create anomalies, in that a small partnership would be entitled to discriminate on the basis of a protected attribute in the choice of partners, but would not be entitled to discriminate in relation to its employees. It may also be inconsistent as a matter of policy to exclude coverage of small partnerships but cover other small business organisations.

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

Regulation of sport

121. Discrimination in sport is inconsistently covered by Commonwealth anti-discrimination laws. The ADA, RDA and SDA do not specifically cover sport, but sporting activities are likely to be covered by these Acts where they fall within other areas such as employment or the provision of goods, services and facilities, or as a human right or fundamental freedom in a field of public life under section 9 of the RDA.

122. The DDA is the only Commonwealth anti-discrimination law that expressly prohibits discrimination in relation to sporting activity. The prohibition only applies to the exclusion of a person from a sporting activity. Exceptions apply where:

- the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity
- the participants in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities relevant to the sporting activity and relative to each other, or

[94] The Victorian Act contains an exception for firms with 5 or less partners where it is 'reasonable' to discriminate.
[95] SDA Report, recommendation 10.
[96] SDA Report, paragraph 4.6.

- the sporting activity is conducted only for persons who have a particular disability.

123. The SDA provides for the exclusion of persons of one sex from participating in any 'competitive sporting activity' in which the strength, stamina or physique of competitors is relevant. This does not apply to participation in coaching, umpiring or refereeing, sport administration, any prescribed sporting activity or sporting activities by children under 12 years. The SDA Report acknowledged that some submissions argued for removal of this exception but did not make a recommendation on the subject.[97]

124. The Victorian Act provides a model which could be adapted for use in the consolidation bill. Under the Victorian Act, a person is prohibited from discriminating against another person by refusing or failing to select the other person in a sporting team or by excluding the other person from participating in a sporting activity.[98] This prohibition extends to all protected attributes covered by the Victorian Act. Specific exceptions are provided for sex and gender identity (where strength, stamina or physique of competitors is relevant) and to permit the restriction of competitive sporting activity to people who can effectively compete, to people of a specified age or age group or to people with a disability.

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

Requests for information

125. Employers and service providers request information from employees, potential employees, service users and potential service users, in order to assess and manage their employees' and service users' needs. While seeking such information is recognised as a legitimate need, seeking information about whether a person has a protected attribute, or asking particular questions only of people with a protected attribute, can be a precursor to discriminatory conduct or may be used to enable discriminatory conduct. All four Commonwealth anti-discrimination laws prevent people from making discriminatory requests for information.

126. The ADA, DDA and SDA tests for requests for information have three elements:

- a request is made in connection with or for the purposes of doing an act, in the performance of which it would be unlawful to discriminate
- a request is only made of people with the protected attribute and is not made of people who do not have the protected attribute, and
- the request does not fall within one of the exemptions relating to requests for information.

127. The DDA provides a defence where it can be shown that none of the purposes for which the information was requested was to unlawfully discriminate against the other person.[99] The SDA specifically excludes requesting information about a person's medical history in relation to medical conditions affecting persons of the person's sex only or medical information concerning their pregnancy.[100]

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97 SDA Report, page 158.
98 Victorian Act, section 72.
99 DDA, subsection 30(3).
100 SDA, subsection 27(2).

128. The underlying policy rationale for both the DDA defence and SDA exception is to allow requests for information about a person's protected attribute where there is legitimate reason to do so, such as to comply with occupational health and safety standards or to ensure reasonable adjustments can be made. For example, employers may provide information about tasks which cannot be carried out while pregnant for safety reasons and may ask employees to notify them of pregnancies. This does not allow an employer to choose not to employ, or to fire, a person because she is pregnant.

129. The RDA does not contain an equivalent request for information provision. However, discriminatory requests for information may fall within the broad prohibition against discrimination in subsection 9(1) of the RDA. Information that only persons of a particular race are required to provide would be a 'distinction' based on race.

130. Victoria and Queensland adopt a different approach by prohibiting requests for information that could be used to discriminate against a person on the basis of a protected attribute.[101] An exception allows the information to be requested only where it will be for non-discriminatory purposes.[102] The person requesting the information bears the onus of proving that it is required for non-discriminatory purposes.[103] In addition, the Victorian Act provides that the person requesting the information must not disclose the information unless it is necessary to do so for non-discriminatory purposes, nor can that person produce or disclose that information in court.[104]

131. One option would be to maintain the existing test, including the exemptions provided by the DDA and SDA. It may be desirable to include a more flexible exemption provision which examines the purpose of the request for information rather than specifying a narrow range of requests which are exempted. The disadvantage of this option is that by only prohibiting the practice of asking questions of people with a particular protected attribute, it is possible to avoid liability by directing questions at *all* people (except in relation to disability, where to ask any question about the disability is prohibited).

132. Another option would be to adopt the Victorian approach to discriminatory requests for information. This provision is simpler than the current Commonwealth provisions and more clearly expresses the policy objective of prohibiting requests for irrelevant information which can enable discrimination. This obligation is clearer and easier to understand, but may cause a small increase in the obligations of duty holders.

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

Vicarious liability

133. Vicarious liability provisions attribute liability to employers and principals for the unlawful acts of their employees and agents, where employers and principals do not take all reasonable steps to prevent discrimination from occurring.

[101] Victorian Act, section 107; Queensland Act, subsection 124(1).
[102] Victorian Act, section 108; Queensland Act, subsection 124(3).
[103] Victorian Act, subsections 108(1)-(2); Queensland Act, subsection 124(3).
[104] Victorian Act, subsections 108(3)-(4).

134. The ADA, DDA, RDA and SDA all contain vicarious liability provisions. The elements of vicarious liability in the Commonwealth anti-discrimination laws are:

- the existence of a specified relationship
- sufficient connection between the relationship and the unlawful act, and
- the defence of reasonable preventative action has not been established.

135. The tests for each of the above elements of vicarious liability are different across the Commonwealth anti-discrimination laws.

Specified relationships for vicarious liability

136. The RDA and SDA cover the relationship between employer and employee and between principal and agent. This means that an employer/principal will be vicariously liable for an unlawful act committed by their employee/agent. 'Employee' is intended to take its meaning from the broad definition of 'employment' in the Acts, while the relationship of principal and agent is intended to include principal and commission agent and principal and contract worker.

137. The ADA and DDA cover the relationships between employer and employee and between principal and agent but also include the relationships (for companies) between the company and directors, employees, and agents.

Connection between unlawful act and employment relationship required to establish vicarious liability

138. The Commonwealth anti-discrimination laws limit vicarious liability to situations where there is a sufficient connection between the unlawful act and the relationship to give rise to vicarious liability. The ADA and DDA tests require the unlawful act to be committed 'within the scope of [the person's] actual or apparent authority'.[105] The RDA and SDA tests require the unlawful act to be 'in connection with' the person's employment or duties as an agent.[106]

139. In the case of unlawful conduct such as discrimination, it will rarely be the case that the employer or principal directly authorised the discriminatory conduct or that the employee or agent was, strictly speaking, acting within the scope of his or her authority. In cases involving the more egregious forms of unlawful conduct — disability harassment, racial vilification or sexual harassment — the 'within the scope of authority' test may be more difficult to satisfy than the 'in connection with' test.

Defences to vicarious liability

140. Each of the four Acts provides a defence of reasonable preventative action. Under the ADA and DDA, an employer or principal will not be liable for acts committed by an employee or agent where they took 'reasonable precautions and exercised due diligence to avoid the conduct'. The RDA and SDA excuse the employer or principal from liability if they 'took all reasonable steps to prevent the employee or agent from doing the act'.

[105] ADA, section 57.
[106] SDA, section 106.

141. There has been little judicial consideration of these defences in discrimination law matters. In *Walgama v Toyota Motor Corporation Australia Ltd*, the Victorian Civil and Administrative Tribunal stated that the 'criterion of what is *"reasonable"* is not very high or very exacting'.[107] In *Caton v Richmond Club Ltd* emphasis was placed on *all* reasonable steps: 'the taking of reasonable steps is not enough, employers must take all reasonable steps to avoid liability.'[108] The phrases 'all reasonable steps', 'reasonable precautions' and 'due diligence' are common phrases used in other areas of law, including corporations law.[109]

142. Requiring employers and corporations to take 'all reasonable steps' to discourage employees and agents from committing unlawful acts will encourage organisations to develop policies which clearly indicate what types of behaviour are unacceptable, and to actively address instances of unlawful discrimination and harassment, in order to avoid liability. The requirement to take 'all' reasonable steps may be more exacting than a 'reasonable requirements and due diligence' test. However, it may be more familiar to business because of its use in other contexts.

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

[107] [2007] VCAT 1318 at para 98.

[108] [2003] NSW ADT 202 at para 175.

[109] See for example, section 588G of the *Corporations Act 2001* (Cth) — it is a defence to a breach of a director's duty to prevent insolvent trading if the director proves that s/he took all reasonable steps to prevent the company for incurring the debt.

EXCEPTIONS AND EXEMPTIONS

143. All Commonwealth anti-discrimination laws contain specific exceptions and exemptions from the prohibitions on discrimination. These exceptions reflect situations in which a person's attributes are relevant to the action taken. They are inconsistent across the Acts, making it difficult for people who are subject to the laws to understand their obligations. There is also inconsistent use of the terms 'exceptions' and 'exemptions'.

144. It is not intended to discuss every exception under Commonwealth anti-discrimination law in detail. Therefore, this chapter focuses on some of the more significant issues:

- the use of a general limitations clause
- exceptions for inherent requirements/genuine occupational qualifications
- exemptions for religious organisations, and
- the power of the Australian Human Rights Commission to grant temporary exemptions..

General limitations clause

145. An alternative approach to the current method of specifically providing for a wide range of permanent exceptions would be to introduce a general limitations clause. This would clarify that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective is not discrimination. The conduct would have to be based on reasonable and objective criteria. For example, the Canadian Act contains a general limitations clause in the form of the bona fide occupational requirement test.[110]

146. Any consideration of inserting a general limitations clause in the consolidation bill must ensure that the policy expressed in existing exceptions under the current Commonwealth anti-discrimination laws is maintained.

147. There are several benefits in adopting a general limitations clause to replace some or all of the current specific exceptions. First, it would allow for a more case-specific approach and give the courts the ability to consider whether a practice or action was the most appropriate method of achieving an objective. Secondly, it would apply broadly to all duty holders under the consolidation bill and accordingly remove the need to grant numerous specific exceptions for particular activities, which would address gaps in coverage and inconsistent protections across the attributes. Finally, a general limitations clause would provide flexibility to adapt to changing standards and community expectations over time.

148. The main disadvantage of adopting a general limitations clause is that it could, at least initially, result in increased uncertainty as its application would depend on the interpretation and application of the test by the courts. The outcomes of court decisions would be dependent on the particular circumstances of each case. This could make it difficult to predict with absolute certainty whether particular conduct would be lawful. There is also a risk that complexity which previously existed in the legislation may re-emerge in the case law.

[110] Canadian Act, section 15.

149. The SDA Report recommended that further consideration be given to removing several of the existing permanent exemptions and replacing them with a general limitations clause.[111] Conversely, the Productivity Commission Report recommended retaining specific exceptions under the DDA on the basis that they provide greater clarity as to the intent of the legislature regarding the scope of the Act, greater certainty where the Act might otherwise be ambiguous and reduce potentially unnecessary legal processes and transaction costs.[112]

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

Inherent requirements and genuine occupational qualifications

150. 'Inherent requirements' is an exception to unlawful discrimination in work. The exception generally applies where a person is unable to carry out the essential requirements of a particular employment. 'Inherent requirement' is not defined in the Commonwealth anti-discrimination laws, but the meaning of the term has been considered in a number of High Court cases.[113]

151. There are significant inconsistencies in the coverage and drafting of the inherent requirement provisions across the Commonwealth anti-discrimination laws. This section will consider the major inconsistencies and options for reform in the consolidation bill.

152. Of the Commonwealth anti-discrimination laws, only the ADA[114] and the DDA[115] use the phrase 'inherent requirements', but these Acts differ significantly in the areas of work to which the inherent requirements exception applies. For example, in the ADA the exception only applies with respect to determining who should be offered employment and dismissal of employees, while in the DDA it also applies to the terms and conditions of being offered employment, promotion and transfer.[116] Both Acts apply to general employment, commission agents, contract workers, partnerships, qualifying bodies and employment agencies.

153. The SDA contains a different exception to unlawful discrimination called 'genuine occupational qualifications'.[117] This exception applies only to the attribute of sex in connection with the recruitment of employees, contract workers and commission agents. It does not apply to partnerships, qualifying bodies or employment agencies (whereas the ADA and DDA do). A non-exhaustive list of examples is given in section 30(2), including dramatic performances and positions involving privacy considerations such as conducting personal searches. The genuine occupational qualification exception does not apply to the other attributes protected under the SDA (marital status, pregnancy, potential pregnancy, breastfeeding or family responsibilities).

154. There is very little case law on genuine occupational qualifications, but it seems that it would be assessed similarly to inherent requirements under the ADA and DDA.

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[111] In particular, SDA Report reecommnedation 36 was that further consideration be given to removing the exemptions in section 30 and sections 34 to 43 of the SDA.
[112] Productivity Commission Report, page 364.
[113] *Qantas Airways Ltd v Christie* [1998] 193 CLR 280; *X v Commonwealth* [1999] 200 CLR 177.
[114] ADA, subsections 18(4) and (5), 19(3) and (4), 20(2) and (3) and 21(4) and (5).
[115] DDA, section 21A.
[116] See generally ADA, sections 18(1)(a), (b) and 18(2)(c) and DDA, sections 15(1)(a),(c),(d) and 15(2)(a) and (c).
[117] SDA, section 30.

155. The RDA does not contain exceptions for inherent requirements or general occupational qualifications, although the provisions prohibiting discrimination in employment refer to work 'for which [the] person is qualified'.[118]

156. The coverage of inherent requirements and genuine occupational qualifications is mixed at the State and Territory level. Most jurisdictions contain both an inherent requirements exception for disability[119] (and sometimes for age)[120] as well as a genuine occupational qualification exception for most attributes.[121]

157. At the international level, a broad test for inherent requirements (where the term is undefined) appears to be the norm. Article 2 of International Labour Organization Convention No. 111 on Discrimination (Employment and Occupation) provides that 'any distinction, exclusion or preference in respect of a particular job based on inherent requirements thereof shall not be deemed to be discrimination'. The Fair Work Act takes this approach by applying a broad general inherent requirements exception to all attributes and in all areas of work covered by the Act.[122]

158. The European Union takes a different approach to current Commonwealth anti-discrimination law. Article 23 of EU Directive 2000/78/EC allows member states to include in anti-discrimination legislation, in limited circumstances, a provision allowing difference of treatment to be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement and where the objective is legitimate and the requirement is proportionate.

159. The UK Act implements the EU Directive by providing an exception from unlawful discrimination in relation to 'occupational requirements'.[123] This exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age (or not being a transsexual person, married or a civil partner) is a requirement for the work and that requirement, which the person cannot meet, is a proportionate means of achieving a legitimate aim (adopting the language used in the EU Directive).

160. The examples provided in the Explanatory Memorandum to the UK Act clearly indicate that its concept of 'occupational requirements' reflects the concept of genuine occupational qualification in the SDA, such as employing a person of the same sex to work in a public changing room.[124] There is no corresponding inherent requirements exception for disability or age in the UK Act.

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

[118] RDA, subsection 15(1).

[119] WA Act, section 66Q; Queensland Act, paragraph 34(a) ('fix reasonable terms to holder of a position who has a restricted ability to do the work genuinely'); Tasmanian Act, paragraph 45(a)(i); NT Act, subsection 35(1); NSW Act, subsection 49D(4); ACT Act, section 49; Victorian Act, section 20 (part of the duty to make reasonable adjustments).

[120] WA Act, s66ZM ('health and safety circumstances and on the terms employment offered); NT Act, section 35(1); SA Act, section 85F(3).

[121] For example, the WA Act has genuine occupational qualification exceptions for sex (section 28), race (section 50), disability (section 66S) and age (section 66ZQ); the Victorian Act has genuine occupational qualification exceptions for sex, age, race and disability (section 26).

[122] Fair Work Act, sections 153,195, 351 and 772.

[123] Schedule 9 to the UK Act,.

[124] Explanatory Memorandum to UK Act, paragraphs 787-789.

Exemptions for religious organisations

161. The Government does not propose to remove the current religious exemptions, apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity.

162. Exemptions are only currently available on the grounds protected under the ADA and the SDA. Both Acts contain a general exemption for any acts or practices of a body established for religious purposes, that:

- conform to the doctrines, tenets or beliefs of the relevant religion or
- are necessary to avoid injury to the religious sensitivities of adherents of that religion.[125]

163. The SDA also includes exemptions for a number of specific activities including:

- the ordination or appointment of priests, Ministers of religion or members of any religious order and accommodation provided by a religious body[126] and
- educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training,[127] provided the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'.[128]

164. All State and Territory Acts contain religious exemptions which are similar in substance to those contained in the SDA.

165. Most State and Territory religious exemptions also extend to discrimination on the grounds of sexual orientation and gender identity. The Tasmanian Act does not include exemptions for sexual orientation. There are some general exemptions relating to discrimination on the grounds of religious belief and practice.

166. In its consultation on addressing sexual orientation and sex and/or gender identity discrimination, the Australian Human Rights Commission noted a lack of community consensus on the issue of religious exemptions. While some submitted that the approach in existing Acts, such as the SDA, is appropriate, others thought that the exemptions should be narrower or removed entirely.[129]

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

[125] ADA, section 35; SDA, paragraph 37(d).
[126] SDA, section 37 and paragraph 23(3)(b).
[127] SDA, section 38.
[128] SDA, subsection 38(1).
[129] Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* Consultation Report (2011), pages 33–4.

Temporary exemptions

167. Currently, the Commission can grant temporary exemptions from certain provisions of the ADA, SDA and DDA. Exemptions can be granted for a maximum of five years and the decision to grant an exemption is reviewable by the Administrative Appeals Tribunal. The Commission publishes guidelines setting out the criteria and procedures it uses when determining when a temporary exemption should be granted. These guidelines, and decisions made concerning applications for temporary exemptions, can be found on the Commission's website.[130]

168. The SDA Report recommended that the SDA should specify that the Commission must exercise its power to grant temporary exemptions in accordance with the objects of the relevant Act.[131] While the Commission already takes this approach, it is supportive of the inclusion of this clarification in the consolidation bill.[132]

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?**

[130] <http://www.humanrights.gov.au/legal/exemptions/index.html>.
[131] SDA Report, recommendation 28.
[132] SDA Report, paragraph 7.66.

COMPLAINTS AND COMPLIANCE FRAMEWORK

169. The complaints process for Australia's anti-discrimination laws is intended to be efficient, informal and low cost for both complainants and respondents. While the current complaints handling process appears to achieve this for many users, some initial submissions to the consolidation project have raised concerns that it may not fulfil these expectations for all. Accordingly, this chapter considers ways in which compliance with Commonwealth anti-discrimination law, the complaints handling process and the Commission's role and functions could be improved to create greater certainty for all users of the legislation and ensure greater compliance with obligations.

170. This chapter examines the following:

- options to assist people to meet their anti-discrimination obligations
- reform of the conciliation process
- improving other aspects of the complaints process, such as permitting representative actions, changes to the arrangements for cost orders and further guidance on available remedies, and
- options to reform the roles and functions of the Australian Human Rights Commission.

Options to assist business in meeting anti-discrimination obligations

171. There are a range of mechanisms available to provide guidance and help to businesses, as employers and service providers, to understand and meet their obligations under Commonwealth anti-discrimination laws. Such mechanisms could include:

- voluntary non-binding action plans
- co-regulation
- standards, and
- certification of special measures.

172. The bulk of discrimination and harassment complaints relate to the workplace and the provision of services.[133] Organisations that value and capitalise on employee diversity have productive and fulfilling workplaces which help them attract and retain employees. This leads to savings in recruitment and training costs, as well as maintaining corporate knowledge and expertise.

173. Employers and service providers may require guidance and assistance to establish policies and procedures that address discrimination issues. There has been criticism that businesses do not have sufficient certainty regarding their obligations under anti-discrimination laws or adequate support in meeting those obligations.[134] This section discusses possible reforms to establish or strengthen the mechanisms to assist business to meet their obligations under Commonwealth anti-discrimination law. The potential benefits of adopting or extending these mechanisms should be balanced with the implementation and ongoing costs of administering each mechanism for business and Government.

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[133] SDA Report, chapters 5 and 8.

[134] See, for example, Australian Human Rights Commission, Submission No 69 to the SDA Report (available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm>.

Action plans

174. The DDA provides that duty holders under the Act (such as employers or service providers) may develop voluntary 'action plans' that specify policies and programs to help them comply with their DDA obligations.[135] These action plans can be registered with the Commission and made publicly accessible on the Commission's website to demonstrate the organisation's commitment to creating a diverse and inclusive workplace or service, and to provide examples to other duty holders. At present, action plans have primarily been adopted by employers and service providers, including banks, public transport services and government departments.

175. Action plans are voluntary, non-binding and have limited effect on the action planner's legal obligations. Action plans provide a collaborative mechanism for addressing the needs of people with a particular protected attribute. They are developed through consultation between the employer or service provider and the Commission and the community. This educative process can help businesses to avoid behaviour and practices which are likely to give rise to complaints of unlawful discrimination. Action plans may also be relevant to the assessment of unjustifiable hardship where a claim of discrimination has been made.[136]

176. One option which has been raised is whether action plans should be extended to other protected attributes. This approach is used in Victoria, where the Victorian Equal Opportunity and Human Rights Commission can register action plans and provide advice to service providers and employers on developing action plans that meet their obligations under the Victorian Act. This would allow businesses to market their commitment to equality and assist them to analyse and improve their policies and procedures.

Co-regulation

177. Another mechanism which could achieve greater certainty for business is a scheme of co-regulation. Co-regulation is a form of self-regulation by an industry or organisation carried out in conjunction with Government. A typical co-regulatory framework will involve a law that sets minimum standards, while permitting industry codes or other mechanisms developed by industry bodies which supplement the law. These codes and mechanisms may be monitored or validated by a government regulator. Systems of co-regulation can be found in a number of other Commonwealth laws.[137]

178. In the context of anti-discrimination law, this could involve an industry working with the Australian Human Rights Commission and affected stakeholders to provide industry-specific detail to existing obligations, which will in turn make obligations clearer to understand, therefore improving compliance. For example, the banking industry might choose to develop minimum standards for the design and placement of Automatic Teller Machines to better facilitate access and use by people with a disability.

179. The Productivity Commission has recommended that the Commission be empowered to certify such co-regulation arrangements.[138] The advantage of co-regulation is that it can improve certainty for businesses — a business which is compliant with its industry's co-regulation plan

[135] DDA, Part 3.
[136] DDA, paragraph 11(1)(e).
[137] For example, the *Privacy Act 1988*, the *Taxation Administration Act 1953* and the *Broadcasting Services Act 1992*.
[138] Productivity Commission Report, recommendation 14.5.

(which has been certified by the Commission) would not be liable for unlawful discrimination claims with respect to the matters covered by the plan.

180. Preparing a co-regulatory code or standard in consultation with the community and the Commission could assist in educating businesses on the broader requirements of Commonwealth anti-discrimination law. Quality of co-regulatory standards and legislative compliance could be enforced by a requirement that standards be approved by the Commission under certain conditions (including appropriate community consultation), and sunsetting provisions requiring the plan to be re-certified on a regular basis (for example, every five years). These measures would also resolve concerns that co-regulation codes and standards may not be compliant with the DDA. [139]

Standards

181. Another feature of the DDA which could be extended to other protected attributes (in addition to disability) to achieve the consolidation bill's aim of providing greater certainty for users of the law is the development of legally binding standards by the Attorney-General.[140]

182. Extending the Attorney-General's standards-making power to some or all protected attributes covered under the Commonwealth anti-discrimination laws would provide flexibility to develop standards addressing particular areas of disadvantage. Standards which apply to other attributes could focus on issues such as representation of gender in organisations and guidance on the scope of the 'inherent requirements' exception.

183. The SDA Report recommended that the Commission be able to formulate legally binding standards under the SDA, equivalent to the power currently exercised by the Attorney-General under section 31 of the DDA.[141] The Australian Law Reform Commission made a similar recommendation in its *Equality Before the Law* report.[142]

184. Standards can be a useful mechanism for providing additional certainty and guidance on specific obligations under legislation. However, prescriptive technical standards may not be well adapted to regulating attributes other than disability. For example, other attributes covered in anti-discrimination law, such as sex and race, are unlikely to require technical regulations like the disability standards for premises and public transport, which specify technical accessibility requirements for paths, ramps, and handrails.

Certification of special measures

185. As discussed earlier, special measures are positive or beneficial measures generally aimed at accelerating or achieving substantive equality for a group within the community that has suffered from historical and entrenched discrimination and disadvantage. Examples of such special measures include recruitment processes targeting people with disabilities and scholarship programs for indigenous students.

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[139] See, for example, Productivity Commission Report, pages 424 to 426.

[140] Three standards have made under the DDA: the *Disability (Access to Premises—Buildings) Standards 2010*, the *Disability Standards for Education 2005*, and the *Disability Standards for Accessible Public Transport 2002*.

[141] SDA Report, recommendation 39.

[142] Australian Law Reform Commission, *Equality before the Law: Justice for Women*, ALRC 69, Part 1, recommendation 3.4.

186. The Commission has argued that the lack of certainty around the legality of proposed special measures has discouraged businesses from using them.[143] For this reason, it may be desirable to empower the Commission to certify a proposed course of action as a special measure for a specified period of time. While not affecting the substantive obligations imposed on business, certification would allow businesses to adopt equal opportunity measures with more certainty. Enabling businesses to pursue special measures with more guidance and certainty could help to overcome areas of disadvantage.

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?**

Options for reforming the conciliation process

187. The first stage in making an unlawful discrimination complaint is to lodge it with the Australian Human Rights Commission, which must investigate the complaint and try to resolve it where possible through conciliation. It is only if conciliation fails to resolve the matter that the complainant may commence proceedings in the Federal Court or Federal Magistrates Court.

188. Commission conciliation is a low-cost, informal and flexible alternative dispute resolution process designed to achieve a negotiated resolution between the parties. Conciliation is a confidential process and any information provided during conciliation is inadmissible in subsequent court proceedings.

189. The use of alternative dispute processes prior to commencing court proceedings has several advantages, including reducing costs and stress for all parties. However, it is timely to consider whether the current model of compulsory conciliation is the most appropriate model for discrimination complaints, as well as whether there is a role for additional alternative dispute resolution methods, such as arbitration or mediation.

Voluntary conciliation

190. As noted above, conciliation in the Commission is a compulsory step that must be taken before bringing an unlawful discrimination action in the federal courts. The President of the Commission has powers to require production of information and attendance at conciliation conferences.[144] It is an offence for a person to fail to provide the information sought, fail to attend a conference as directed or provide false or misleading information. However, in practice, the Commission generally conducts its conciliation and investigation processes on a voluntary basis and requests (rather than compels) attendance and/or the provision of information.

191. The advantage of compulsory conciliation is that it provides parties with a low cost opportunity to explore the issues and attempt to reach an agreement satisfactory to both sides. Conciliation is also a more flexible process than court action. For example, matters can be settled by an exchange of letters, a telephone negotiation between the Commission and the people involved

[143] Australian Human Rights Commission submission to the SDA Report, above n 153.

[144] AHRC Act, sections 46PI and 46PJ. The President also has the power to terminate complaints under section 46PH for reasons including that the President is satisfied the alleged discrimination is not unlawful, the complaint is trivial, vexatious, misconceived or lacking substance or where the subject matter of the complaint involves an issue of public importance and should be considered by the federal courts.

or a telephone or face-to-face conciliation conference. Conciliation also has the potential to limit the damage that might otherwise be done to ongoing relationships between the parties (eg employer and employee). Currently, the majority of State and Territory jurisdictions require compulsory conciliation.

192. However, it has been suggested that there may be advantages to having a voluntary conciliation process which would allow parties to proceed directly to court without going through compulsory conciliation. This is the approach taken in the Victorian Act.[145] The Victorian Equal Opportunity Review supported this model on the basis that it is more efficient and avoids duplication and delays associated with the two stage complaint process.[146] The complaints process in New Zealand similarly allows parties to proceed to the Human Rights Tribunal without attempting to resolve the matter at conciliation. In the United Kingdom there is no conciliation process at all, with all complaints commencing in the relevant court or tribunal at first instance.[147]

193. Another option is to retain a compulsory alternative dispute resolution stage, but broaden it to include other forms of ADR rather than just conciliation. The parties could then select the form of ADR best suited to the circumstances of the particular matter. Examples of other forms of ADR, such as arbitration and mediation, are considered in more detail below.

Voluntary arbitration

194. The Commission currently uses a flexible conciliation system to resolve complaints. The AHRC Act does not place significant restraints on the way in which conciliation is conducted. It allows the parties to state their point of view, discuss the issues in dispute and attempt to settle the matter in a flexible manner.

195. An alternative possibility for resolution of complaints is voluntary, or consent-based, arbitration, where the parties agree in advance to abide by the decision of an arbitrator. Arbitration is a more structured process usually involving formal presentation of evidence and legal argument to the arbitrator, who then makes a determination in order to resolve the dispute. The determination of the arbitrator in voluntary arbitration is binding. Voluntary arbitration may have a beneficial deregulatory effect in providing a second, relatively low-cost avenue for binding resolution of disputes. The Fair Work Act provides an example of a dispute resolution system that includes both conciliation and voluntary or consent-based arbitration—Fair Work Australia can arbitrate certain disputes if both parties to the dispute agree that it can do so.[148]

196. However, arbitration can be more costly than conciliation, both for the parties involved and for Government (if it provides the arbitration services). It is also suggested that the more formal and structured process involved in arbitration may leave the parties with fewer opportunities to speak or to suggest and consider options that match their needs and interests.[149]

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[145] Victorian Act, section 122.

[146] Department of Justice (Victoria), *Equal Opportunity Review,* above n 96, page 69.

[147] Section 138 of the UK Act gives complainants the power to obtain information from potential respondents through a series of forms published by the UK Equalities Office. These forms allow complainants to pose questions to respondents, the answers to which are admissible in proceedings under the Act, with the relevant court or tribunal permitted to draw adverse inferences from a failure to respond or an 'evasive or equivocal answer',.

[148] Fair Work Act, subsection 595(3). However, arbitration is not available for alleged discriminatory conduct in breach of the general protections provisions of the FW Act.

[149] See for example, National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution in the Civil Justice System – Issues Paper* (2009), page 5 and National Alternative Dispute Resolution Advisory Council, *National Principles for Resolution of Disputes – Interim Report to the Attorney General* (July 2010).

Mediation

197. Mediation is a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

198. Offering mediation to discrimination complainants could supplement Commission conciliation. The Commission could use in-house mediators or refer complainants to private mediators or a community mediation service. It would be preferable for mediators to be accredited under the National Mediator Accreditation System.

Question 25.	**Are any changes needed to the conciliation process to make it more effective in resolving disputes?**

Options to improve the court stage of the complaints process

199. If the parties cannot reach a settled outcome through conciliation, a complainant can then file a complaint with the Federal Magistrates Court or the Federal Court. It is often argued that the costs and formality of the federal courts present a significant barrier to the effectiveness of the complaints process.[150] This section considers reform options relating to the court process for anti-discrimination complaints which have been raised in recent inquiries.

Representative actions

200. The AHRC Act currently allows complaints to be lodged with the Commission by a person (including representative bodies) or a trade union on behalf of one or more other persons aggrieved by an alleged act of unlawful discrimination.[151] However, if the matter does not resolve at conciliation, these bodies cannot then commence an action in the federal courts on behalf of the aggrieved person.[152]

201. A number of reports have recommended that representative bodies such as advocacy groups, human rights organisations and trade unions should be able to bring actions in the federal courts.[153] It is argued that giving representative organisations standing to pursue complaints in the federal courts on behalf of complainants will make the complaints process more efficient and user-friendly.[154] It may also assist in cases of systemic disadvantage which are more difficult to raise with an individual complaint. Engaging with the complexities of the court system can be difficult and costly for complainants and representative actions would allow genuine cases which previously

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[150] See, for example, Productivity Commission Report, Chapter 13.3 and SDA Report, Chapter 6.

[151] AHRC Act, paragraph 46P(2)(c).

[152] Section 46PO(1) only permits an 'affected person' to commence action in the federal courts. 'Affected person' is defined to mean a person on whose behalf the complaint was lodged. See also *Access for All Alliance (Hervey Bay) v Hervey Bay City Council* [2007] FCA 615.

[153] SDA Report, recommendation 20; Productivity Commission Report recommendation 13.5; Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), recommendation 8.10.

[154] For further discussion, see Productivity Commission Report, pages 396 to 401; SDA report, pages 77 to 78 and 154 to 156.

would not have proceeded past conciliation (particularly those with a public interest element) to be heard in the courts. It may also lead to more judicial consideration of important provisions, which could provide greater certainty as to obligations over time.

202. In order to ensure that such a reform would not lead to an increase in unmeritorious complaints in the federal courts, limitations could be placed on a representative body's ability to commence actions, such as a requirement that representative bodies be required to establish a demonstrated connection with the subject matter of the dispute before commencing an action or that there must be a justiciable issue identified before an action can be brought. The federal courts already have the power to dismiss an action which is frivolous or has no reasonable prospects of success.

Litigation costs

203. The costs of litigation, and the risk of adverse costs orders, create a significant barrier to the pursuit of unlawful discrimination actions. Under the current system, the unsuccessful party in a litigation matter must pay the costs of the successful party (although the courts have discretion in how they award costs).

204. The Productivity Commission Report recommended that each party to a discrimination case should bear their own costs.[155] It also recommended providing guidelines for costs orders based on similar criteria to the *Family Law Act 1975*,[156] including a consideration of the financial circumstances of the parties, the conduct of the parties during the course of the proceedings and any other matter the court considers relevant. Alternatively, other submissions have suggested that the courts could be empowered to award costs only where they determine that a party has acted unreasonably.[157] Consideration could also be given to raising the issues earlier at the conciliation stage by providing the President of the Commission with discretion to issue a certificate upon the failure of conciliation, stating that the action is vexatious and without merit, in order to inform the court early in proceedings that it may be appropriate to award costs in the matter.

Remedies

205. The courts can make any order they see fit if they determine that unlawful discrimination has occurred. The AHRC Act lists examples of orders the court may make, including requiring the respondent to re-employ the complainant, to perform any reasonable act to redress the loss or damage suffered by the complainant, including payment of damages, and requiring the respondent to vary the terms of a contract or agreement.[158] Australia has an obligation under a number of international human rights treaties to provide an 'effective remedy' for discrimination.[159]

206. The SDA Report recommended that the AHRC Act be amended to extend the example list of orders available to the courts to include corrective and preventative orders.[160] This would enable courts to order the respondent to perform any reasonable act or acts aimed at ensuring future

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[155] Productivity Commission Report, recommendation 13.4.
[156] *Family Law Act 1975*, subsection 117(2A) and section 118.
[157] Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, above n 23, page 18.
[158] AHRC Act, subsection 46PO(4).
[159] See, for example, Article 6 of CERD and Article 2 of CEDAW.
[160] SDA Report, Recommendation 23.

compliance with the SDA.[161] Such an amendment could provide better guidance to courts on the range of possible orders it may wish to make. It would also highlight to duty holders the possible consequences of non-compliance with the Act. However, such a provision is not strictly necessary to empower the courts to make such orders, which are already empowered to make any orders they see fit.

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

Options for reforming the roles and functions of the Australian Human Rights Commission

207. A range of recommendations for reforming the Commission's role and functions have been made in a number of reports.[162] These reform proposals, which are discussed in greater detail below, include:

- amending the definition of 'human rights' in the AHRC Act
- extending the formal inquiry powers of the Commission to acts and practices of the States and Territories
- monitoring the elimination of discrimination and reporting to Parliament
- reforming the *amicus curiae* role of the specialist Commissioners
- granting the Commission the power to investigate and enforce breaches of unlawful discrimination, and
- granting temporary exemptions for all protected attributes.

Current role and functions of the Commission

208. Currently, the Commission has functions relating to three core issues:

- unlawful discrimination
- human rights, and
- equal opportunity in employment.

209. **Unlawful discrimination functions:** The Commission inquires into and attempts to conciliate complaints of unlawful discrimination. 'Unlawful discrimination' is defined as conduct which is unlawful under the ADA, DDA, RDA or SDA. The process for resolving unlawful discrimination complaints is discussed above.

210. **Human rights and other functions:** The Commission may inquire into Commonwealth acts or practices which may be inconsistent with human rights, either on its own motion or on receipt of a complaint. The Commission is also responsible for public education on human rights, including the rights to non-discrimination, reporting to the Attorney-General on breaches of Australia's

[161] SDA Report, page 156; also see Pay Equity Report, recommendation 21: that 'the SDA be amended to make it mandatory for employers who are repeat offenders discriminating on the basis of pregnancy or family responsibilities to be required to attend counselling or an approved training course.'

[162] The SDA Report; the Productivity Commission Report; the Pay Equity Report.

international human rights obligations, preparing and publishing guidelines on unlawful discrimination and granting temporary exemptions.[163]

211. **Equal opportunity in employment functions:** The Commission has functions which give effect to Australia's obligations under ILO Convention No. 111. These functions extend to acts and practices of all employers in Australia, including the Commonwealth, the States and Territories and the private sector. The Commission can seek to conciliate complaints of ILO discrimination brought under these provisions. However, these matters cannot progress to the federal courts if conciliation fails.[164]

Definition of 'human rights' in the AHRC Act

212. As discussed above, the Commission exercises a number of functions in relation to human rights. The scope of the Commission's ability to act under these provisions is confined by the definition of 'human rights' provided in the AHRC Act, which includes the rights and freedoms recognised in the following international instruments:

- the International Convention on Civil and Political Rights
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities
- the UN General Assembly Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief
- the UN General Assembly Declaration on the Rights of the Child
- the UN General Assembly Declaration on the Rights of Mentally Retarded Persons
- the UN General Assembly Declaration on the Rights of Disabled Persons

213. The Human Rights (Parliamentary Scrutiny) Bill 2010 defines human rights by reference to the seven core international human rights treaties to which Australia is a party (set out at paragraph 6 above). The Senate Standing Committee on Legal and Constitutional Affairs' inquiry into that Bill recommended that the Government consider harmonising the definition of human rights in that bill and in the AHRC Act.

Formal inquiries

214. As noted above, the Commission can currently inquire into matters relating to Commonwealth acts or practices which infringe human rights and report to the Attorney-General on laws that should be made by Parliament or actions that should be taken by the Commonwealth in relation to human rights. However, these inquiry powers are limited to acts of the Commonwealth and do not extend to acts of the States and Territories.

215. The SDA Report recommended that the Commission be empowered to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a State or Territory and under State

[163] AHRC Act, subsection 11(1).
[164] AHRC Act, section 31.

or Territory laws.[165] This would enable the Commission to carry out formal inquiries into broader and systemic discrimination matters, since these matters often overlap between jurisdictions.

216. This suggestion, if it were to be further considered, would require consideration to be given to how it might work in practice, including the development of cooperative arrangements with the States and Territories and the powers which might be given to the Commission in relation to State and Territory matters. The interaction of Commonwealth and State and Territory laws and arrangements is considered further in the next chapter.

Monitoring elimination of discrimination and reports to Parliament

217. The SDA Report[166] recommended that the SDA be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality and to report to Parliament every four years. The SDA report stated that giving the Commission this function would 'demonstrate the Australian Government's commitment to independent monitoring and assessment of progress towards gender equality' and 'allow for an assessment of whether existing legislation and programs are succeeding in eliminating discrimination'.[167]

218. Currently, only the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to submit an annual Social Justice Report to Parliament on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islander persons.[168] The UK Human Rights Commission has a similar obligation to monitor progress on the achievement of equality and the success of the UK Act and must report to Parliament every 3 years.[169]

Amicus curiae

219. An *amicus curiae* is a 'friend to the court' who assists the court on points of law in a particular case. An *amicus* is generally not a party to the proceedings, does not file pleadings or lead evidence and may not lodge an appeal from the court's decision. An *amicus* is usually a specialist in the particular area of law that is under examination in the matter before the court and provides information to the court on the broader legal issues that are raised by the matter.

220. Currently, each of the specialist Commissioners can appear as *amicus curiae* in unlawful discrimination matters being heard by the federal courts with the leave of the court.
The SDA Report recommended that the specialist Commissioners be allowed to also appear as *amicus curiae* in appeals from decisions made by the Federal Court and the Federal Magistrates Court.[170] Although this already occurs in practice, the existing provision could be amended for clarification.

221. The SDA Report also recommended that the specialist Commissioners be empowered to intervene, or appear as *amicus curiae*, as of right in unlawful discrimination proceedings (that is, without requiring leave of the court).[171] One issue to consider is the impact such a right of

[165] SDA Report, recommendation 29.
[166] SDA Report, recommendation 33.
[167] SDA Report, page161.
[168] AHRC Act, section 46C.
[169] *Equality Act 2006* (UK), section 12.
[170] SDA Report, recommendation 31.
[171] SDA Report, recommendation 32.

appearance would have on the conduct and cost of the proceeding, particularly where the proposed involvement may be opposed by the parties. In practice, the federal courts generally allow the specialist Commissioners to appear upon application and it may be more appropriate that the courts retain the power to regulate their own proceedings.

Investigation of alleged unlawful discrimination

222. The Commission's inquiry power is limited to breaches of human rights by the Commonwealth and instances of ILO discrimination (and only after a complaint has been made). The Commission cannot initiate investigations into unlawful discrimination under the anti-discrimination laws; it can only conciliate once a complaint is lodged.

223. The individual complaints-based model has been criticised for its limited ability to affect discriminatory behaviour across society. A number of reports have recommended that the Commission, or the relevant specialist Commissioner, be empowered to investigate potential breaches of Commonwealth anti-discrimination laws without an individual complaint being made.[172]

224. In addition, a number of inquiries have recommended the introduction of an enforcement role for the Commission by empowering it to bring actions for breaches of anti-discrimination laws in the federal courts.[173] Others have recommended allowing the Commission to issue compliance notices for breaches of the Act and for breaches of agreements made following conciliation.[174]

225. Examples of other anti-discrimination commissions with investigation and enforcement powers can be found in other jurisdictions.[175] The Victorian Act empowers its Commission to investigate issues of discrimination without an individual complaint, to seek enforceable undertakings and apply to the Victorian Civil and Administrative Tribunal to enforce undertakings.[176] Similarly, the anti-discrimination provisions of the Fair Work Act can be enforced through investigations and enforcement actions undertaken by the Fair Work Ombudsman.[177]

226. Introduction of these functions would allow the Commission to pursue litigation to increase awareness of anti-discrimination law and deter non-compliance. However, it would considerably alter the Commission's role in relation to unlawful discrimination complaints and could create a perceived conflict of interest with the Commission's function as neutral conciliators.[178] If the Commission could bring actions as well as having a dispute resolution role, clear separation of these two functions would be required and as such, the Commission may not be the appropriate body to exercise this function. It could also arguably duplicate, at least to an extent, the functions of the Fair Work Ombudsman in relation to employment.

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?**

[172] SDA Report, recommendation 37; House of Representatives Standing Committee on Legal and Constitutional Affairs, *'Access All Areas' report of the inquiry into Draft Disability (Access to Premises — Building) Standards*, recommendation 17; Pay Equity Report, recommendation 19.
[173] SDA Report, recommendation 38; Pay Equity Report, recommendation 20.
[174] Pay Equity Report, recommendation 20; Access All Areas Report, see above n 197, recommendation 17.
[175] See for example, the *Equality Act 2006* (UK), sections 20 and 28.
[176] Victorian Act, Part 9.
[177] Fair Work Act, Subdivision D of Division 3 of Part 5-2.
[178] See, for example, Productivity Commission Report, page 384.

INTERACTION WITH OTHER LAWS AND APPLICATION TO STATE AND TERRITORY GOVERNMENTS

227. With the exception of section 10 of the RDA, the Commonwealth anti-discrimination laws do not apply directly to Acts of Parliament. They do, however, interact with many Commonwealth, State and Territory laws and programs, including:

- the possibility of inconsistency between Commonwealth anti-discrimination law and other Commonwealth laws
- interaction with the Fair Work Act's anti-discrimination provisions
- potential overriding of inconsistent State laws under section 109 of the Commonwealth Constitution
- interaction with State and Territory anti-discrimination laws and complaints systems, and
- application of Commonwealth anti-discrimination laws to State and Territory executive government.

228. The Commonwealth anti-discrimination laws currently provide mechanisms for dealing with each of these overlaps with other laws and jurisdictions. These mechanisms have a number of objectives, including avoiding forum shopping and double jeopardy, preserving the operation of State and Territory anti-discrimination laws as far as possible and enabling Parliament to balance competing policy considerations in developing laws. Management of these interactions is important in order to prevent unnecessary regulatory complexity for individuals and in particular, to prevent increasing the burden on businesses due to conflicting obligations or forum shopping.

Commonwealth laws

Exemptions for direct compliance with other Commonwealth laws

229. The ADA, DDA and SDA presently avoid the possibility of inconsistencies with other Commonwealth laws by providing specific exemptions for acts done in direct compliance with specified laws. No equivalent exemption is provided by the RD Act. The advantage of this approach is that it clearly identifies, and ensures Parliament has turned its mind to, Commonwealth laws containing provisions which might otherwise be discriminatory. This approach promotes transparency and encourages careful consideration of whether differentiation on the basis of an attribute is appropriate in the circumstances. However, the approach is complex and requires frequent updating to reflect changes in Commonwealth laws.

230. State and Territory anti-discrimination laws generally adopt a different approach. For example the NSW Act exempts everything done in order to comply with any other State Act, subordinate law, or order of a court or tribunal.[179] This approach has the advantage of simplicity, but does not clearly identify areas of remaining discrimination in the NSW statute book and is less likely to encourage rigour in policy processes than the current Commonwealth approach.

[179] NSW Act, paragraph 54(1)(c).

Fair Work Act

231. There are two main areas of potential interaction between the Fair Work Act and Commonwealth anti-discrimination laws. These are:

- the power of Fair Work Australia to vary discriminatory modern awards and enterprise agreements on referral from the Commission, and
- the prohibitions of adverse action in employment based on a protected attribute and termination based on a protected attribute.

232. The first potential interaction is between the Fair Work Act provisions regulating discriminatory modern awards and enterprise agreements and Commonwealth anti-discrimination laws. Regulatory overlap is avoided by provisions in the ADA, DDA and SDA exempting acts done in direct compliance with these instruments,[180] complemented by a power for the Commission to refer discriminatory instruments to Fair Work Australia for review.[181] In reviewing the instruments upon referral, Fair Work Australia must vary discriminatory provisions if they would have been unlawful under the Commonwealth anti-discrimination laws but for the exemption.[182] As a consequence, complaints about breaches of Commonwealth anti-discrimination law in the terms of modern awards and enterprise agreements can in effect be determined by Fair Work Australia.

233. A second potential interaction is between the Fair Work Act's general protections against discrimination in employment and the Commonwealth anti-discrimination laws. The Fair Work Act extends the protection provided against discrimination in employment to cover a wide range of adverse action taken against employees because of a protected attribute.[183] Protection is also provided against unlawful termination based on a protected attribute.[184]

234. There is substantial overlap between the discriminatory conduct in employment regulated by the Fair Work Act and the provisions relating to discrimination in work in the Commonwealth anti-discrimination laws. However, the provisions of the Commonwealth anti-discrimination laws extend well beyond traditional employment relationships to include persons working for a person under a contract with a third party, partnerships, and other relevant areas (including qualifying bodies). The Fair Work Act does not allow claims for discrimination in employment to be brought in multiple jurisdictions.[185] The choice of jurisdiction is left to complainants, but an action cannot be pursued in more than one jurisdiction.

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?**

[180] ADA, subsection 39(1); DDA, section 47; SDA, paragraph 40(1)(g).
[181] AHRC Act, section 46PW; see also Fair Work Act, sections 161 and 218.
[182] Fair Work Act, subsections 161(3) and 218(3).
[183] Fair Work Act, section 342 and 351.
[184] Fair Work Act, paragraph 772(1)(f).
[185] See generally Fair Work Act sections 725–732, 734.

State and Territory anti-discrimination laws

'Covering the field' incompatibility under the Constitution

235. The first issue concerning interaction with State and Territory laws is the extent to which the Commonwealth laws 'cover the field' and prevent States and Territories from legislating in respect of discrimination. Section 109 of the Commonwealth Constitution provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

236. Inconsistency may arise where a Commonwealth law is intended to comprehensively regulate a particular area. Inconsistency may also arise where a State law removes a right conferred by a Commonwealth law, or where simultaneous compliance with a State law and a Commonwealth law is not possible.

237. The Commonwealth anti-discrimination laws prevent the possibility of covering the field incompatibility arising with State or Territory anti-discrimination laws. They do this by specifying that they are not intended to exclude or limit the operation of the State or Territory anti-discrimination laws that are capable of operating concurrently with them. There are two models of provision presently used for this purpose:

- the RDA and SDA contain provisions preserving the effect of anti-discrimination laws that further the objects of CERD and CEDAW respectively, and which are capable of operating concurrently,[186] and
- the ADA, DDA and SDA contain provisions preserving the effect of anti-discrimination laws that are capable of operating concurrently, *without* an explicit requirement of consistency with any underlying international convention.[187]

238. The purpose of the first style of provision appears to be to guard against the possibility of State and Territory legislation departing from international law standards.

239. As the consolidation bill is intended to enable existing State and Territory anti-discrimination systems that are capable of operating concurrently to remain in place, the consolidation bill is likely to include a similar provision to indicate that the bill is not intended to cover the field.

Interaction between State and Commonwealth complaints systems

240. Where a person has made a complaint or initiated proceedings under a State or Territory anti-discrimination law, that person is not entitled to make a complaint or initiate proceedings under the Commonwealth scheme.[188] This ensures that litigants cannot bring multiple discrimination actions against a respondent arising from the same facts by commencing actions under both the State and Commonwealth schemes. Corresponding provisions can be found in anti-discrimination legislation in each of the States and Territories and the Fair Work Act.

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[186] RDA, section 6A; SDA, section 11.
[187] SDA, section 10, DDA, section 13, and ADA, section 12.
[188] ADA, subsection 12(4); DDA, subsection 13(4); RDA, subsection 6A(2); SDA, subsection 10(4).

State and Territory laws generally

241. There have been a number of high profile cases in which State laws have been found inconsistent with Commonwealth anti-discrimination laws.[189] This is because any provision in a State or Territory law which directs a person to do an act which would be unlawful under the Commonwealth anti-discrimination laws will be overridden under section 109 of the Constitution. The Commonwealth anti-discrimination laws also address potential interactions with State and Territory laws.

242. The Commonwealth anti-discrimination laws make different provision with respect to how they affect acts done in direct compliance with State or Territory laws:

- the RDA and SDA provide *no* exemption for acts done in direct compliance with State or Territory laws
- the DDA allows regulations to be made exempting acts done in direct compliance with specified State and Territory laws,[190] and
- the ADA exempts acts done in direct compliance with all State and Territory laws, except for any specified by regulations.[191]

243. Neither the ADA nor the SDA regulation-making powers have been heavily used. The DDA therefore applies to acts done in direct compliance with almost all State and Territory laws, while the ADA generally does not.

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

[189] *McBain v Victoria* (2000) 99 FCR 116; *Mabo v Queensland (No 1)* (1988) 166 CLR 186.
[190] DDA, Subsection 47(2).
[191] ADA, Subsection 39(4).

Crown in right of the States

244. A final area of interaction between the Commonwealth anti-discrimination laws and the States and Territories anti-discrimination laws is the application of the Commonwealth Acts to State and Territory executive governments. The ADA, DDA and RDA currently apply to the Crown in right of the States and Territories without exception.[192]

245. The SDA only applies to the Crown in right of the States and Territories in relation to discrimination in some areas of public life.[193] However, the SDA does not apply to the Crown in right of the States and Territories, or State instrumentalities, in relation to discrimination in work (including employment) or clubs, and has limited application in relation to sexual harassment.

246. The SDA Report recommended the SDA be amended to apply to the Crown in rights of the States and State instrumentalities, to ensure that all women in all parts of Australia have access to the same levels of protection against discrimination and sexual harassment.

Question 30.	**Should the consolidation bill apply to State and Territory Governments and instrumentalities?**

[192] ADA, section 13; DDA, section 14; and RDA, section 6.
[193] SDA, subsections 21(4), 22(2), 23(4), 24(3), 26(2), and 27(3).

GLOSSARY

ACT Act	*Discrimination Act 1991* (ACT)
ADA	*Age Discrimination Act 2004* (Cth)
AHRC Act	*Australian Human Rights Commission Act 1986* (Cth)
Canadian Act	*Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (Canada)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
Commission	Australian Human Rights Commission
CRPD	Convention on the Rights of Persons with Disabilities
DDA	*Disability Discrimination Act 1992* (Cth)
Fair Work Act	*Fair Work Act 2009* (Cth)
NSW Act	*Anti-Discrimination Act 1977* (NSW)
NT Act	*Anti-Discrimination Act 1996* (NT)
Pay Equity Report	House of Representatives Standing Committee on Employment and Workplace Relations, *Making it Fair: Pay equity and associated issues related to increasing female participation in the workforce* (2009)
Productivity Commission Report	Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004)
Queensland Act	*Anti-Discrimination Act 1991* (Qld)
RDA	*Racial Discrimination Act 1975* (Cth)
SA Act	*Equal Opportunity Act 1984* (SA)
SDA	*Sex Discrimination Act 1984* (Cth)
SDA Report	Senate Standing Committee on Legal and Constitutional Affairs report, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008)
Tasmanian Act	*Anti-Discrimination Act 1998* (Tas)
UK Act	*Equality Act 2010* (UK)
Victorian Act	*Equal Opportunity Act 2010* (Vic)
WA Act	*Equal Opportunity Act 1984* (WA)

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