Improving Access to Equality:

Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper

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Recommendation 1 - Objects clause

The new Act should contain an objects clause along the following lines:

1. *The object of this Act is to eliminate unlawful discrimination, and to give effect to Australia's obligations under the United Nations human rights instruments set out in the Schedule. In pursuing these objects, regard shall be had to the following principles:*

   a) *In this Act regard shall be paid at all times to the aims of eliminating discrimination on the basis of attributes covered by this Act, and Australia's obligations under the United Nations human rights instruments set out in the Schedule;*
   b) *The values of equality, respect and human dignity shall be shown to all persons, regardless of attribute. This includes a right to be free from harassment and victimisation;*
   c) *The principle of equality shall be interpreted to mean substantive equality, not merely formal equality;*
   d) *It is recognised that the attainment of substantive equality may require special accommodation and special measures;*
   e) *In the case of a finding of discrimination, a remedy may include a proactive initiative that benefits those with the same attribute as the complainant and recognises the systemic nature of discrimination;*
   f) *This Act enables the Australian Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;*
   g) *This Act enables the Australian Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Federal Magistrates Court and the Federal Court for resolution of such disputes.*

2. *It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further its objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.*

Recommendation 2 - Prohibits discrimination

The new Act should contain a single provision that prohibits discrimination, along the following lines: 'Discrimination is unlawful in public life unless it is a proportionate means of achieving a legitimate aim within the scope and objects of this Act'

Recommendation 3 - Single definition

The new Act should include a single definition of discrimination along the following lines:

Discrimination includes:

(a) *treating a person, or proposing to treat a person, unfavourably on the basis of a protected attribute;*
(b) *imposing a condition, requirement, practice, provision or criterion that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person.*

Recommendation 4 - Direct discrimination

Alternatively, if the Federal Government does not adopt a single definition of discrimination as proposed in recommendation 3 above, the definition of direct discrimination should:

a) *replace the comparator test with the detriment test as per the* Discrimination Act 1991 (ACT)*;*
b) *continue to make it clear that it is not necessary to show that the discriminatory reason was the dominant or substantial reason for the action, provided it is at least one reason for the actions; and*
c) *expressly state that direct discrimination extends to discrimination on the basis of a characteristic that generally appertains to that attribute.*

Recommendation 5 - Indirect discrimination

If the Federal Government does not adopt a single definition of discrimination as proposed in recommendation 3 above, the definition of indirect discrimination should be amended as follows:

a) *the phrase 'condition, requirement or practice' should be supplemented with the words 'provision or criterion';*
b) *a complainant should not need to show that s/he cannot meet the relevant condition, requirement, practice, provision or criterion in order to establish indirect discrimination;*
c) *a complainant should be required to show only that the condition, requirement, practice, provision or criterion has, or is likely to have the effect of disadvantaging persons with that attribute to establish indirect discrimination;*
d) *the requirement of reasonableness should be replaced with a requirement that a respondent show that the discriminating behaviour is a proportionate means of achieving a legitimate aim;*
e) *a non-exhaustive list of factors to determine whether the behaviour is proportionate should be provide, including:*
    i) *the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition, provision, criterion or practice;*
    ii) *the feasibility of overcoming or mitigating the disadvantage;*
    iii) *the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;*
    iv) *the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and*
    v) *in relation to discrimination at work, the inherent requirements of the job.*

Recommendation 6 - Burden of proof

A rebuttable presumption of discrimination should arise once the complainant establishes a prima facie case.

If separate definitions of discrimination are maintained in the Equality Act:

- *for direct discrimination there should be a rebuttable presumption that action has been taken for a discriminatory reason once the complainant has established a prima facie case; and*
- *for indirect discrimination, the respondent should be required to show that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim.*

Recommendation 7 - Single special measures provision

A single special measures provision be included in the Equality Act covering all protected attributes. The provision should be modelled on s 12 of the Equal Opportunity Act 2010 (Vic).

Recommendation 8 - Certified special measures

The Commission should certify special measures. The certification process should be modelled on the current temporary exemption application process, with provision for merits and judicial review.

The following criteria should be used in assessing special measures:

- *The purpose of the special measure is to achieve substantive equality for members of a group with a particular attribute;*
- *If the special measure is taken for more than one purpose the other purpose must be non-discriminatory;*
- *The special measure must be taken in good faith for achieving the above purpose;*
- *The special measure must be reasonably likely to achieve the purpose;*
- *The special measure must be necessary and proportionate to achieving the goal of substantive equality;*
- *The special measure can be justified because the members of the group:*
    - *have a particular need for advancement or assistance;*
    - *are disadvantaged or excluded; or*
    - *sought the benefit offered;*
- *On achieving the purpose, the special measures must cease.*

Recommendation 9 - Reasonable adjustments

The Equality Act should contain a duty to make reasonable adjustments that applies to all attributes. The requirement should be a standalone provision.

Recommendation 10 - Positive duty

There should be a positive duty on public sector organisations to take reasonable steps to eliminate discrimination and harassment and promote equality.

There should also be a duty to have due regard to reducing inequalities relating to socio-economic disadvantage.

Public sector organisations, should be clearly and broadly defined to include:

- *public officials;*
- *government departments;*
- *statutory authorities;*
- *state owned corporations;*
- *police;*
- *local Government;*
- *Ministers;*
- *Members of Parliamentary Committees when acting in an administrative capacity;*
- *an entity declared by regulations to be a public authority for the purposes of the legislation;*
- *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and*
- *any entity that chooses to be subject to the legislative obligations of a public sector organisation.*

The new Act should include a power to make regulations so that organisations can be added to the category of 'public authority' as required.

Recommendation 11 - Additional attributes

In addition to all the attributes currently protected under the four Commonwealth anti-discrimination acts, all attributes currently protected under the ILO and the Fair Work Act should be included in the Equality Act, namely:

- *religion;*
- *political opinion;*
- *industrial activity;*
- *nationality;*
- *criminal record;*
- *medical record;*
- *sexual preference;*
- *carer's responsibilities;*
- *national extraction; and*
- *social origin.*

In addition, housing status and one's status as a victim of domestic violence should be protected attributes in the new Act.

Recommendation 12 - Intersectional discrimination

The new Act should expressly cover intersectional discrimination in relation to both direct and indirect discrimination.

The provision should also make it clear that it is not necessary to establish that each ground amounts to discrimination separately.

The new Act should make it clear that the question whether intersectional discrimination falls within an exception or can otherwise be justified should be treated cumulatively.

Recommendation 13 - General limitations clause

All of the existing exceptions and permanent exemptions should be repealed and replaced with a new provision that provides that discrimination will be justified if it is a proportionate means of achieving a legitimate aim. This provision should be included in the new Act, even if the existing exceptions and permanent exemptions are retained.

If the Australian Government is not minded to repeal the existing exceptions and permanent exemptions, these provisions should all be renamed 'exceptions' and made subject to a three-year sunset clause.

The new Act should include a non-exhaustive list of matters to be taken into account when determining whether the behaviour is justified along the following lines:

In determining whether the behaviour is proportionate, a court:

- *(a) must take into account the objects of the Act; and*
- *(b) may take into account any other relevant factor, including:*
  - *(i) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the disadvantage or condition, requirement, provision, criterion or practice;*
  - *(ii) the feasibility of overcoming or mitigating the disadvantage;*
  - *(iii) the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;*
  - *(iv) the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and*
  - *(v) in relation to discrimination at work, the inherent requirements of the job.*

Consideration should be given to granting the Australian Human Rights Commission power to issue more detailed guidelines about the general justification provision.

Recommendation 14 - Exemption for religious organisations

There should be no permanent exemptions for religious organisations in respect of any protected attributes.

Alternatively, if permanent exemptions are to be retained then they should be limited to the grounds of marital status, age, sexual orientation and gender identity in the areas of:

- *the ordination, appointment, training or education of priests, Ministers of religion or members of any religious orders; and*
- *educational institutions established for religious purposes in relation to the employment of staff in the provision of religious education and training.*

Recommendation 15 - Temporary exemptions

The new Equality Act should contain provision for applications to be made to the Commission for a temporary exemption up to five years.

Temporary exemptions should be assessed according to the following criteria:

- *the application must be specific and specify what provisions the applicant is seeking exemption from, for how long the exemption is sought;*
- *the application should produce evidence as to why the exemption is required;*
- *the proposed exemption must be consistent with the objects of the Equality Act;*
- *the proposed exemption must be necessary;*
- *the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;*
- *matters raised in any submissions in response to the application;*
- *whether there have been genuine attempts to comply with the provisions of the Equality Act;*
- *whether the applicant has an action plan in which to ensure compliance with the Equality Act, following the expiration of the temporary exemption; and*
- *whether it is appropriate to grant the exemption subject to any terms or conditions.*

The temporary exemption application process should include:

- *all applications should be published on the Commission's website;*
- *all applications are subject to a period of public consultation, in which submissions are invited;*
- *the Commission's temporary exemption decisions should be published on the Commission's website and in the Gazette;*
- *temporary exemptions should be granted for a period of no more than five years; and*
- *temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.*

Recommendation 16 - Action plans

The new Equality Act should contain provision for the registration of action plans for all attributes. The existence of an action plan should be a consideration in determining liability for discrimination.

Recommendation 17 - Guidelines

The Commission should be empowered to issue guidelines to assist duty holders understand their obligations under the new Act.

Recommendation 18 - Review by the Commission of policies and practices

The Commission should be empowered to review an organisation's policies and practices to provide advice on compliance with the new Equality Act. Such a provision should be modelled on s 151 of the Equal Opportunity Act 2010 (Vic).

Recommendation 19 - Co-regulation

Further consultation should be conducted regarding the concept of co-regulation and how it would operate with the new Act.

Recommendation 20 - Standards

The Commission should be empowered to develop standards for other protected attributes. Standards should be developed in consultation with key stakeholders.

Recommendation 21 - Conciliations

The Commission should retain the power to require attendance at conciliation and to require production of documents, including a written response to a discrimination complaint.

Conciliation agreements should be automatically registered with the federal courts. Such a provision should be modelled on s 164(3) of the Anti-Discrimination Act 1991 (Qld) *and* s 62 of the Human Rights Commission Act 2005 (ACT).

The Equality Act should include provision for a complaint to be lodged directly with the federal courts, bypassing the Commission investigation and conciliation process.

Recommendation 22 - Standing

The Equality Act should include a provision that ensures an organisation has standing to bring a complaint on behalf of a person to both the Commission and the federal courts.

The Equality Act should have open standing to allow anyone to bring a complaint to enforce a breach of discrimination or harassment provisions. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).

Alternatively, organisations should have standing to bring discrimination complaints to the Commission and to the federal courts in their own right. The Equality Act should include the following criteria as guides to determine whether the organisation has standing:

- *the membership of the organisation or group; or*
- *if the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.*

Recommendation 23 - Litigation costs

The federal courts should be made a no-costs jurisdiction for discrimination matters.

Provision should be made for the courts to make a costs order when:

- *a party has conducted proceedings leading to unnecessary delays;*
- *the case is frivolous or vexatious; or*
- *the complaint is successful and the matter is classed by the court as a public interest matter.*

Recommendation 24 - Representation

Consideration should be given to increasing the funding to community legal centres and broadening the availability of Commonwealth legal aid for discrimination matters.

Recommendation 25 - Remedies

The new Act should include the power to make corrective and preventative orders in the list of orders that a court can make in a discrimination matter.

The list of orders should also include the power to make orders relating to conduct of the respondent that affects persons other than the complainant.

Recommendation 26 - Damages and compensation

The new Act should make explicit reference to a court being able to make orders for damages for all loss, past and future, including for hurt, humiliation and distress.

Recommendation 27 - Civil penalty provisions

The new Act should include the power of the court to impose civil penalty provisions for breach of discrimination or harassment provisions.

Recommendation 28 - Creation of a new Equality body

A new independent Equality body, separate to the Commission, should be established to perform the following functions:

- *monitor duty holders' compliance with the Equality Act, including any Disability Standards or other Standards;*
- *investigate breaches of the Equality Act, including by acts of the States or Territories, of their own motion in the absence of an individual complaint; and*
- *commence litigation in court, of their own motion in the absence of an individual complaint.*

Recommendation 29 - Definition of human rights

The new Act should refer to the functions of the Commission in the area of human rights by reference to the seven core international human rights treaties to which Australia is a party.

The seven core international human rights treaties should be included in the schedule to the new Act.

Recommendation 30 - Amicus Curiae

The Commission should be empowered to appear as of right as amicus curiae.

Recommendation 31 - Discrimination Commissioners

Each protected attribute in the new Act should have a Discrimination Commissioner who is responsible for that attribute.

The Discrimination Commissioners should be required to report annually to Parliament on the achievement of equality in their specialist area. The Parliament should be required to respond to the reports.

Recommendation 32 - Commission funding

The Commission should be adequately resourced to carry out any additional functions under a new Act.

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Department of Trade and Investment for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's expertise in discrimination law and equality

PIAC has long played a leadership role in developing and using anti-discrimination law and in promoting equality in Australia. It has represented litigants in a number of significant discrimination cases in Australia.[1] PIAC has also been involved in a

[1] For general discrimination cases, see, eg, involving indirect discrimination in employment against women: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165: involving the imposition of a standard in the mining industry that disproportionately affected women *Human Rights and Equal Opportunity Commission v Mt Isa Mines Limited & Ors* [1993] FCA 535 (9 November 1993); alleging unlawful sex discrimination in regulation of sport *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740 (10 December 2001). For disability access cases, see, eg, *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658 (18 May 2000); involving discrimination in education: *Maguire v Sydney Organising Committee for the Olympic Games* [2000] FCA 1112 (3 August 2000); involving discrimination in the provision of information and services: *Grosvenor v Eldridge* [2000] FCA

broad range of public policy development and review processes in relation to anti-discrimination law,[2] the promotion of equality and human rights[3].

PIAC also contributed to the submissions made by the National Association of Community Legal Centres (**NACLC**) to the Attorney-General's Department in relation to the consolidation of anti-discrimination in March and April 2010,[4] and in relation to the Discussion Paper.

General comments on paper

PIAC commends the Federal Government on the anti-discrimination law consolidation project as part of improving human rights protection in Australia. PIAC welcomes the opportunity to provide this submission to the Attorney-General's Department as part of the implementation of Australia's Human Rights Framework. The consolidation process also aims to address some of the recommendations of

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1574 (19 October 2000); involving disability discrimination in access to retail premises: *Travers v New South Wales* [2000] FCA 1565 (3 November 2000); in relation to independent travel criteria: *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008). Involving alleged failure to comply with the *Disability Standards for Accessible Public Transport 2002* (Cth) (**Disability Transport Standards**) in relation to the provision of bus stop infrastructure: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007); in relation to wheelchair accessible taxis: *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; in relation to non-wheelchair accessible buses and coaches: *Haraksin v Murrays Australia Ltd* [2011] FCA 1133 (final decision by Federal Court pending); in relation to audio announcements on trains: *Innes v Rail Corporation NSW* (currently before the Federal Magistrates Court); involving discrimination by a religious organisation against a homosexual couple relating to foster care services: *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).

2 See, eg, Alexis Goodstone and Dr Patricia Ranald, *'Discrimination ... have you got all day?' Indigenous women, discrimination and complaints processes in NSW* (2001); Public Interest Advocacy Centre, *Submission on the Australian Human Rights Commission Legislation Bill 2003: Submission to the Senate Legal and Constitutional Committee on the Australian Human Rights Commission Legislation Bill* (2003); Robin Banks, *Implementing the Productivity* Commission *Review of the Disability Discrimination Act; submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill* (2009), Gemma Namey, *The other side of the story: extending the provisions of the Sex Discrimination Act 1984 (Cth): Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Sex and Age Discrimination Legislation Amendment Bill 2010* (2010), Lizzie Simpson and Robin Banks, *Taxis for All: Submission to the NSW Legislative Council's Select Committee on the NSW Taxi Industry* (2010). These and most PIAC publications, including submissions, are available on the Centre's website: <http:///www.piac.asn.au/publications/pubs/dateindex.html>.

3 See, for example, Chris Hartley et al, *National Human Rights Baseline Study: submission by the Public Interest Advocacy Centre* (2011), Chris Hartley and Edward Santow, *ACT Government consultation on the inclusion of economic, social and cultural rights in the Human Rights Act 2004* (2011), Edward Santow and Brenda Bailey, *Human Rights Charter Review-respecting Victorians* (2011).

4 Available from <http://www.equalitylaw.org.au/elrp/submissions/>.

the Senate Standing Committee on Legal and Constitutional Affairs from its Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality (**SDA Inquiry**).[5] In 2008, PIAC contributed to the joint NACLC, Combined Community Legal Centres Group (NSW), Kingsford Legal Centre submission to the SDA Inquiry.

PIAC's submission does not address every question in the Discussion Paper. Rather, PIAC's submission focuses on areas relevant to PIAC's expertise and experience. PIAC notes that in addition to this submission, PIAC has also contributed to the NACLC submission in response to the Discussion Paper. PIAC staff have also attended a stakeholder forum in Sydney in November 2011 and met with Attorney-General's Department staff regarding the consolidation.

PIAC supports the guiding principles outlined in the Discussion Paper, namely:

- 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.

The consolidation process represents a significant opportunity to enhance Australia's human rights protection and strengthen our discrimination laws. PIAC notes that similar jurisdictions to Australia, including Canada and the United Kingdom, have surpassed Australia in the development of their discrimination laws.[6] Naturally, the above four principles should not act to limit the current reform process; rather the Australian Government should aim to address systemic discrimination and ensure equality in Australia.

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5 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (2008) (**SDA Inquiry**).

6 See Belinda Smith and Dominique Allen, 'Whose Fault is It? Asking the Right Question when trying to Address Discrimination', *Working Paper*, (2011).

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1. Preliminary Issues

Objects of the new Act

Although the Discussion Paper does not directly raise the issue of how the objects of the new Act should be framed, PIAC strongly supports the inclusion of an objects clause in the proposed new Act, which more clearly spells out the purpose of the new Act. Unquestionably, federal anti-discrimination legislation is beneficial in intent – a fact that is accepted either expressly or implicitly. However, this alone has not ensured that this legislation is always construed broadly and liberally. For example, the narrow interpretation adopted by the High Court in *Purvis* has been criticised for failing to meet the beneficial objects of the Act.[7] Although the intention is that anti-discrimination legislation will be interpreted beneficially, this has not always happened in practice.

One example of a provision, which seeks to set out legislative objectives in this area, is s 3 of the *Equal Opportunity Act 2010* (Vic) (**Victorian Act**), which provides:

> The objectives of this Act are-
>
> (a) to eliminate discrimination, sexual harassment and victimisation to the greatest possible extent;
>
> (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
>
> (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
>
> (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that-
>
> (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
>
> (ii) equal application of a rule to different groups can have unequal results or outcomes;
>
> (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
>
> (e) to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking

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7 Belinda Smith, 'From Wardley to Purvis – How Far has Australian Anti-Discrimination Law Come in 30 years?' (2008), *Australian Journal of Labour Law*, 3; Discrimination Law Experts' Group, *Submission on the Consolidation of Anti-Discrimination Laws*, 13 December 2011, 7 <http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Submission_Dec2011.pdf> at 9 January 2012.

research, educative and enforcement functions;

(f) to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.[8]

PIAC has had the benefit of reading the Discrimination Law Experts' Group Submission in response to the Discussion Paper and strongly supports the proposed objects clause included in that submission.[9]

PIAC supports the Discrimination Law Experts' Group's recommendation[10] that there should be a single provision in the new Act, which prohibits discrimination unless it is justified by reference to the scope and objects of the Act.

Recommendation 1 – Objects clause

The new Act should contain an objects clause along the following lines:

1. The object of this Act is to eliminate unlawful discrimination, and to give effect to Australia's obligations under the United Nations human rights instruments set out in the Schedule. In pursuing these objects, regard shall be had to the following principles:

(a) In this Act, regard shall be paid at all times to the aims of eliminating discrimination on the basis of attributes covered by this Act, and Australia's obligations under the United Nations human rights instruments set out in the Schedule;
(b) The values of equality, respect and human dignity shall be shown to all persons, regardless of attribute. This includes a right to be free from harassment and victimisation;
(c) The principle of equality shall be interpreted to mean substantive equality, not merely formal equality;
(d) It is recognised that the attainment of substantive equality may require special accommodation and special measures;
(e) In the case of a finding of discrimination, a remedy may include a proactive initiative that benefits those with the same attribute as the complainant and recognises the systemic nature of discrimination;
(f) This Act enables the Australian Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
(g) This Act enables the Australian Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Federal Magistrates Court and the Federal Court for resolution of such disputes.

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8 See also *Freedom of Information Act 1982* (Cth) s 3.

9 Discrimination Law Experts' Group, *Submission on the Consolidation of Anti-Discrimination Laws*, 13 December 2011, 7-8 <http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Submission_Dec2011.pdf >, at 9 January 2012.

10 Ibid, 8.

2. *It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further its objects set out in subsection (1) and that any discretions conferred by this Act shall be exercised so as to facilitate those objects.*

Recommendation 2 - Prohibits discrimination

The new Act should contain a single provision that prohibits discrimination, along the following lines 'Discrimination is unlawful in public life unless it is a proportionate means of achieving a legitimate aim within the scope and objects of this Act'.

2. Meaning of Discrimination

Question 1: What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect) be clearer and preferable? If not, can the clarity and consistency of the separate test for direct and indirect discrimination be improved?

Problems with the existing definition of direct discrimination

The comparator test contained in s 5(1) of the *Sex Discrimination Act 1984* (Cth) (**SDA**), s 5(1) of the *Disability Discrimination Act 1992* (Cth) (**DDA**) and s 14(1) of the *Age Discrimination Act 2004* (Cth) (**ADA)** has been widely criticised as artificial[11], confusing, and flawed as it effectively reinforces stereotypes and fails to recognise the historical and systemic barriers faced by marginalised groups that are meant to be protected by anti-discrimination legislation[12]. Furthermore, the High Court's narrow interpretation of the phrase 'the same or not materially different circumstances' in the case of *Purvis v State of NSW (Dept of Education)*[13] has significantly limited complainants' ability to establish direct discrimination.[14] PIAC is also concerned that the notion of a comparator sits uncomfortably with the recommendation (see Question 10 below) that the new Act should recognise intersectional or multiple discrimination.

As noted in the Discussion Paper, not all Australian anti-discrimination laws contain a comparator test. For example, s 8(1)(a) of the *Discrimination Act 1991* (ACT)

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11 See, Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality,* September 2008, Australian Human Rights Commission, <http://www.hreoc.gov.au/legal/submissions/2008/20080901_SDA.html> at 8 December 2011, 54.

12 Ibid.

13 (2003) 217 CLR 92. See also, *Tyler v Kesser Torah College* [2006] FMCA 1, *Y v Human Rights & Equal Opportunity Commission* [2004] FCA 184, *Ware v Oamps Insurance Brokers Ltd* [2005] FMCA 664, *Dare v Hurley* [2005] FMCA 844.

provides that '*a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7*'.[15] PIAC prefers this approach to the definition of direct discrimination, as it is simpler and clearer. Most importantly, although courts may still make comparisons in deciding whether there has been detrimental treatment[16], this is no longer a rigid threshold question in establishing discrimination.

PIAC also prefers the detriment test to the direct discrimination test contained in s 9 of the *Racial Discrimination Act 1975* (Cth) (**RDA**). PIAC is concerned that by requiring a complainant to show that the distinction, exclusion or preference has the purpose or effect of nullifying or impairing human rights or fundamental freedoms, that this provision imposes another unnecessary test on a complainant.[17] PIAC maintains that it should be sufficient to show that there has been unfavourable or detrimental treatment because of a protected attribute and that it should not also be necessary to establish that the detrimental treatment impairs the enjoyment of a complainant's human rights.

Additionally, PIAC submits the definition of direct discrimination should continue to make it clear that it is not necessary to show that the discriminatory reason was the dominant or substantial reason for the action, provided it is *a* reason for the action.[18] The new Act should also make it clear that direct discrimination extends to discrimination on the basis of a characteristic that generally appertains to that attribute.[19]

Problems with the existing definition of indirect discrimination

The current definitions of indirect discrimination contained in the DDA, SDA and ADA are complex, difficult to prove and inconsistent. For example, some commentators have suggested that proving indirect discrimination has been particularly difficult in sex discrimination cases.[20] It has also been suggested that in some cases courts have adopted a narrow view of what amounts to a 'requirement/condition'. For example, in *Kelly v TPG Internet Pty Ltd*[21], the applicant alleged indirect discrimination on the basis of her employer's failure to grant her request for part-time work upon return from maternity leave. The Court determined that this was the refusal of an employment-related benefit. A second example is the case of *New South Wales v Amery*[22] in which the female applicants claimed they suffered

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15 See also *Equal Opportunity Act 2010* (Vic) s 8; *Fair Work Act 2009* (Cth) (**Fair Work Act**) s 351, which has been interpreted as only requiring a causative element; see *Hodkinson v The Commonwealth* [2011] FMCA 171 (31 March 2011) at [128].

16 See, eg, *Prezzi and Discrimination Commission* [1996] ACTAAT 132, [24]-[25].

17 See, eg, *Australian Medical Council v Wilson* (1996) 68 FCR 46; *Secretary, Department of Veteran's Affairs v P* (1998) 79 FCR 594.

18 SDA s 8, DDA s 10, ADA s 16.

19 Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination law: Australian Human Rights Commission Submission to the Attorney-General's Department,* 8 December 2011, 11, recommendation 8 <http://www.hreoc.gov.au/legal/submissions/2011/20111206_consolidation.html> at 8 December 2011. See also Human Rights and Equal Opportunity Commission, above n11, 53-54; *Anti-Discrimination Act 1998* (Tas) s 14.

20 See, eg, Chris Ronalds, *Discrimination Law and Practice* (3rd ed, 2008), 43.

21 (2003) 176 FLR 214.

22 (2006) 230 CLR 174.

discrimination on the basis of their sex because there were different pay scales between permanent and casual teachers (the majority of whom were women). The High Court concluded that they were separate positions and therefore the pay scales of one was not a requirement or condition of the other position.

Most people who contact PIAC seeking legal advice or assistance in relation to discrimination complaints are concerned about indirect discrimination. Thus, it is essential that the definition is sufficiently broad, clear and consistent to ensure that the mischief that anti-discrimination law is designed to address is effectively covered.

As a starting point, the Federal Government should ensure that the definition of indirect discrimination is consistent across all protected attributes. Bearing in mind the Government's commitment not to reduce existing protections, PIAC recommends the following changes should be made to the definition of indirect discrimination:

- there should be no requirement that a complainant show that s/he cannot meet the impugned condition, requirement or practice as part of the test for indirect discrimination;[23]
- the burden of proof contained in the DDA, SDA and ADA should be applied to all protected attributes;[24] and
- it should only be necessary to show that the requirement or the condition has or is likely to have, the effect of disadvantaging persons with that attribute (rather than establishing that a significantly higher proportion of people with that attribute cannot comply with that condition or requirement).

Additionally, PIAC takes the view that the phrase 'condition, requirement or practice' should be supplemented by adding the words 'provision or criterion'[25] to ensure that the test for indirect discrimination is sufficiently broad to cover employee benefits, pay scales and so on.

PIAC further recommends that the requirement of reasonableness be replaced with the requirement that a respondent show that the discriminating behaviour is a proportionate means of achieving a legitimate aim. This test is more consistent with Australia's international human rights obligations[26] and international practice[27]. The definition should include an indicative list of factors to determine whether the behaviour is proportionate as this would assist both duty holders and individuals regarding what amounts to indirect discrimination. PIAC notes that the concept of proportionality is already used in s 7B(2) of the SDA[28] and PIAC takes the view that

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23 SDA s 5(2), ADA s 15(1), DDA s 5(2), cf. RDA s 9(1A)(b).

24 See for eg, s 15(2) of the ADA, which provides that the burden of providing that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator. See also SDA s 7C, DDA s 6(4).

25 Cambridge Pro Bono Project, *Equality for all: Submission on Australia's proposed reform of anti-discrimination legislation*, 18 March 2011, University of Cambridge Faculty of Law <http://www.law.cam.ac.uk/cpp/> at 8 December 2011.

26 Human Rights and Equal Opportunity Commission, above n 11, 77.

27 Cambridge Pro Bono Project, above n 24; See *Equality Act 2010* (UK) c 2, s 19 and *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* [1999] 3 S.C.R. 3, 1999 SCC 48.

28 SDA s 7(2) provides:
The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
(a) the nature and extent of the disadvantage resulting from the imposition, or proposed

this list of factors is a good starting point for determining whether a condition, requirement or practice is proportionate in the new Act. Additionally, PIAC contends that this list should be expanded to include: the financial circumstances of the person imposing the condition; the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage and in relation to discrimination at work[29], the inherent requirements of the job[30].

Adopting a unified definition of discrimination

An alternative approach is to include a single unified definition of discrimination in the new Act. One example of such an approach is s 9(1) of the RDA. It has been suggested that this approach is more consistent with the definition of discrimination in international treaties and is less complex and more accessible. On the other hand, concerns have been raised that this may lead to increased uncertainty and could mean that indirect discrimination is no longer clearly covered by anti-discrimination legislation.[31]

PIAC's preferred approach is that the definition of discrimination should be contained in a single provision that expressly includes both direct and indirect discrimination. Importantly, this provision should expressly state that it is not necessary to plead direct and indirect discrimination in the alternative and that the tests are not mutually exclusive.

Finally, the legislation should make it clear that discrimination includes proposed discrimination as per the DDA and ADA so that the new Act covers threatened or proposed discrimination as well as discrimination that has already taken place.

Recommendation 3 - Single definition

The new Act should include a single definition of discrimination along the following lines:

Discrimination includes:

(a) treating a person, or proposing to treat a person, unfavourably on the basis of a protected attribute;

(b) imposing a condition, requirement, practice, provision or criterion that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person.

Recommendation 4 - Direct discrimination

Alternatively, if the Federal Government does not adopt a single definition of discrimination as proposed in recommendation 3 above, the definition of direct discrimination should:

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imposition, of the condition, requirement or practice; and
(b) the feasibility of overcoming or mitigating the disadvantage; and
(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

29 See *Equal Opportunity Act 2010* (Vic) s 9(3).

30 Discrimination Law Experts' Group, n 9 above, 9.

31 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, 14.

a) *replace the comparator test with the detriment test as per the* Discrimination Act 1991 (ACT)*;*
b) *continue to make it clear that it is not necessary to show that the discriminatory reason was the dominant or substantial reason for the action, provided it is at least one reason for the actions; and*
c) *expressly state that direct discrimination extends to discrimination on the basis of a characteristic that generally appertains to that attribute.*

Recommendation 5 - Indirect discrimination

If the Federal Government does not adopt a single definition of discrimination as proposed in recommendation 3 above, the definition of indirect discrimination should be amended as follows:

a) *the phrase 'condition, requirement or practice' should be supplemented with the words 'provision or criterion';*
b) *a complainant should not need to show that s/he cannot meet the relevant condition, requirement, practice, provision or criterion in order to establish indirect discrimination;*
c) *a complainant should be required to show only that the condition, requirement, practice, provision or criterion has, or is likely to have the effect of disadvantaging persons with that attribute to establish indirect discrimination;*
d) *the requirement of reasonableness should be replaced with a requirement that a respondent show that the discriminating behaviour is a proportionate means of achieving a legitimate aim;*
e) *a non-exhaustive list of factors to determine whether the behaviour is proportionate should be provide, including:*
    i) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition, provision, criterion or practice;
    ii) the feasibility of overcoming or mitigating the disadvantage;
    iii) the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;
    iv) the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and
    v) in relation to discrimination at work, the inherent requirements of the job.

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

Current allocation of burden of proof

Currently, there are a number of elements that need to be proved to establish unlawful discrimination. For direct discrimination, this includes proof that:

- the complainant has an attribute that is protected by the legislation;

- an action that is discriminatory under the legislation occurred, that is that the complainant was treated less favourably[32], or the treatment nullified or limited their enjoyment of a human right[33];
- the respondent was responsible for the discriminatory act;
- the action was taken because of the protected attribute;
- the action is not justified or excused by a defence; and
- the action is not covered by an exception or exemption.

The burden of proof for direct discrimination currently falls almost entirely upon the complainant. The onus is only on the respondent to prove the existence of a defence or an exception or exemption if the complainant has proved the discrimination. This causes a number of difficulties for complainants as usually all evidence of the reason for the action lies with the respondent.

Often it is necessary for a complainant to prove matters relating to the state of mind of the respondent. For example, a complainant who claims they were not employed because of their family responsibilities has to prove that their family responsibilities was the reason why they did not get the job. Evidence about subjective motivation is not easily available to a complainant. Therefore many cases fail because the court is not satisfied that the action was taken because of the protected attribute.

For indirect discrimination, the elements that need to be proved are that:

- the complainant has an attribute that is protected by the legislation;
- a condition, requirement or practice covered by the legislation has been imposed;
- the respondent was responsible for imposing the condition, requirement or practice;
- the requirement disadvantages people with a protected attribute;
- the complainant does not or cannot comply;[34]
- the condition, requirement or practice is not reasonable in the circumstances;
- the action is not excused by a defence; and
- the action is not covered by an exception or exemption.

In indirect discrimination matters under the SDA, DDA and ADA, once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging people with the relevant attribute, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the alleged discriminator.[35] In other words, the respondent only bears the onus of proof once the complainant has shown that a condition, requirement or practice disadvantages people with the relevant attribute.

However, under the RDA the onus of showing that the term, condition or requirement is not reasonable lies with the complainant.[36] There does not appear to be any logical reason why the onus should not shift in racial discrimination matters also.

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32 For direct discrimination under the ADA, SDA and DDA.

33 For direct discrimination under the RDA.

34 For indirect discrimination under the RDA and DDA.

35 SDA s 7D, DDA s 6(4), ADA s 15(2).

36 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62.

Proposed allocation: rebuttable presumption

PIAC submits that the burden of proof should be borne by the party most able to adduce the evidence in each situation.

PIAC submits that for both direct and indirect discrimination, there should be a 'rebuttable presumption' of discrimination on the basis of that attribute once the complainant establishes a prima facie case. This means that a presumption will then arise that an action was taken for the reason alleged by the complainant and the onus falls on the respondent to rebut that presumption. This is consistent with the common law principle that evidence is to be "weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict."[37]

It means for direct discrimination that the complainant does not bear the unreasonably difficult burden of establishing the state of mind of the respondent. For indirect discrimination, it means that the respondent has the burden of proving that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim (or is reasonable under the current test). Of course, the burden of justifying the action should remain with the respondent.

Case study 1

PIAC has received a number of complaints about discrimination on the basis of race by a bowling club. PIAC represented a particular Aboriginal woman in a complaint against the bowling club under the RDA. Our client's membership of the club was suspended because she used minor offensive language. Her membership was then suspended for a further 12 months for no apparent reason.

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

This kind of racial discrimination is very difficult for a complainant to prove. Our client had enough evidence to establish a prima facie case of discrimination but did not have any of the evidence concerning causation. For example, she did not have access to the minutes of the meetings where her membership status was discussed and the decision taken to suspend her membership. Furthermore, our client did not know about the total number of memberships suspended and their race of those members, she only had anecdotal evidence regarding those issues.

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

This proposed position reflects the approach taken under the *Fair Work Act 2009* (Cth) (**Fair Work Act**). As is explained in the Discussion Paper,[38] under the Fair Work Act, once the 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

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37 *Qantas Airways Limited v Gama* [2008] FCAFC 69, citing *Medtel Pty Ltd v Courtney* [2003] FCAFC151; (2003) 130 FCR 182 per Branson J at [76].

38 Discussion Paper, 15.

proves otherwise.[39] This is because almost invariably the respondent will be in a better position than complainants to produce evidence in relation to their conduct. Harmonisation with the Fair Work Act will make it easier for business to meet their obligations. It will also mean that the case law can develop together.

Furthermore, PIAC's recommendation is supported by the SDA Inquiry report.[40] Recommendation 22 of that report states:

> The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the Sex Discrimination Act 1975 (UK) so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

As the Discrimination Law Experts' Group have explained in their submission, a rebuttable presumption allows the court and the parties to focus on the issues of substance earlier in proceedings.[41]

This would not create an undue burden on respondents. There must first be facts from which the court could decide that discrimination has occurred in the absence of any other explanation. The burden of proof will only shift to the respondent where the complainant has already shown there are proper grounds to believe that discrimination might have occurred.
In the UK, EU and Canada, the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. This does not seem to have caused any problems in these jurisdictions.

In fact, the UK Court of Appeal in *Ingen Ltd v Wong* [2005] EWCA Civ 142 noted that the burden of proof made "*good sense given that a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated*."[42]

What should the complainant have to prove to establish a prima facie case of discrimination?

The Discrimination Law Experts' Group suggest that the prima facie case should "*allow the possibility of inferring that unlawful discrimination occurred, that is, that the respondent's action could have been motivated by an unlawful attribute*."[43]

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39 Fair Work Act s 361.

40 SDA Report, above n 5.

41 Discrimination Law Experts' Group, above n 9, 13.

42 *Ingen Ltd v Wong* [2005] EWCA Civ 142 at [31].

43 Discrimination Law Experts' Group, above n 9, 13.

Case study 2

The case of *Hussain v Vision Security & Mitie Security Group* [2011] UKEAT/0439/10/DA illustrates the way the burden of proof works in the UK.[44] The complainant, Mr Hussain, was 64 years old and was one of three security guards working at a particular site. The other two guards were 34 and 36 years old. They were all told that they were no longer required at that particular site but would continue to work as relief guards until they found permanent positions. The 34 and 36 year old guards were given permanent positions at a new site shortly after. There was a third job at the new site but it was not given to the complainant. Mr Hussain claimed that he was the victim of age discrimination.

At the Tribunal, the manager said that Mr Hussain was not given a job at the new site as he had refused to move to the new site when this was suggested at a telephone meeting. Mr Hussain said that no such conversation took place, and the other two guards supported this evidence. The Employment Tribunal accepted the claimant's version of events and determined that the manager's evidence was 'unreliable'. However, the Tribunal did not draw an adverse inference that the reason for the treatment was due to age discrimination.

The Employment Appeals Tribunal found that there were facts from which the Tribunal could decide that discrimination had occurred, such as the fact that the younger guards were given jobs when the employee close to retirement was not. Given the employer's evidence was untruthful in their opinion, the facts enabled an adverse inference to be drawn.

Given the employer bore the burden of proof, and their evidence was untruthful, discrimination had been proved.

The UK courts have given clear guidance on what this means in *Ingen Ltd v Wong*. The UK Court of Appeal upheld the Tribunal's finding that it was entitled to draw the inference that the claimant had suffered discrimination from unexplained unreasonable conduct by the employer. The Australian courts could draw on this case law in the UK jurisdiction.

How can the respondent rebut the presumption?

In relation to direct discrimination, the respondent can rebut the presumption by providing evidence that the reason for the conduct does not relate to a protected attribute, that is, there was some other legitimate reason for the conduct.

For indirect discrimination, the respondent can show that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim. This is broadly consistent with the existing burdens under the SDA, ADA, and

[44] For a short summary of the case, see Veale Wasbrough Vizards, 'Discrimination: the reverse burden of proof', 21 October 2011, available at: <http://www.vwv.co.uk/site/briefings/briefingsdetail/empezine2_reverse_burden_proof211011.html> at 10 January 2012.

DDA in relation to the respondent showing the condition, requirement or practice is reasonable in the circumstances.

In cases of both direct and indirect discrimination, the respondent could show that the discriminatory behaviour was justified as it was a 'proportionate means of achieving a legitimate aim' (see Question 20 below regarding PIAC's proposal for a single justification provision.) Of course, if the respondent had a relevant temporary exemption granted by the Commission then this would be a defence to a discrimination complaint.

Recommendation 6 - Burden of proof

A rebuttable presumption of discrimination should arise once the complainant establishes a prima facie case.

If separate definitions of discrimination are maintained in the Equality Act:

- *for direct discrimination, there should be a rebuttable presumption that action has been taken for a discriminatory reason once the complainant has established a prima facie case; and*
- *for indirect discrimination, there should be a rebuttable presumption that the condition, requirement, practice, provision or criterion was indirectly discriminatory once the complainant has established a prima facie case.*

Questions 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?

Special measures allow certain action to be taken for the benefit of a particular group of people to address a need of the particular group or to achieve substantive equality. They are an important aspect of anti-discrimination law in achieving substantive equality. Special measures are currently permitted in all Commonwealth anti-discrimination legislation,[45] although the terminology used varies significantly between each statute.

Single special measures provision

PIAC supports the inclusion of a single special measures provision, covering all protected attributes. A single provision will remove some of the existing discrepancies in the special measures provisions in Commonwealth anti-discrimination legislation. A single provision will make it easier for individuals and businesses to understand their rights and obligations under an Equality Act.

Objective or subjective criteria

One important aspect to the different language used in the special measures provisions of the existing Commonwealth statutes is whether the special measure is assessed according to objective or subjective criteria and the relevance of the intention of the person implementing the special measure.

[45] The DDA s 45, the SDA s 7D, and the RDA s 8 refer to 'special measures', whereas the ADA s 33 refers to 'positive discrimination'.

The special measures provision in the RDA[46] incorporates Article 1.4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*. The meaning of this article was considered by the High Court in *Gerhardy v Brown*[47]. Brennan J considered the scope of Article 1.4, stating:

> A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based in race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.[48]

Consideration of whether a measure is a special measure requires consideration of both objective and subjective factors. The subjective intention of the person taking the special measure is relevant, provided that "*the measure is not patently incapable of achieving what was so intended*."[49] Objective factors are also relevant, including whether the special measure is necessary.

Judicial consideration of the special measures provision in s 7D of the SDA also suggest that both subjective and objective factors are relevant. In *Jacomb v Australian Municipal Administrative Clerical and Services Union,*[50] Crennan J in the Federal Court clearly stated that subjective factors are relevant "*Thus it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory, not the necessary effect of the measure in disadvantaging any group*".[51] However, Crennan J also seemed to accept the Australian Human Rights Commission's submissions that objective factors were also relevant: "*whether the entity propounding a special measure acted reasonably in assessing the need for the special measure, and secondly the capacity of the special measure to achieve the purpose of substantive equality*".[52] The proportionality of the special measure and whether the special measure was still required also appeared relevant.[53]

The special measures provisions in s 45 of the DDA refer to whether the measure is "reasonably intended" to achieve certain specified outcomes. The Full Court of the Federal Court has held that this requires an objective assessment of the suitability of the measure to achieve the specified objects.[54]

The ADA provision (s 33) refers to "positive discrimination" rather than 'special measures'; the provision has not been judicially considered. It differs in other respects to the other statutes, namely, it refers to a 'bona fide benefit', not to acts done in pursuance of substantive equality or to meet the special needs of a

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46 RDA s 8.

47 (1985) 159 CLR 70.

48 Ibid, 133.

49 Ibid, 135.

50 (2004) 140 FCR 149.

51 Ibid [47].

52 Ibid [61] and [62].

53 Ibid [62].

54 *Catholic Education Office v Clarke* (2004) 138 FCR 121 at [130], agreeing with Kenny JA in *Coyler v Victoria* [1998] 3 VR 759 at 771.

particular group. Also the provision is not subject to temporal limits, that is, the acts do not cease to be protected once its purpose has been achieved. Section 33(b) and (c) refer to an act which is intended to meet a need or disadvantage, and so the subjective intent of the person performing the act is relevant. The Explanatory Memorandum to the Age Discrimination Bill 2003 states: "*As with the needs-based exemption, the requisite intention to reduce disadvantage need not be held by the person actually providing the beneficial treatment*",[55] suggesting subjective intent is not crucial, although arguably the person who designed the scheme would need to have such a beneficial intention.

Defining the special measures provision

PIAC submits that the special measures provision should include both subjective and objective criteria. PIAC submits that the special measures provision should be modelled on s 12 of the Victorian Act and the recommendation of the NSW Law Reform Commission in its 1999 report[56] and include the following criteria:

- The purpose of the special measure is to achieve substantive equality for members of a group with a particular attribute;
- If the special measure is taken for more than one purpose the other purpose must be non-discriminatory;
- The special measure must be taken in good faith for achieving the above purpose;
- The special measure must be reasonably likely to achieve the purpose;
- The special measure must be necessary and proportionate to achieving the goal of substantive equality;
- The special measure can be justified because the members of the group:
    - have a particular need for advancement or assistance;
    - are disadvantaged or excluded; or
    - sought the benefit offered; and
- On achieving the purpose, the special measures must cease.

PIAC submits that the Equality Act should include examples of conduct that would be a permissible special measure, as currently included in s 33 of the ADA and s 12 of the Victorian Act.

PIAC submits that in drafting the provision careful consideration must be given to ensuring that the existing protections in the area of race discrimination are not diminished. Also consideration should be given to ensuring that the broad positive discrimination provisions in the ADA are not lost.

Although the subjective intent of the person implementing the special measures is a relevant consideration, it should not be given undue regard. Over reliance on subjectivity has led to policy or legislation that has been paternalistic and damaging, for example the removal of Indigenous Australians from their families.

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55 Explanatory Memorandum, Age Discrimination Bill 2003 (Cth).

56 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999) Recommendation 49.

Rather, an important consideration is whether the persons for whom the special measures are targeted support the special measure. As Brennan J observed in *Gerhardy*:

> The purpose of securing the advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure if taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[57]

Certification of special measures by the Commission

Currently, none of the Commonwealth anti-discrimination statutes requires approval or certification of special measures. Instead a person relies on a particular action designed to achieve substantive equality as falling within the relevant special measure provision. If a complaint is later lodged about the action being discriminatory, the respondent could seek to rely on the special measure as a defence to a discrimination claim.

One consequence of the current system is that persons implementing special measures have no certainty that a particular action will not be subject to a claim for discrimination and that they will be successful in proving that the conduct is a special measure. PIAC submits that requiring special measures to be certified prior to implementation will provide duty holders with certainty. Currently, NSW is the only State or Territory that provides for a process for the formal approval of a special measure prior to its implementation.[58]

The certification process should be modelled on the temporary exemption approval process. That is, the certification process should involve public consultation, particularly with the group who the special measure is designed to assist. Additionally, the applicant should include evidence in its application for certification that consultation with the targeted group has taken place. The importance of including the group in the process was observed by Brennan J in *Gerhardy*, he noted "*The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them*".[59]

Public consultation will also have other important benefits. It will allow the sharing of special measures acts and programs and showcasing of best practice policies. It will also have an important educative benefit.

The certification decision by the Commission should be subject to merits review in the Administrative Appeals Tribunal, as are currently the Commission's temporary exemption decisions. Judicial review should be available as well under the *Administrative Decisions (Judicial Review Act) 1977* (Cth).

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57 *Gerhardy v Brown* (1985) 159 CLR 70, 133-135.

58 See *Anti-Discrimination Act 1977* (NSW) s 126A.

59 *Gerhardy v Brown* (1985) 159 CLR 70, 135.

The special measures should be subject to temporal limits. Given special measures are designed to achieve substantive equality, once equality is achieved then the special measures should cease. This is consistent with the provisions of the SDA and RDA.

The Equality Act should make it clear that a certified special measure is a lawful activity. This is consistent with the amendments to the SDA and the insertion of s 7D. The distinction between lawful activity and exempt discriminatory activity is important, as special measures are not discriminatory; rather they are designed to achieve the goal of substantive equality, which should be an object of the Equality Act.

Recommendation 7 - Single special measures provision

A single special measures provision should be included in the Equality Act covering all protected attributes. The provision should be modelled on s 12 of the Equal Opportunity Act 2010 (Vic).

Recommendation 8 - Certified special measures

The Commission should certify special measures. The certification process should be modelled on the current temporary exemption application process, with provision for merits and judicial review.

The following criteria should be used in assessing special measures:

- *The purpose of the special measure is to achieve substantive equality for members of a group with a particular attribute;*
- *If the special measure is taken for more than one purpose the other purpose must be non-discriminatory;*
- *The special measure must be taken in good faith for achieving the above purpose;*
- *The special measure must be reasonably likely to achieve the purpose;*
- *The special measure must be necessary and proportionate to achieving the goal of substantive equality;*
- *The special measure can be justified because the members of the group:*
    - *have a particular need for advancement or assistance;*
    - *are disadvantaged or excluded; or*
    - *sought the benefit offered;*
- *On achieving the purpose, the special measures must cease.*

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

PIAC submits that the duty to make reasonable adjustments should apply to other attributes and that such a duty should be a standalone positive duty.

The duty to make reasonable adjustments was inserted into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*, which came into force on 5 August 2009. These provisions, ss 5(2) and 6(2), have yet to be judicially considered.

Duty to make reasonable adjustments should be extended to all attributes

The duty to make reasonable adjustments should be extended to all other attributes. Currently, claims of indirect discrimination arise where a person with a particular attribute is unable to comply with the requirement or condition, or the requirement or condition has a disproportionate impact on a group with the particular attribute. To defeat a claim of indirect discrimination, a respondent must prove that the requirement or condition is reasonable.

A separate positive duty to make reasonable adjustments would provide clarity to duty holders in assessing the impact of a neutral requirement or condition and its reasonableness. For example, an employer may impose a condition that an employee be able to lift 25kg, a requirement that is likely to have a disproportionate impact on women. An adjustment in that situation might be allowing another employee to assist with lifting of heavy objects. Whether such an adjustment is reasonable would depend on, for example, the number of employees, the frequency such lifting is required etc.

Another example of how such a duty would operate is that an employer could be required to make an adjustment to provide Occupational Health and Safety manuals in a language other than English. Assessing whether such an adjustment is reasonable, would involve consideration of the size of the employer, the number of employees who speak a different language, the number and size of the manuals. Similarly, premises such as a shopping centre may provide a special facility for women who are breastfeeding. Whether making such an adjustment is reasonable would depend on the size of the shopping centre.

Standalone provision

PIAC submits that the duty to make reasonable adjustments should be a standalone provision that applies to all attributes. The provision should also apply to all areas of public life that are protected from discrimination and not be limited to, for example, employment. The Victorian Act contains a duty to make reasonable adjustments that is limited to the areas of employment, education, the provision of goods and services and access to premises. Given that the current provisions in the DDA apply across all areas of public life protected by the DDA, if a new standalone provision were limited to particular areas, as the Victorian Act is, then this would represent a reduction in existing protections.

Also, as outlined above, PIAC submits that there should be a single unified definition of discrimination in an Equality Act. As a result, rather than adding a duty to make reasonable adjustments to such a provision, it would be simpler for the reasonable adjustment duty to be a separate provision.

Recommendation 9 - Reasonable adjustments

The Equality Act should contain a duty to make reasonable adjustments that applies to all attributes. The requirement should be a standalone provision.

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

Even though it could be regarded as a positive duty, the duty to make reasonable adjustments to accommodate specific needs has already been discussed above under Question 4. PIAC interprets this question as relating to other types of positive duties.

PIAC submits that public sector organisations should have a positive duty to eliminate discrimination and harassment. Discrimination law is currently largely reactive and change relies on individual complaints. This characterises the discrimination as a personal dispute and does not encourage organisations to look at holistic change, particularly since the penalties are generally minor. Imposing a positive duty on public sector organisations would proactively promote substantive equality.

A positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible was introduced in Victoria's *Equal Opportunity Act 2010*.[60] The Act contains a list of factors that must be considered in determining whether a measure is reasonable and proportionate and the Act also contains examples.[61] The Victorian Equal Opportunity and Human Rights Commission may investigate a breach of this duty or conduct a public inquiry, but it cannot receive individual complaints.[62] If the Commission finds a breach of the duty, it can issue a compliance notice and the Victorian Civil and Administrative Tribunal can enforce the notice.[63]

The UK is an interesting model for such a duty. In the UK, under the new *Equality Act 2010 (UK)* (**UK Act**),[64] public authorities have a duty to have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity between persons who share a protected characteristic and persons who do not share it, and foster good relations between persons who share a protected characteristic and persons who do not share it.[65]

These requirements are further defined as removing or minimising disadvantages suffered by people due to their protected characteristics, taking steps to meet the needs of people with protected characteristics and encouraging people from protected groups to engage in public life. The duty covers the following characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Under the previous UK legislation a positive duty existed for the public sector in relation to gender, disability and race.[66]

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60 *Equality Opportunity Act 2010* (Vic) s 15(2).

61 *Equality Opportunity Act 2010* (Vic) s 15(6).

62 *Equality Opportunity Act 2010* (Vic) s 15(3) and s 15(4).

63 *Equality Opportunity Act 2010* (Vic) s 139 and 151.

64 The duty commenced on 5 April 2011.

65 *Equality Act 2010* (UK) s 149(7).

66 *Equality Act 2006* (UK), imposed a duty in relation to gender, the *Race Relations (Amendment) Act (2000)* (UK) imposed a duty in relation to race and the *Disability Discrimination Act 2005* (UK) imposed a duty for disability.

A breach of the provisions in the UK Act does not give rise to a cause of action at private law.[67] The UK Equality and Human Rights Commission has a number of statutory powers to enforce the duty, including undertaking assessments to assess to what extent a body has complied with the duty, serving compliance notices and then enforcing the notices through the courts.[68] The provisions can also be enforced through an application to the High Court for judicial review.[69] A person or a group of people with an interest in the matter, or the UK Commission, could make an application for judicial review.

The SDA Inquiry report also proposed the introduction of a positive duty to eliminate sex discrimination and sexual harassment and promote gender equality.[70]

What should the positive duty consist of?

The positive duty to eliminate discrimination and harassment needs to be carefully defined.

First, PIAC submits that public sector organisations should be required to take *reasonable steps* to eliminate discrimination and harassment, rather than just pay *due regard* to the need to do so. This makes the duty more action and outcome focused. In this regard, the Victorian legislation is a better model than the UK Act.

Public sector organisations should be required to set defined goals in relation to substantive equality and discrimination and harassment. There should be mandatory reporting on the progress towards these defined goals.

The UK *Equality Act 2010 (Specific Duties) Regulations 2011* requires public authorities to publish information to demonstrate their compliance with the general equality duty at least annually. The information must include information relating to people who share a relevant protected characteristic who are its employees (for authorities with more than 150 staff); and people affected by its policies and practices, such as service users. The information must be published in a manner that is accessible to the public.

The new Act or regulations could set out similar requirements to the UK in relation to requiring public authorities to report and publish information.

Secondly, PIAC submits that public sector organisations should be required to ensure that their policies, practices and services do not have an unjustifiable adverse impact on certain groups of people. This requires public sector organisations to conduct an audit of their policies, practices and services to monitor compliance with this obligation.

The duty should also consist of general requirements to promote equality.

Furthermore, s 1 of the UK Act creates a general duty on public authorities to have due regard to the desirability of reducing inequalities arising from socio-economic disadvantage when making strategic decisions about how to exercise their functions.

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67 *Equality Act 2010* (UK) s 156.

68 *Equality Act 2006* (UK) s 31 and 32.

69 Explanatory Notes to the *Equality Act 2010* (UK) [521].

70 SDA Report, above n 5, Recommendation 40.

Unfortunately, this provision has not been brought into force.[71] It would be desirable to include this general duty in the new Act.

Ideally, such a positive duty should be enforceable by individuals. The effectiveness of the positive duty is limited if it does not give rise to any enforceable private law rights. The availability of judicial review of decisions by public sector authorities is not sufficient as there is rarely an order for compensation in judicial review proceedings.

This would not have an undue burden on these organisations as many larger organisations already have policies that aim to eliminate discrimination and harassment. Furthermore, employers are required under the Commonwealth anti-discrimination Acts to take reasonable steps to prevent discrimination and harassment to avoid vicarious liability.

The importance of having a broad definition of a public sector organisation

One of the most important questions for the operation of the new Act is determining the definition of 'public sector organisations', which in turn determines the application of the duty.

PIAC submits that the definition of 'public sector organisations' needs to be broad and detailed. The definition should expressly include the following:

- public officials;
- government departments;
- statutory authorities;
- state owned corporations;
- police;
- local Government;
- Ministers;
- Members of Parliamentary Committees when acting in an administrative capacity;
- an entity declared by regulations to be a public authority for the purposes of the legislation;
- an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and
- any entity that chooses to be subject to the legislative obligations of a public sector organisation.

PIAC recommends that the new Act include a power to make regulations so that organisations can be added to the category of 'public authority'. This will ensure that the legislation will retain a degree of flexibility.

PIAC also recommends that the legislation provide some guidance on the definition of "*an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority*". It is a common feature of modern government that various non-state actors, for example,

[71] *Equality Act 2010* (UK) s 1.

not-for-profit organisations, religious or faith based bodies and private companies, are involved with the delivery of government and public services.[72]

PIAC recommends that the legislation should include guidance, such as examples and a list of indicia, as to when an entity is performing a "function of a public nature".[73] The list of indicia should include whether:

- the function is conferred on the entity under a statutory provision;
- the function is connected to or generally identified with functions of government;
- the function is of a regulatory nature;
- the entity is publicly funded to perform the function; and
- the entity is a State or Council owned company.

The legislation should also indicate that these indicia are neither exhaustive nor determinative, but are merely matters that can be taken into account.

PIAC recommends that the legislation provide that certain specified functions, which are central to effective public service delivery, are taken to be of a public nature.[74] The functions that should be specified include the operation of detention places and correctional centres, the provision of the following services: gas, electricity and water supply, emergency services, public health services, public education, public transport, and public, community or social housing.

Under the recommended definition of 'public authority' and the indicia for 'functions of a public nature' referred to above, the issue of government funding or government control of a non-government service provider are among the criteria used to assess whether that service is performing a "function of a public nature on behalf of the state", and as such, is bound by the legislation. PIAC therefore recommends that the legislation should not be limited to those non-government service providers who provide services funded or controlled by government. The fact that a service is funded and/or controlled by government should not definitively determine whether it is a function of a public nature.

Secondly, to confine the guidance in this way undermines the purpose of the provision, namely to assess whether the entity performs the functions of a public authority. Confining the aspects to be considered to the existence of government funding and control would result in a number of activities and functions being excluded from the definition of 'public authority', including any privatised public transport, privatised utility services, and some welfare and charitable services that have a readily identifiable 'public service' aspect to their character.

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72 This transformation in the way government and public services are delivered was the subject of research undertaken by PIAC in partnership with the Whitlam Institute and the Social Justice and Social Change Research Centre of the University of Western Sydney in 2009. See Public Interest Advocacy Centre, The Whitlam Institute within the University of Western Sydney, and Social Justice and Social Change Research Centre, University of Western Sydney (2009), *A question of Balance: Principles, contracts and the government-not-for- profit relationship*, July 2009.

73 This is the approach adopted in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2) and the *Human Rights Act 2004* (ACT) s 40A(1).

74 This was also included in the *Human Rights Act 2004* (ACT) s 40A(3).

PIAC also recommends that the legislation allow any entity that is not a public sector organisation to choose to be subject to the legislative obligations of public sector organisations. Such a provision could encourage the private and non-government sector to subject itself voluntarily to the anti-discrimination obligations under the legislation.[75] Non-government entities that voluntarily choose to be subject to the legislative non-discrimination obligations may be considered favourably by government for tendered services. Alternatively, certain government contracts may specifically require contractors to comply with the legislation.

Recommendation 10 - Positive duty

There should be a positive duty on public sector organisations to take reasonable steps to eliminate discrimination and harassment and promote equality.

There should also be a duty to have due regard to reducing inequalities relating to socio-economic disadvantage.

Public sector organisations, should be clearly and broadly defined to include:

- *public officials;*
- *government departments;*
- *statutory authorities;*
- *state owned corporations;*
- *police;*
- *local Government;*
- *Ministers;*
- *Members of Parliamentary Committees when acting in an administrative capacity;*
- *an entity declared by regulations to be a public authority for the purposes of the legislation;*
- *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and*
- *any entity that chooses to be subject to the legislative obligations of a public sector organisation.*

The new Act should include a power to make regulations so that organisations can be added to the category of 'public authority' as required.

[75] This is similar to the *Privacy Act 1988* (Cth) s 6EA and the *Human Rights Act 2004* (ACT) s 40. As at January 2012, 237 small businesses have opted in to be covered by the *Privacy Act* and three organisations have chosen to be subject to the obligations of public authorities in the ACT: Companion House Inc, Centre for Australian Ethical Research and Women's Legal Centre (ACT and Region).

3. Protected Attributes

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

PIAC submits that all attributes currently protected through the International Labour Organization (**ILO**) discrimination complaints stream under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) and the Fair Work Act should be included in the consolidated Equality Act, namely:

- religion;
- political opinion;
- industrial activity;
- nationality;
- criminal record;
- medical record;
- sexual preference;
- carer's responsibilities;
- national extraction; and
- social origin.

These additional attributes are already covered in the employment context and it would harmonise employment with other contexts and enable the case law to develop together. As the Commission explains in its submission, the *International Covenant on Civil and Political Rights* (**ICCPR**)[76] and the *International Covenant on Economic Social and Cultural Rights* (**ICESCR**)[77] provide a basis for prohibiting discrimination more broadly. Given that these grounds are already covered in the employment context, the impact on business and more broadly of extending protection to all contexts would not be substantial.

PIAC supports the Discrimination Law Experts' Group proposed definition of 'protected attribute' as including a past, future or presumed attribute, characteristics of an attribute and association with a person possessing an attribute.[78] PIAC supports the suggestion that the exhaustive list of protected attributes should be separate so that additions can be made from time to time.

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76 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

77 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

78 Discrimination Law Experts' Roundtable: *Report on recommendations for a Consolidated Federal Anti-Discrimination Law in Australia,* Updated 31 March 2011, 8.

Religion

PIAC supports adding religion as a protected attribute. Currently there is some uncertainty as to the extent that different religions are protected by the RDA.[79] Freedom of religion and belief is a fundamental human right[80] that should be protected under Australian discrimination law.

There is evidence suggesting that discrimination on the basis of religion is widespread, particularly in relation to Muslim Australians. In its submission to the Australian Human Rights Commission's Freedom of Religion and Belief Consultation, the Australian Muslim Civil Rights Advocacy Network said:

> The absence of federal religious discrimination laws has become even more pertinent in light of extensive reports of discrimination and vilification against the Muslim community, as documented by the Human Rights and Equal Opportunity Commission. In light of the findings of widespread discrimination against the Muslim community specifically because of their adherence to the religion of Islam, the lack of specific protection against religious discrimination has now become urgently inadequate. The failure to enact federal laws to prohibit discrimination on the ground of religion must be addressed.[81]

Furthermore, providing protection against discrimination on the ground of religion would enable the Australian Government to re-shape the religious exemptions under the consolidated Act so that they more suitable to their purpose (see Question 22 below in this regard). By more effectively combating religious intolerance in anti-discrimination legislation, the Government would be able to provide a more effective, more principled response to the need for religious freedom than overly-broad exemptions granted to religious organisations.

In addition, PIAC submits that in addition to the above grounds, housing status and victims of domestic violence should be included in the new Act.

Housing status

PIAC has particular expertise in relation to discrimination on the basis of housing status through its Homeless Persons Legal Service (**HPLS**). A joint initiative between PIAC and the Public Interest Law Clearing House (**PILCH**), HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. HPLS currently operates ten free legal clinics on a roster basis at welfare agencies in the greater Sydney metropolitan region, coordinating and supervising 350 lawyers acting pro bono. In the previous financial year, HPLS helped 738 clients, and since its inception in 2004, HPLS has assisted over 4,500 clients.

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79 It has been held that Jewish people comprise a group of people with an "ethnic origin" for the purposes of the RDA (*Jones v Scully* [2002] FCA 1080*, Miller v Wertheim* [2002] FCAFC 156). However it is unclear whether other faiths, such as Muslim people, fall within the term "ethnic origin". The Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) suggests that Sikhs, Jews and Muslims fall within the term "ethnic origin" in Australian legislation.

80 Universal Declaration of Human Rights, article 18; ICCPR, article 18.

81 Submission 1867 Australian Muslim Civil Rights Advocacy Network, quoted in Australian Human Rights Commission, *Freedom of Religion and Belief Report* (2011), 45.

While there are some provisions in anti-discrimination legislation that can indirectly provide protections for homeless people,[82] there are no specific legal protections against discrimination on the basis of housing status. There is also no protection for other common related attributes such as unemployment, social status, drug dependency or receiving social security. Discrimination on the basis of housing status is currently lawful in Australia. Sadly, it is frequent and widespread.

PIAC has proposed the term 'housing status' as it includes not only people who are homeless, but also people who are at risk of homelessness, people who were previously homeless, and people who are in public housing.

Case study 3[83]

Van Minh Nguyen is 45 years old. He started working for the NSW Attorney General's Department in 1991.

He worked in various roles in different locations, most recently as a court officer at Central Local Court in Sydney, in administration of bail undertakings and sureties.

He worked five days a week at the courts, and on the weekends had a thriving side business as a DJ in Sydney's nightclubs.

Being in a good financial situation, he and a friend went 50-50 in purchasing a $700,000 investment property. He used all his savings to do so. A year later, the friend wanted to withdraw from the investment so Minh was faced with the choice of selling up too or borrowing more money to buy out his friend's share. He decided to borrow more money and take on the whole investment himself.

With the onset of the global financial crisis in 2009, Minh's DJ business declined and he experienced financial hardship. He did not have any close friends or family to help, having arrived in Australia after the Vietnam War as a child orphan. He was initially fostered out to a family in western NSW, but when the couple fell pregnant with their fourth child, they sent him back to be raised in Sydney orphanages.

When he could no longer pay his mortgage, his lenders garnished his income. While he managed to hold down his well-paid job, he had very little money to live on and became homeless.

He had 24 hour access to his workplace, a secure court building in Sydney, and as it was safer than the streets, he began sleeping there. After finishing work, he would leave the building and roam the streets of Sydney until 9pm when he would go back into work and sleep. He would set his alarm for 3am so he could have a shower in the magistrates chambers before the cleaners came, then walk the streets again in the morning until arriving for work at 7.30am.

He did this for two or three months. It was hugely mentally and physically tiring but he maintained his standard of work performance and did not tell anybody. When he accidentally responded to a work email in the early hours of one morning, he was

82 For example, disability discrimination, as defined under section 4 of the DDA, can provide some protections to homeless people who have intellectual or physical disability, suffer from mental illness or addictions.

83 Acknowledgements to Van Minh Nguyen for wanting to share his story and to Lauren Martin, for her article about Minh in Salvation Army, *Pipeline Magazine*, October 2011, 20-23.

discovered. The colleague that he'd sent it to questioned him the next day. He confessed he had been sleeping at the office as he had no home to go to. While she was sympathetic, she told him she had to report it.

Thus began more than 12 months of investigations by the Attorney General's Department. Van Minh was interviewed at length, with investigators probing into how he had become homeless, where he was spending his money and whether he had a gambling problem. Van Minh had to produce his bank statements to show that he did not have a gambling problem and that his financial strife had been caused by his bad property investment decision.

The Department was also concerned about their Code of Conduct being upheld and wanted to ensure the security of the building and files, and that Van Minh was not bringing other people into the building. (Security camera surveillance was obtained showing him consistently entering and leaving the building alone, so he was vindicated in this regard.)

Van Minh was eventually asked to attend a meeting with the Director-General of the Attorney General's Department. He found the Director-General to be a kind and compassionate man and thought that the investigation had been resolved and that the Department was going to help him get back on track.

He was therefore shocked when a few months later, he arrived at work to be told that the Director-General had issued an ultimatum – to resign or be terminated. Van Minh's last vestige of security – his employment and income – was taken away.

After 21 years of service with the Department, Van Minh could not believe it was ending in this way. He attempted suicide that day. He was then hospitalised at St Vincent's hospital psychiatric unit before being referred to Salvation Army's Streetlevel Mission.

Van Minh cannot understand why his use of the building outside normal work hours is any more a breach of security than other staff who he saw accessing the building for their personal use. All staff had 24 hour access. He says he saw other staff using the carpark on weekends, so that they could go to the movies or go shopping in the city.

His reason for using the building was merely for sleeping because he was desperate and homeless. He did not make it his home, and did not jeopardise security of the building or documents in any way.

In regard to his dismissal, by the time Van Minh sought legal advice it was too late to make an unfair dismissal application within the short statutory time period provided by the legislation. The costs implications of pursuing a common law action for wrongful dismissal arguing breach of procedural fairness are prohibitive. As NSW and Commonwealth discrimination laws currently stand, none of the protected attributes provided a sound basis on which Van Minh could challenge his termination. He also cannot make an application for unlawful termination in breach of the General Protections provisions of the *Fair Work Act 2009*, as housing status is not a protected attribute in s 351 of that Act. He therefore has no legal recourse in respect of his dismissal.

If housing status were a protected attribute under Commonwealth anti-discrimination legislation, the Department would have been required to handle this matter with the greater sensitivity it deserved. The Department's actions in forcing Van Minh's

resignation on the basis that he was sleeping in the building because he was homeless would have clearly exposed them to a discrimination complaint.

According to a study undertaken by the Victorian Homeless Persons Legal Clinic (**HPLC**) on behalf of the Victorian Government, 69% of homeless people surveyed reported having experienced discrimination on the basis of homelessness or social status at the hands of accommodation service providers.[84] These include private real estate agents, private landlords, hotels, boarding houses, public housing and transitional or crisis accommodation service providers. Approximately half of those surveyed reported that discrimination had prolonged their homelessness and made it more difficult to navigate out of homelessness.

According to the same study, 58% of homeless people surveyed reported that they had been discriminated against from providers of goods and services on the basis of homelessness or social status. Respondents reported that discrimination was most often experienced from restaurants, cafes, bars, banks, retail shops, hospitals and telecommunications providers.

Discrimination on the basis of homelessness may manifest itself in a number of different ways. Factors which form the basis of such discrimination include:

- appearance;
- source of income (eg. Centrelink benefits);
- association with, or assistance by, a welfare agency (eg, by presenting an emergency payment cheque from that agency for payment of rent); and
- being unable to meet certain requirements imposed for accessing goods and services, such as having a permanent address or landline telephone number.[85]

The Final Report of the Victorian Equal Opportunity Review extracted an example from the Victorian MPLC submission to illustrate the experience of discrimination on the basis of homelessness:

> A homeless man approached the local backpackers' hostel and asked whether they had a vacancy. They advised that they did and the man went to the Salvation Army for financial assistance. The man then returned to the hostel with a Salvation Army cheque for his accommodation. Upon seeing the cheque, the hostel owner told him that all their vacancies had been filled…
>
> In [this] example, the use of a Salvation Army cheque revealed, or possibly confirmed, the man's homelessness to the hostel owner. It is likely that the hostel owner made a number of assumptions about the man's ability to pay, lifestyle and character. His decision to refuse accommodation was based on the man's homeless status and use of a cheque from a support service to pay for his accommodation….
>
> As a general rule, if a person can pay for a service they should have the right to access that service without discrimination. The refusal of charity or Housing Establishment Fund cheques is an overt form of discrimination against homeless

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84 PILCH Victoria Homeless Persons' Legal Clinic, *Report to the Department of Justice, Discrimination on the Grounds of Homelessness or Social Status,* 2007.

85 PILCH Victoria Homeless Persons' Legal Clinic, *Discrimination on the basis of homelessness: Position paper of the PILCH Homeless Persons' Legal Clinic*, available at: http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf. at 10 January 2012.

people. The consequences of this discrimination are immediate and real – a person may end up without accommodation. [86]

According to the study by the Victorian HPLC, discrimination can have serious consequences for a person experiencing homelessness, further exacerbating their pre-existing disadvantage.[87] These include:

- hindering access to accommodation, employment, goods and services;
- exacerbating social exclusion, negative stereotyping and stigmatisation, sometimes leading to relationship difficulties;
- entrenching homelessness, particularly where it results in an inability to secure private rental accommodation, causing a need to further rely on transitional or crisis accommodation, often at great cost;[88] and
- adverse physical and mental health consequences, including depression, anxiety and substance abuse. Poor physical health was a frequent occurrence in 35 to 40 per cent of cases.[89]

Research by Vic Health illustrates that people who suffer from discrimination are more likely to develop depression and anxiety. The report also notes that there is a strong link between poor mental health and poor physical health.[90]

The Victorian Equal Opportunity Review Final Report recommended that homelessness be included as a protected attribute under Victorian anti-discrimination law.[91]

International law also provides support for including housing status as a protected attribute. The ICESCR requires that States use all their available resources to progressively realise the rights set out in the Covenant. Article 11 recognises the right to an adequate standard of living and this includes adequate housing. Article 12 states that everyone has the right to enjoy the highest attainable standard of physical and mental health. According to Article 2(2) of ICESCR, these rights must be exercised 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**' (emphasis added).

Article 2(1) of the ICCPR also states:

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86 Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, 96- 97.

87 PILCH Victoria Homeless Persons' Legal Clinic, *Discrimination on the basis of homelessness: Position paper of the PILCH Homeless Persons' Legal Clinic*, available at http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf. at 10 January 2012.

88 A City of Sydney study showed that the public cost of someone remaining homeless is as much as $34,000 per person every year. ABC Radio, 'The Cost of Homelessness', *702 Sydney Breakfast Show,* 2 March 2006 <http://www.abc.net.au/sydney/stories/s1582528.html>.

89 PILCH Victoria Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 17.

90 Vic Health, *More than Tolerance: Embracing Diversity for Health,* September 2007.

91 Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, 96 - 97.

> Each State party undertakes to respect and to ensure to all individuals …the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status.** (Emphasis added).

Article 26 of the ICCPR protects 'social origin' and 'any other status'.

This attribute 'other status' provides protection to people linked by their common status. There is international jurisprudence that supports the inclusion of homelessness, social status and criminal record within the definition of 'other status'.[92]

There is international precedent for specifically prohibiting discrimination on the basis of housing status. The New Zealand *Human Rights Act 1993* contains 'employment status' as a protected attribute and the definition of the attribute includes being a recipient of benefits under social security law. In Canada, 'receipt of public assistance' is protected under discrimination legislation in a number of provinces and some jurisdictions prohibit discrimination on the basis of 'social condition'. There is also a federal Canadian guarantee of freedom from discrimination on a number of grounds (that do not include housing status) but the list is not exhaustive. The UK *Human Rights Act 1998* incorporates article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which guarantees a right to freedom from discrimination on any ground, including social status.

Adding housing status as a protected attribute will, most importantly, provide those who are homeless, at risk of homelessness, or previously homeless, with a possible recourse if they are discriminated against on the basis of their housing status. Secondly, it sends an important educational and deterrent message to service providers and employers about discrimination on the basis of housing status. Even though it will not actually address the root causes of homelessness, law reform like this is an important part of a holistic strategy to reduce homelessness. This is particularly important given that the Federal Government has pledged to halve homelessness by 2020, a very ambitious target.

Domestic violence

Domestic violence has a major impact on a person's life. Victims of domestic violence often have difficulties getting work, experience anxiety at work, need changes to schedules or work location for safety reasons, need to attend court or counselling appointments or have other interactions with the criminal justice system.[93]

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92 See Victorian Council of Social Services, *Submission to Discussion Paper regarding Review of Victorian Equal Opportunity Act*, January 2008. Also see S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2nd ed, 2004), 689.

93 Belinda Smith and Tashina Orchiston, "Domestic Violence Victims at Work: the Role of Anti-Discrimination Law", *Working Paper*, 12 December 2011.

Although victims of domestic violence are often female and may also have a disability, the protection under the SDA and DDA is very limited. The SDA does not suitably cover particular sub-groups of women, hence breastfeeding, pregnancy and family responsibilities have each been introduced as separate grounds. The DDA only helps victims who have an impairment and have identified as having that impairment; for example, an injury as a result of domestic violence. Furthermore, the reasonable adjustment provision only relates to needs that are due to the impairment, not other needs arising from domestic violence.

PIAC endorses the proposed wording of the definition in Belinda Smith and Tashina Orchiston's working paper.[94]

Depending on the outcome in relation to Question 4 of the Discussion Paper, adding such an attribute may also mean that employers have to make reasonable adjustments for domestic violence victims, such as leave to attend criminal justice hearings.

In conclusion, PIAC recognises that adding housing status and victims of domestic violence as protected attributes under the new Act will only be truly effective if the court-based adjudication regime is 'no costs' (see discussion below in relation to Question 26). The financial risks would generally be likely to deter claimants suffering from discrimination on the basis of their housing status or their domestic violence victim status.

Recommendation 11 - Additional attributes

In addition to all the attributes currently protected under the four Commonwealth anti-discrimination acts, all attributes currently protected under the ILO and the Fair Work Act should be included in the Equality Act, namely:

- *religion;*
- *political opinion;*
- *industrial activity;*
- *nationality;*
- *criminal record;*
- *medical record;*
- *sexual preference;*
- *carer's responsibilities;*
- *national extraction; and*
- *social origin.*

In addition, housing status and one's status as a victim of domestic violence should be protected attributes in the new Act.

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

PIAC takes the view that modern discrimination laws should recognise that people are multi-layered and may be subject to discrimination based on several aspects of their identity. At an international level, there is a growing recognition of intersectional discrimination, which is also sometimes referred to as 'intersectionality' and 'multiple

94 Ibid.

discrimination.'[95] Although these terms are often used interchangeably, it has been argued intersectional discrimination is a form of multiple discrimination. Multiple discrimination occurs when someone experiences discrimination on more than one protected attribute, for example, being treated less favourably on the grounds of both age and disability. Intersectional discrimination occurs when multiple aspects of a person's identity compound each other and cannot be separated. Intersectional discrimination means people are discriminated against in qualitatively different ways as a consequence of the combination of their individual characteristics.[96]

Australia's existing anti-discrimination laws do not adequately allow for the recognition of discrimination that occurs on the basis of more than one protected attribute.[97] Currently, if a person believes they have been subjected to discrimination based on more than one attribute they must plead each ground separately; a court then considers each ground of discrimination one at a time, not in combination.

PIAC recommends that a new Act should include a provision that expressly permits a court to consider discrimination on the basis of two or more protected attributes. For example, s 14(1) of the UK Act provides:

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

However, PIAC contends that the phrase 'less favourably' be replaced with 'unfavourably' to avoid any inadvertent suggestion that intersectional discrimination should be proved by relying on comparators. PIAC also notes that the UK Act limits multiple discrimination to two protected attributes. PIAC takes the view that an intersectional discrimination provision should not be limited this way and so the provision should refer to discrimination because of a combination of two *or more* protected attributes. Furthermore as per 14(3) of the UK Act, the new Act should make it clear that it is not necessary to establish that each ground amounts to discrimination separately. Also, it should not be limited to cases of direct intersectional discrimination but should also prohibit indirect intersectional discrimination.

PIAC takes the view that if intersectional discrimination is to be effectively protected in the consolidated bill it is essential to remove any reference to the comparator in

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95 See, eg., The Platform for Action for Equality, Development and Peace at the United Nations' Fourth World Conference on Women in Bejing cited in European Network Against Racism, July 2011 ENAR Factsheet 44, *The Legal Implications of Multiple Discrimination,* < http://cms.horus.be/files/99935/MediaArchive/publications/FS44%20-%20The%20legal%20implications%20of%20multiple%20discrimination%20final%20EN.pdf > 12 December 11. See also report of the United Nations Expert Group Meeting on Gender and Race Discrimination held in Zagreb, Croatia, 21-24 November 2001 <http://www.un.org/womenwatch/daw/csw/genrac/report.htm>

96 Equality and Diversity Forum, *Multi-dimensional discrimination: Leaflet*, http://www.edf.org.uk/blog/?p=12670> on 14 December 2011.

97 See, eg, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, CEDAW, 34th sess, 28,UN Doc /C/AUL/CO/5 (2006), cited in Cambridge Pro Bono Project, above n 25, 23. See also Andrew Thackrach, "From Neutral to Drive: Australian anti-discrimination law and identity", (2008) 33(1), *Alternative Law Journal*, 31-32.

the definition of discrimination. PIAC contends that the requirement of a comparator is simply not compatible with intersectional discrimination. For example, if a Vietnamese woman was discriminated against in seeking employment because of weight/height restrictions that could be satisfied by both other women (who weren't Vietnamese) or Vietnamese men, retaining this test as part of the definition of discrimination would undermine the value of including a 'compound' discrimination provision in the new Act.

PIAC further recommends that the intersectional discrimination provision should make it clear that the question whether the discriminatory behaviour falls within an exception or can otherwise be justified should be treated cumulatively.[98]

Recommendation 12 - Intersectional discrimination

The new Act should expressly cover intersectional discrimination in relation to both direct and indirect discrimination.

The provision should also make it clear that it is not necessary to establish that each ground amounts to discrimination separately.

The new Act should make it clear that the question whether intersectional discrimination falls within an exception or can otherwise be justified should be treated cumulatively.

[98] See, eg, *The General Equal Treatment Act 2006* (Germany) s 4.

4. Exceptions and Exemptions

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

The exceptions and permanent exemptions contained in the current Australian anti-discrimination legislation have sometimes been criticised as inflexible, unreasonable and overly broad.[99] It has also been suggested that permanent exceptions contained in anti-discrimination laws have reinforced discrimination against marginalised groups of Australian society.[100]

PIAC contends that all of the exceptions and permanent exemptions contained in current Commonwealth anti-discrimination legislation should be replaced with a single justification provision, which provides that the discriminatory behaviour will not be unlawful discrimination if the respondent can show that '*the action was a proportionate means of achieving a legitimate aim*'.[101] All other defences such as unjustifiable hardship would also be subsumed within this provision. On a symbolic level, including a single defence provision that balances the interests of duty holders against the rights of individuals represents a powerful message about the importance of equality in Australian society. On a practical level, a single justification provision is simpler for individuals to understand. It is also more flexible, as it allows decisions about discrimination to change over time in line with changing community expectations.

Finally, PIAC takes the view that it is more consistent with our international human rights obligations. PIAC further suggests that consideration be given to providing that the Commission with the power to issue guidelines providing examples and more details about how the general justification provision should be applied.

On the other hand, PIAC is mindful that many duty-holders may feel that the repeal of all of the existing exceptions, permanent exemptions and defences gives rise to increased uncertainty.

As an intermediate step, PIAC suggest that consideration be given to making all of the existing exceptions, permanent exemptions and defences subject to a three year

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99 HREOC, 2008, n 11 above, 162.

100 See, eg, Human Rights Law Centre & Public Interest Law Clearing House, *Eliminating Discrimination and Ensuring Substantive Equality, Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995(Vic),* 2009 < http://www.hrlrc.org.au/files/eo-review-pilch-hrlrc-submission-to-sarc.pdf> at 8 December 2011,2.

101 See for eg, UK Act s 13(2) which provide 'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'. See also UK Act s 15(1)(b) and 19(2)(d).

sunset clause[102]. Additionally, PIAC contends that the current terminology is confusing. PIAC adopts the comments of the Discrimination Law Experts' Roundtable that "*An 'exception' should describe conduct which, but for the operation of [an] excepting provision, would be unlawful discrimination*"[103] and "*An 'exemption' is a permissive authorisation for conduct which, but for the operation of [an] exemption, would be unlawful discrimination*"[104]. PIAC submits therefore that existing exceptions and permanent exemptions should be renamed as "exceptions".

The final question is whether it would be helpful to add this general justification provision to the new Act if the existing exceptions and permanent exemptions were retained. Provided that this provision is sufficiently tied to the objectives of the new Act, PIAC takes the view the inclusion of a general justification provision would enhance the operation of Australia's anti-discrimination framework. PIAC therefore endorses the Discrimination Law Experts' Group proposal that the objects, definition of discrimination and justification provisions should be interconnected. In particular, the new Act should state that discrimination is unlawful unless it is justified within the scope and objects of the new Act.[105]

Finally, PIAC suggests that the new provision should include a list of the following factors that may be taken into account when determining whether discriminatory actions are justified:

- the objects of the Act;
- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the disadvantage or condition, requirement, provision, criterion, or practice;
- the feasibility of overcoming or mitigating the disadvantage;
- the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;
- the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and
- in relation to discrimination at work, the inherent requirements of the job.

However, the new Act should make it clear that the balancing exercise should be weighted in favour of achieving the objects of the Act.

Recommendation 13 - General limitations clause

All of the existing exceptions and permanent exemptions should be repealed and replaced with a new provision that provides that discrimination will be justified if it is a proportionate means of achieving a legitimate aim. This provision should be

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102 HREOC 2008, n 11 above, 151, 163-4.

103 Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* 29 November 2010, 8 < http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Roundtable_Report_revised_31Mar2011.pdf>, at 12 January 2012.

104 Ibid.

105 Discrimination Law Experts' Group, n 9 above, 8.

included in the new Act, even if the existing exceptions and permanent exemptions are retained.

If the Australian Government is not minded to repeal the existing exceptions and permanent exemptions, these provisions should all be renamed 'exceptions' and made subject to a three-year sunset clause.

The new Act should include a non-exhaustive list of matters to be taken into account when determining whether the behaviour is justified along the following lines:

In determining whether the behaviour is proportionate, a court:

(a) must take into account the objects of the Act; and

(b) may take into account any other relevant factor, including:

(i) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the disadvantage or condition, requirement, provision, criterion or practice;

(ii) the feasibility of overcoming or mitigating the disadvantage;

(iii) the financial circumstances of the person imposing the condition, requirement, provision, criterion or practice;

(iv) the feasibility of making reasonable adjustments or reasonable accommodation to reduce the disadvantage; and

(v) in relation to discrimination at work, the inherent requirements of the job.

Consideration should be given to granting the Australian Human Rights Commission power to issue more detailed guidelines about the general justification provision.

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

PIAC notes that the Discussion Paper is limited to consideration of how a religious exemption might apply to the grounds of sexual orientation or gender identity. However, in PIAC's view the consolidation represents a good opportunity to review religious exemptions on other grounds, namely those contained in the SDA and ADA.[106] Accordingly, in this section PIAC outlines some recommendations in relation to exemptions for religious organisations more generally as well as in relation to sexual orientation and gender identity.

PIAC acknowledges that it is difficult to balance the right to freedom of religion and belief, and freedom from discrimination. Some have argued that freedom of religion

[106] ADA s 35, SDA s 37.

should be accorded more weight than other human rights because it is non-derogable and it is the only right in the ICCPR where the limitation provision is qualified by the word 'fundamental'. However, PIAC endorses the orthodox, more widely accepted position that there is no hierarchy of rights. This view is supported by UN General Comment 24, which states there is no hierarchy of rights under the covenant.[107]

Religious organisations play a large and important role in public life in Australia; for example, in the provision of education, aged care and other services. The extent to which they are allowed to discriminate affects a significant number of people, including potential employees and recipients of services. Therefore, PIAC believes the exemptions for religious organisations should be no broader than is justifiable and necessary.

Application of exemptions to religious organisations generally

PIAC's primary position is that there should be no permanent exemptions for religious organisations in respect of any protected attribute. Instead, PIAC submits that religious bodies, if they wish to discriminate on certain grounds, must justify such discrimination. As outlined above, such discrimination must conform to the general limitations clause – that is, it must be a proportionate means of achieving a legitimate aim (see Question 21 above).

Many of the discriminatory practices by religious organisations that currently rely on the permanent exemptions would fall within the terms of such a justification clause. In particular, the addition of religion as a protected attribute would ensure that in performing the balancing exercise required by such a limitation clause, the importance of religious beliefs would be taken into account. Nonetheless it is important that religious organisations are treated in the same way as other organisations and are not given privileged status and be permitted to discriminate on a permanent basis. For these reasons, PIAC recommends that the current permanent religious exemptions in the ADA and SDA be removed.

Although PIAC believes most discriminatory action by religious bodies would be justifiable under the proposed new general limitations clause, it is possible that some conduct may fall outside the scope of the limitation provision. In those circumstances it would be open to religious organisations to apply for a temporary exemption from the Commission. PIAC believes it is preferable that such exemptions be subject to public consultation and be limited to a period of five years, rather than being permanent exemptions. Upon expiry it would be open to the religious organisation to reapply for a further temporary exemption is still required.

The Commission should only be able to grant exemptions in accordance with the aims and objectives of the new Act (see preliminary issues regarding inserting an objects clause). The SDA Inquiry report recommended that the SDA clarify that the

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[107] General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant: 11/04/1994. CCPR/C/21/Rev.1/Add.6.

power to grant temporary exemptions should be exercised in accordance with the objects of the Act.[108] Furthermore, the Commission should only be able to grant exemptions for the core functions of religious bodies.

PIAC acknowledges that religious groups sometimes need permission to discriminate when making key religious appointments. PIAC endorses the view of the Uniting Church in Australia in limiting the core functions to leadership and teaching positions. The Uniting Church supports:

> [f]ederal legislation prohibiting religious discrimination, including a specific provision which allowed for discrimination on the basis of religion by faith communities in the area of employment in leadership and teaching positions, where it is reasonably necessary for maintaining the integrity of the religious organisation...[109]

If the Federal Government is not minded to remove the permanent exemptions that currently exist for religious organisations, PIAC submits that there should be a number of restrictions on the way the existing exemptions in the SDA and ADA are currently framed. Existing protections should not be diminished (this is a key principle in considering options for reform) and therefore PIAC is concerned to ensure that these religious exemptions do not extend to disability, race or any other protected attributes that are not already covered.

The current exemptions are unnecessarily broad. In relation to age discrimination, the current provisions are not limited to discrimination on the basis of age in relation to the ordination or appointment of religious members, but are extremely broad. The exemptions apply to employment, education, access to premises, goods, services and facilities, accommodation, land and requests for information.

Under the SDA, the exemptions apply to sex, marital status, pregnancy, potential pregnancy, breastfeeding and family responsibilities in the areas of employment, education, goods and services, accommodation, land, clubs and requests for information.[110] PIAC endorses the recommendation of the Senate SDA Inquiry to:

- retain the exemption in relation to discrimination on the basis of marital status;
- remove the exemption on the grounds of sex and pregnancy; and
- introduce a requirement that discrimination be reasonable in the circumstances.[111]

Additionally, PIAC submits that the exemption should not apply to the ground of family responsibilities or breastfeeding.

The discrimination in educational institutions established for religious purposes that is currently allowed under the SDA is supposed to be done 'in good faith' in 'order to

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108 SDA Inquiry Report, above n 9, recommendation 28.

109 Uniting Church in Australia National Assembly, *Submission to the Australian Human Rights Commission –Freedom of Religion and Belief in the 21st Century*, March 2009, 14.

110 Family responsibilities applies only to the employment.

111 SDA Inquiry Report, above n 5, recommendation 35.

avoid injury to the religious susceptibilities of adherents of that religion or creed.'[112] However, there is no requirement that the religious organisation demonstrate the discrimination has been exercised in good faith. All exemptions should require justification by the religious organisation as to why the exemption should apply.

There is also a section of the SDA that allows 'any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'[113] This phrasing is too broad as it may permit discrimination on the basis that an act will injure the religious susceptibilities of *some* adherents of a religion.

Given these problems with the wording of the current provisions in the SDA, PIAC recommends that if there are permanent religious exemptions in the new Act, limited to marital status and age, they should be narrowed to two areas:

- the ordination, appointment, training or education of priests, Ministers of religion or members of any religious orders; and
- educational institutions established for religious purposes in relation to the employment of staff in the provision of religious education and training.[114]

Accordingly the permanent exemption should not extend to goods, services and facilities, access to premises, accommodation, land and requests for information.

PIAC does not support discrimination by organisations who are in receipt of public funding and are performing a service on behalf of government. As outlined above, PIAC supports a positive duty being imposed on such organisations to eliminate discrimination and harassment. If such a duty is included in the new Act then discrimination by a religious organisation in receipt of public funds would not be possible.

Religious exemption on ground of sexuality and gender identity

In relation to discrimination on the grounds of sexual orientation or gender identity, PIAC submits that there should be no permanent exemptions. Rather, as explained above, the only exemption should be the general limitations provision – whether the discrimination is a 'proportionate means of achieving a legitimate end or purpose'. Alternatively, religious organisations can apply to the Commission for a temporary exemption for a maximum period of five years in relation to discriminatory conduct on the basis of sexual orientation and gender identity. Upon expiry it would be open to the religious organisation to reapply for a further temporary exemption.

However, if the new Equality Act is to include a permanent exemption on these grounds, then as explained above, it should be limited to:

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112 SDA s 38.

113 SDA s 37.

114 The exemption in relation to age may not be necessary in relation to educational institutions.

- the ordination, appointment, training or education of priests, Ministers of religion or members of any religious orders; and
- educational institutions established for religious purposes in relation to the employment of staff in the provision of religious education and training.

PIAC submits that the exemption should be limited to these two areas and should not apply to goods, services and facilities, access to premises, accommodation, land and requests for information.

Case study 4 – OV and OW v Wesley Mission[115]

PIAC represented a homosexual male couple, OV and OW, in their case against Wesley Mission. In 2002, OV and OW sought to apply to a foster care agency that was mostly funded by the Department of Community Services but operated by Wesley Mission to become foster carers. The couple applied to the Wesley Mission agency because it was the only one in their area offering the type of foster care that they wanted to provide. The agency refused to provide them with an application form, giving as its reason the sexuality of OV and OW.

OV and OW lodged a complaint against the Wesley Mission, alleging it had unlawfully discriminated against them by refusing to provide them with a service because of their sexuality. Wesley Mission relied on section 56 of the *Anti-Discrimination Act 1977* (NSW), particularly paragraphs (c) and (d) to claim that its conduct was lawful. Section 56 provides:

Nothing in this Act affects:
a) the ordination or appointment of priests, ministers of religion or members of any religious order,
b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
c) the appointment of any other person in any capacity by a body established to propagate religion, or
d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

At first instance, the NSW Administrative Decisions Tribunal (**ADT**) found that Wesley Mission had unlawfully discriminated against OV and OW because neither ss 56(c) nor (d) applied. Section 56(c) did not apply because foster carers are 'approved' pursuant to the child protection scheme set out in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 56(d) did not apply because Wesley Mission failed to prove that 'monogamous heterosexual partnership in

115 *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293; *OV & OW v Wesley Mission* [2010] NSWCA 155 (6 July 2010); *OV v QZ (No. 2)* [2008] NSWADT 115 (1 April 2008); *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5 (27 January 2009); *Members of the Board of the Wesley Mission Council v OW and OV (No 2)* [2009] NSWADTAP 57.

marriage as the norm and ideal' of the family was a doctrine of the Christian religion or of the Uniting Church.

Wesley Mission appealed to the ADT Appeal Panel (**Appeal Panel**) to have the questions arising on the appeal referred to the Supreme Court. The NSW Attorney General intervened in support of the appeal and the application to refer the matter to the Supreme Court.

The Appeal Panel did not refer the proceedings to the Supreme Court and dismissed Wesley Mission's appeal in relation to section 56(c). However, the Appeal Panel found that the religion of Wesley Mission was Christianity and that 'religion' in s 56 should be determined by reference to the 'belief system' from which relevant doctrines are derived. The Appeal Panel sent the question of s 56(d) back to the ADT for rehearing.

PIAC's clients appealed from the decision of the Appeal Panel to the Court of Appeal. Wesley Mission cross-appealed on s 56(c). The Court of Appeal dismissed the cross-appeal in relation to s 56(c). The Court also found that s 56 "encompassed any body established to propagate a system of beliefs, qualifying as a religion." That appeal was successful and the matter was remitted to the ADT for further determination in July 2010.

Ultimately, the ADT found in favour of Wesley Mission. However, the ADT said that it was not its task to decide whether it was appropriate for Wesley Mission to accept public funds for providing a service that it provided in a discriminatory fashion. They said the test was 'singularly undemanding' in that it merely required the ADT to 'find that the discriminatory act was 'in conformity' with the doctrine not affirmatively that it breached it. This may be a matter which calls for the attention of Parliament.'

This case illustrates the broad nature of the current religious exemption in the NSW legislation. PIAC submits that a similar outcome should be avoided under Commonwealth Equality Act. Even the Tribunal that ultimately found in favour of Wesley Mission suggested that the exemptions needed to be reformed. As a public policy matter, no public service provider or educational institution that receives public funding should be able to discriminate on any of the protected attributes without justifying the discrimination to the Commission.

Recommendation 14 - Exemption for religious organisations

There should be no permanent exemptions for religious organisations in respect of any protected attributes.

Alternatively, if permanent exemptions are to be retained then they should be limited to the grounds of marital status, age, sexual orientation and gender identity in the areas of:

- *the ordination, appointment, training or education of priests, Ministers of religion or members of any religious orders; and*
- *educational institutions established for religious purposes in relation to the employment of staff in the provision of religious education and training.*

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?

PIAC supports the continued availability of temporary exemptions. Temporary exemptions provide duty holders with certainty, that for a specific temporary period certain conduct that would otherwise be unlawful discrimination is permissible. The current mechanisms for granting temporary exemptions under the SDA, ADA and DDA, should be clarified and harmonised so that the procedures for each ground are the same.

PIAC has participated in a number of public consultations relating to temporary exemption applications by transport operators for exemption from the provisions of the DDA and *Disability Standards for Accessible Public Transport 2002 (*Cth) (**Disability Transport Standards**). Of the 13 applications made by transport operators since the commencement of the Disability Transport Standards in October 2002, 10 applications have been granted.[116]

Given the significance of a temporary exemption (authorisation to discriminate) it is important that the process and criteria for granting temporary exemptions be included in the new Equality Act, rather than included in guidelines produced by the Commission, as is currently the position. Inclusion of the criteria in the Equality Act provides greater clarity about the criteria and process. PIAC submits that the process for granting temporary exemptions should include that:

- all temporary exemption applications should be published on the Commission's website;
- all applications are subject to a period of public consultation, in which submissions are invited;
- the Commission's temporary exemption decisions should be published on the Commission's website and in the *Gazette*;
- temporary exemptions should be granted for a period of no more than five years; and
- temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.

PIAC submits that the following criteria, many of which are currently used by the Commission in assessing applications,[117] should be included in the Equality Act and be used by the Commission in determining whether to grant an exemption application:

- the application must be specific and specify what provisions the applicant is seeking exemption from and for how long the exemption is sought;
- the application should produce evidence as to why the exemption is required;

116 See <http://www.hreoc.gov.au/disability_rights/exemptions/ybe/noi.html> at 9 January 2012.

117 See <http://www.hreoc.gov.au/legal/exemptions/index.html> at 9 January 2012.

- the proposed exemption must be consistent with the objects of the Equality Act;[118]
- the proposed exemption must be necessary;
- the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;
- matters raised in any submissions in response to the application;
- whether there have been genuine attempts to comply with the provisions of the Equality Act;
- whether the applicant has an action plan in which to ensure compliance with the Equality Act, following the expiration of the temporary exemption; and
- whether it is appropriate to grant the exemption subject to any terms or conditions.

It is important to note that currently there are no provisions under the RDA that allow for the granting of temporary exemptions. In the drafting of the temporary exemption provisions in the Equality Act, consideration should be given to ensuring that protections in relation to race discrimination do not diminish existing protections.

PIAC submits that whilst there are certain circumstances in which a temporary exemption from a discrimination provision may be appropriate, there should be no provisions allowing temporary exemptions from harassment, as is currently the position.

Recommendation 15 – Temporary Exemptions

The new Equality Act should contain provision for applications to be made to the Commission for a temporary exemption up to five years.

Temporary exemptions should be assessed according to the following criteria:

- *the application must be specific and specify what provisions the applicant is seeking exemption from, for how long the exemption is sought;*
- *the application should produce evidence as to why the exemption is required;*
- *the proposed exemption must be consistent with the objects of the Equality Act;*
- *the proposed exemption must be necessary;*
- *the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;*
- *matters raised in any submissions in response to the application;*
- *whether there have been genuine attempts to comply with the provisions of the Equality Act;*
- *whether the applicant has an action plan in which to ensure compliance with the Equality Act, following the expiration of the temporary exemption; and*
- *whether it is appropriate to grant the exemption subject to any terms or conditions.*

[118] The SDA Inquiry report recommended that the SDA clarify that the power to grant temporary exemptions should be exercised in accordance with the objects of the Act (Recommendation 28).

The temporary exemption application process should include:

- *all applications should be published on the Commission's website;*
- *all applications are subject to a period of public consultation, in which submissions are invited;*
- *the Commission's temporary exemption decisions should be published on the Commission's website and in the Gazette;*
- *temporary exemptions should be granted for a period of no more than five years; and*
- *temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.*

5. Complaints and Compliance Framework

Question 24: Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

Action plans

The Commission currently has over 500 disability action plans published on its website.[119] The public availability of action plans has an important educative effect and allows good ideas to be shared. Action plans are developed in consultation with people with disability, and can be a means of proactively preventing discrimination complaints. Additionally, it presents an opportunity for an organisation to showcase its policies and practices as best practice. The Commission has developed a number of resources to assist organisations in the preparation of their action plans.

PIAC supports the continuation of provision for employers and other businesses to lodge action plans with the Commission. PIAC also supports extending action plans to other attributes as a useful preventative means of compliance. However, the development and existence of an action plan is of limited legal effect for an organisation defending a discrimination complaint. An action plan is only relevant in determining defences of unjustifiable hardship, a defence that is currently limited to disability discrimination.[120]

For these reasons, and given the significant time, resources and expertise required in developing an action plan, consideration should be given to making the existence of an action plan a relevant factor in determining liability. However, PIAC does not support action plans being used as a defence to a discrimination complaint. After all, the existence of a perfect plan to prevent discrimination does not ensure that the organisation actually follows the plan. For this reason, action plans should only be considered as a relevant factor in determining a discrimination complaint.

PIAC does not support certification of action plans by the Commission as this would involve a disproportionate expenditure of resources by the Commission. Alternatively, PIAC submits that the Commission should develop further guidelines to assist organisations develop action plans for other attributes.

Guidelines

PIAC supports guidelines being issued by the Commission to assist duty holders to comply with their obligations under an Equality Act. Part 10, Division 1 of the

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119 See <http://www.hreoc.gov.au/disability_rights/action_plans/index.html> at 9 January 2012.

120 DDA s 11(1)(e).

Victorian Act provides a useful template to provide duty holders with additional guidance with the development of guidelines. PIAC submits that compliance with guidelines issued by the Commission should not be a defence to a complaint of discrimination but should be regarded as a relevant factor in determining liability for a claim of discrimination.

Review of policies and practices by the Commission

As outlined above, PIAC submits that compliance with guidelines and the existence of an action plan should have little or no legal effect and be limited to consideration as one of the factors relevant in determining a discrimination complaint. In order to provide duty holders with greater legal certainty, PIAC submits that the Commission should be empowered to review an organisation's policies and practices and provide advice on their level of compliance. PIAC submits that s 151 of the Victorian Act provides a possible template for the operation of such a function. Although the advice would not subject the Commission to legal liability, such advice would assist duty holders in meeting their obligations by providing recommendations. In addition a review function would be a proactive means for an organisation to assess their compliance and address areas of non-compliance.

Given the resource implications for the Commission in undertaking such a function, PIAC supports provision in the Equality Act for the Commission to charge for providing such a review. This is appropriate as the advice would be legal advice for which an organisation would otherwise have to pay a private law firm. Such a provision for payment is included in s 151(1A) of the Victorian Act.

Co-regulation

The Discussion Paper discusses co-regulation as one option for improving compliance and assisting business to meet its obligations. PIAC notes that the Productivity Commission in its report outlined three possible options for co-regulation for disability discrimination:

- compliance with industry codes could be considered if a complaint is lodged;
- allow industries to handle complaints, and if unresolved, complaints would proceed to the Commission; or
- organisations with codes could be granted a temporary exemption, or the Commission could certify codes.[121]

It is not clear from the Discussion Paper the type of co-regulation being considered by the Australian Government. In PIAC's view, the first option listed above is similar to the proposed action plans and guidance. Without legal certainty there is little incentive for business to develop industry codes if their legal effect in a discrimination complaint is limited to consideration. The second option appears to duplicate the existing Commission complaint-handling function and as a result may

[121] Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), 425-426.

not reduce the regulatory burden on business but rather creates an additional process to comply with.

PIAC is not opposed to co-regulation and submits that further discussion and consultation are required to consider what would be involved with co-regulation. Co-regulation may increase industry compliance and has the potential to reduce the regulatory burden on business. Co-regulation can also be more flexible than existing mechanisms. However, there is also the potential that co-regulation merely adds another layer of regulation and actually adds to the regulatory burden. For this reason, PIAC suggests that further consideration be given to how such a mechanism would operate.

PIAC submits that the following principles should guide future discussion on the issue of co-regulation and the certification of industry codes by the Commission:

- how an industry code might be applicable to attributes other than disability;
- consideration be given to how an organisation would prove compliance with the code;
- whether compliance with the code would be a defence to a discrimination complaint, or whether it would be a relevant factor in determining a complaint;
- which industries might be suited to the development of a code and for what attributes;
- the effect of certification for compliance with State and Territory anti-discrimination laws;
- what level of stakeholder consultation would take place in developing the code and whether this would be coordinated by the Commission or industry;
- limiting certification by the Commission to a period of five years, for example; and
- the certification decision by the Commission should be appealable by the applicant industry and any other person with a sufficient interest.

PIAC recommends that further consideration be given to the development of co-regulation schemes two years after the commencement of the Equality Act. This would allow duty holders a period of time to adjust to the new regime and identify areas where co-regulation might be of assistance.

Standards

PIAC supports the continuation of the disability standards and the extension of standards to other attributes. The disability standards provide important guidance to duty holders in particular areas, namely education, public transport and access to premises. The application of standards to other attributes aside from disability is not obviously apparent; however, they may be useful in the area of employment[122] across all attributes and in the area of family responsibilities and breastfeeding. For example, standards could outline in what circumstances facilities must be made available for breastfeeding mothers.

[122] Although the draft Disability Standards for Employment were never finalised.

PIAC supports the Commission having the power to formulate standards, rather than the Attorney-General. The development of standards should be done in consultation with the relevant industry and the broader community. To date the development of the standards has been a lengthy process; empowering the Commission to develop standards may result in the more timely development of standards.

It is important that some of the existing problems with the Disability Standards are not repeated if standards are developed for other attributes. For the Disability Transport Standards, the current problems include:

- low levels of industry compliance, even with a staged compliance timetable;[123]
- no regulator monitoring to ensure compliance;[124]
- no integration with other relevant industry codes/regulations, to ensure more effective compliance and less red tape;[125] and
- delayed and irregular reviews[126].

It is important that the standards retain their legal force. Any breach of a standard should be unlawful discrimination.

Certification of special measures

PIAC supports provision for special measures to be certified by the Commission (see Question 3). This will provide greater certainty to duty holders than currently exists.

Recommendation 16 – Action Plans

The new Equality Act should contain provision for the registration of action plans for all attributes. The existence of an action plan should be a consideration in determining liability for discrimination.

Recommendation 17 – Guidelines

The Commission should be empowered to issue guidelines to assist duty holders understand their obligations under the new Act. Compliance with a guideline should be a consideration in determining liability for discrimination.

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123 See Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport*, Final Report (October 2009), released on 3 June 2011, available from <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Disabilitystandardsforaccessiblepublictransport> at 9 January 2012.

124 PIAC recommends elsewhere in this submission (Questions 26 and 27) that the Commission and organisations be empowered to bring complaints of non-compliance to the Courts This will go someway to addressing this issue.

125 In this respect the *Disability (Access to Premises-Buildings) Standards 2010* (Cth) are an improvement on the Disability Transport Standards as they are linked to the Building Code of Australia. See also Productivity Commission Report, above n 121, recommendation 14.4.

126 The Disability Transport Standards were due for review in 2007, five years after they commenced. However the Review Report was only released on 3 June 2011.

Recommendation 18 – Review by the Commission of policies and practices

The Commission should be empowered to review an organisation's policies and practices to provide advice on compliance with the new Equality Act. Such a provision should be modelled on s 151 of the Equal Opportunity Act 2010 (Vic).

Recommendation 19 – Co-regulation

Further consultation should be conducted regarding the concept of co-regulation and how it would operate with the new Act.

Recommendation 20 – Standards

The Commission should be empowered to develop standards for other protected attributes. Standards should be developed in consultation with key stakeholders.

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

The enforcement of Commonwealth anti-discrimination law relies on a two-stage process, an individual making a compliant to the Commission, and if following investigation and conciliation the matter does note resolve, then commencing proceedings in the Federal Court or Federal Magistrates Court. State and Territory anti-discrimination laws rely on the same model of enforcement. PIAC submits that the enforcement of discrimination laws should not solely rely on individuals. As discussed in response to Questions 26 and 27 below, PIAC supports the Commission being empowered to bring action on behalf of individuals to address issues of systemic discrimination. In addition, PIAC recommends the Equality Act make improvements to the conciliation process.

Voluntary conciliation

PIAC generally supports the use of conciliation conferences to resolve discrimination complaints. Conciliation is an informal, flexible, low-cost method of resolving disputes and in many cases results in a satisfactory outcome for all parties.

There is some uncertainty regarding the existing provisions of the AHRC Act that relate to conciliation. A number of provisions in Part IIB, Division I of the AHRC Act create obligations on the President in relation to conciliations. Section 46PF states that the "President *must* inquire into the complaint and attempt to conciliate the complaint" (emphasis added). Section 46PJ provides that if the President decides to hold a conference, the President must direct the parties to attend the conference. Section 46PI also empowers the President to require the production of information.

As noted in the Discussion Paper, these powers of the President are rarely used in practice. As the Commission has noted, in the majority of cases parties voluntarily agree to participate in the Commission's conciliation process.[127] Arguably, the practice of not requiring attendance at conciliation conferences is inconsistent with the provisions in Part IIB, Division I.

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127 Australian Human Rights Commission, above n 19, at [257].

PIAC submits that the provision to require attendance at conciliation conferences should remain in an Equality Act. Although PIAC does not support compulsory conciliation for all cases (see below), the Commission should retain the power to require attendance at conciliation. In PIAC's experience, often respondents are unwilling to attend conciliation conferences. Retaining this provision, and altering the Commission's practice of invoking the provisions, may enable more discrimination complaints to resolve at an earlier stage. A provision that requires attendance at conciliation is not unusual. Most State and Territory anti-discrimination laws require compulsory conciliation. There are provisions in the Fair Work Act for the holding of compulsory conferences in relation to dismissals in contravention of the general protections in Part 3-1 of the Fair Work Act.[128] Also, both the Federal Court and Federal Magistrates Court have the power to order parties to compulsory alternative dispute resolution.[129]

The benefits of attending conciliation at the Commission stage are that it provides a low-cost, informal opportunity to resolve the complaint. When conciliation conferences are not held by the Commission, the only real option for a complainant is to drop the complaint or proceed to the Federal Court or Federal Magistrates Court. For those complaints that proceed to court, it is PIAC's experience that often at the first directions hearing the parties are ordered to attend compulsory dispute resolution. Requiring the parties to attend a conciliation conference at the Commission stage could save both parties time and additional costs and the complainant the additional stress of commencing court proceedings. Also, conciliation by the Commission may be preferable, as the Commission notes, it "offers a more accessible, informal and specialist service in relation to the often complex area of human rights and anti-discrimination".[130]

PIAC also supports the retention of the provision that allows the President to require the production of documents. In particular, PIAC would like this provision retained and used by the Commission to ensure that when parties attend a conciliation conference the respondent has already submitted a written response to the complaint. In PIAC's experience, it is not uncommon for respondents to provide no response in writing prior to a conciliation conference. This puts the complainant at a significant disadvantage as they are not aware of the respondent's position, and have not had the opportunity to obtain legal advice, prior to the conciliation. This can exacerbate what is already often an uneven playing field between the parties.

Registration of conciliation agreements

PIAC submits that provision should be made in the Equality Act for the compulsory registration of conciliation agreements with the Federal Court and Federal Magistrates Court so that they are enforceable as if they were orders of the Court. PIAC notes that the Productivity Commission made a similar recommendation in its report on the DDA.[131] Unlike many State and Territory anti-discrimination statutes,[132]

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128 Fair Work Act s 368.

129 *Federal Magistrates Court Act 1999* (Cth) s 23; *Federal Court of Australia Act 1976* (Cth) s 53A.

130 Australian Human Rights Commission, above n 19, at [261].

131 Productivity Commission, above n 121, Recommendation 13.3.

there is no provision in the AHRC Act for the registration of conciliated agreements with the Federal Court or Federal Magistrates Court. As a result, many discrimination complaints settle at conciliation but the respondent often never implements the terms of the settlement agreement.

The process of enforcing conciliated agreements should be low-cost and straight forward. PIAC submits that the provisions in s 164(3) of the *Anti-Discrimination Act 1991* (Qld) and s 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements.

Option of no conciliation conference

Whilst many discrimination complaints are able to successfully resolve at conciliation, some complaints are plainly unlikely to resolve at conciliation. Examples include, cases in which the parties have a fixed position, where the case may have significant implications for the parties, or other people, or where there is a significant power imbalance between the parties. Many of the matters PIAC acts in fall into this category as they tend to be test cases and not susceptible to conciliated results. PIAC submits that in such circumstances it would be preferable for complainants to be able to file directly with the courts, rather than be delayed by the Commission's investigation and conciliation process. A similar provision exists in s 122 of the Victorian Act.

Other forms of alternative dispute resolution

PIAC does not support arbitration of discrimination complaints by the Commission. Arbitration is a more formal dispute resolution process than discrimination. As a result parties are often legally represented. PIAC submits that unrepresented complainants would be more disadvantaged at an arbitration than a conciliation given the more formal, adversarial style of arbitration. PIAC is concerned that an unrepresented litigant would then be left with a binding decision, as arbitral awards cannot be appealed. One of the benefits of the current conciliation process is that parties can resolve discrimination complaints using remedies, for example an apology or that staff be trained in equal opportunity and harassment, that are not available from a court. Arbitration would also have less flexibility in terms of such remedies as the arbitrator makes orders, compared to in conciliation the parties reaching a mutually acceptable resolution.

Another concern is that arbitration awards are typically confidential. This would mean that it would be difficult to monitor the results of arbitrations. Also it would hamper the development of discrimination jurisprudence: if awards were not public then they would not have precedent or educative value. Arbitration is more suited to disputes involving commercial contracts or other contractual arrangements where the parties' rights are more readily ascertainable, not disputes involving legislative protections and consideration of existing authorities. Depending on how the

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[132] See *Anti-Discrimination Act 1977* (NSW) s 91A(6), *Equal Opportunity Act 2010* (Vic) s 120, *Anti-Discrimination Act 1991* (Qld) s 164, *Anti-Discrimination Act 1998* (Tas) s 76, *Human Rights Commission Act 2005* (ACT) s 62.

arbitration of disputes were constituted there may be constitutional issues with the Commission making arbitration awards.

Finally, arbitration is unlikely to address issues of systemic discrimination as it would be focused on the individual circumstances of the case. For these reasons arbitrations are more suitable for commercial contractual disputes, not human rights complaints.

PIAC does not support mediation by the Commission as an alternative form of dispute resolution. Both the Federal Court and Federal Magistrates Court can order parties to attend mediation.[133] PIAC submits that it is appropriate that the Commission provide conciliation services and that if the matter does not resolve that the parties have the option of mediation before the Courts. If mediation was also to be provided by the Commission there would be unnecessary duplication.

Recommendation 21 – Conciliations

The Commission should retain the power to require attendance at conciliation and to require production of documents, including a written response to a discrimination complaint.

Conciliation agreements should be automatically registered with the federal courts. Such a provision should be modelled on s 164(3) of the Anti-Discrimination Act 1991 (Qld) *and* s 62 of the Human Rights Commission Act 2005 (ACT).

The Equality Act should include provision for a complaint to be lodged directly with the federal courts, bypassing the Commission investigation and conciliation process.

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

Very few discrimination complaints proceed from the Commission to the federal courts. This has resulted in very few decisions on discrimination law and, as a result, the jurisprudence in this area is underdeveloped. For many complainants there are a number of barriers to accessing the courts. PIAC submits that a number of changes could be made to the court stage of proceedings to improve access to justice.

Standing

PIAC submits that there are two problems with the existing rules regarding standing.

First, there is an inconsistency regarding the rules of standing to bring a complaint to the Commission and a complaint to the federal courts. Currently, complaints to the Commission can be made by or on behalf of a 'person aggrieved' (s 46P(2) of the AHRC Act). However, only an 'affected person' (s 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This means that an

133 *Federal Magistrates Court Act 1999* (Cth) s 23; *Federal Court of Australia Act 1976* (Cth) s 53A.

organisation, such as a disability advocacy organisation, can bring a complaint on behalf of an individual to the Commission, but if the matter does not settle then only the individual with the disability can bring the complaint to court, as only the individual is an 'affected person'.

PIAC has experience of the problems these inconsistencies create. PIAC advised a disability organisation that had brought complaints on behalf of a number of individuals around Australia regarding access to a particular service. PIAC advised that, given the inconsistencies between ss 46P(2) and 46PO(1), it would be difficult for the organisation to continue acting on behalf of the individuals in the Federal Court. Given the individual complaints related to the same service, it would have made sense for the complaints to be heard together and brought by the organisation on behalf of the individuals.

Given the difficulties in pursuing a discrimination complaint in the courts, including the financial, time and emotional resources required, it is important that organisations be able to bring such complaints to court on behalf of individuals, who are often vulnerable or marginalised. PIAC submits that even if the Commission or another body is empowered to bring complaints of discrimination before the courts (see Question 27 below), it is still important for organisations to have standing to bring such complaints on behalf of individuals. The inconsistencies between s 46P(2) and s 46PO(1) should be amended to ensure that organisations can bring complaints on behalf of an individual before the courts as well as before the Commission.

A second problem with the law of standing relates to the standing of organisations to bring complaints, in their own right, as opposed to on behalf of individual members. PIAC represented Access for All Alliance (Hervey Bay) Inc (**AAA**) in a disability discrimination action against Hervey Bay City Council regarding a breach of the Disability Transport Standards, relating to inaccessible bus stop infrastructure.[134] AAA, an incorporated association, was established to ensure equitable and dignified access to premises and facilities for all members of the community. The complaint was dismissed by Collier J on the basis that AAA was not a 'person aggrieved' within the terms of s 46P and therefore did not have sufficient standing to bring the complaint. Although the applicant was an organisation that represented people with disability, the Court found that the applicant itself was not affected by inaccessible public transport infrastructure to an extent greater than an ordinary member of the public. The Court found that the applicant needed to establish that it was a 'person aggrieved in its own right'.[135]

This decision appears to have inhibited other organisations making complaints about systemic discrimination.[136] The test outlined in *Access for All* that applies to the standing of an organisation to bring a discrimination complaint is very limited and

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134 *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (***Access for All***).

135 Ibid at [58].

136 See for eg, NSW Disability Discrimination Law Centre Inc, *Submission: Response to a Strategic Framework for Access to Justice in the Civil Justice System*, (2009) < http://www.piac.asn.au/publication/2009/12/091130-piac-sub-a2j> at 11 May 2011. http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf/$file/Submission+33+-+NSW+Disability+Discrimination+Legal+Centre.pdf> at 12 June 2011, 8.

hampers the ability of organisations to bring action to address systemic discrimination.

PIAC submits that ideally there should be a liberal approach to the question of standing. PIAC supports open standing for discrimination complaints, in similar terms to s 123 of the *Environmental Planning and Assessment Act 1979* (NSW). PIAC notes that the Commission in its submission also refers to environmental law rules of standing as one of the options for simplifying the standing requirements in discrimination law.[137] It is arguable that the NSW Act[138] and Western Australian Act[139] include open standing provisions, which permit any person, whether personally affected or not, to lodge a complaint that a contravention of the Act has occurred.

Open standing provisions will make it easier for organisations to bring proceedings to address systemic discrimination, taking the pressure off individuals in bringing such claims. As noted in the Discussion Paper, courts already have the power to dismiss an action which is frivolous or has no reasonable prospects of success. In PIAC's view, this power would be sufficient to address any concerns that open standing would result in a flood of discrimination complaints being brought before the courts.

In PIAC's experience, open standing provisions would be particularly useful to bring actions in the area of disability discrimination relating to access. PIAC has represented a number of individuals, who at great personal cost - in terms of time, stress and financial risk- have brought proceedings in the Federal Court against public transport operators in relation to inaccessible transport.[140] In each case, the problems identified about access not only affected the individuals involved, but also equally affected other people with disability; they were cases of genuine public interest. Open standing provisions would have allowed a disability organisation, or an organisation such as PIAC, to bring the proceedings, rather than the individuals.

In the event that open standing is not adopted in an Equality Act, PIAC submits at the least the Equality Act should include a test for standing for organisations or groups, in particular incorporated organisations, to bring discrimination proceedings according to the following criteria:

- the membership of the organisation or group; or
- if the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.

The first criterion finds some support in obiter comments in decisions regarding the standing of bodies corporate to bring complaints where all (or some) of its members

137 Australian Human Rights Commission, above n 19, at [299].

138 NSW Act s 87A(1).

139 *Equal Opportunity Act 1984* (WA) s 83(1).

140 See *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; *Haraksin v Murrays Australia Ltd* [2011] FCA 1133; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

have been affected by the alleged discriminatory conduct.[141] The second criterion derives from s 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), an uncontroversial provision, which PIAC submits should be extended to this context. We submit that these criteria should be included in the legislation to provide guidance on standing for groups and organisations.

Jurisdiction

One of the problems with the existing discrimination complaint system is that complaints cannot be brought to the courts unless first raised before the Commission. Section 46PO(3) of the AHRC Act limits the subject matter of the complaints that can be brought to the courts to matters that are the same as the unlawful discrimination the subject of the complaint before the Commission or arises out of the same acts, omissions or practices that were the subject of the complaint before the Commission. The Courts have held that this provision does not permit conduct that occurred after a complaint has been lodged with the Commission to be the subject matter of the complaint before the federal courts.[142]

In PIAC's experience, the effect of this provision is that in circumstances where a respondent continues to breach discrimination law throughout the Commission process, and the court process, such ongoing (often wilful) non-compliance must be the subject of a fresh complaint to the Commission. This is a lengthy and time-consuming process. As already outlined, PIAC proposes that individuals be able to bring complaints directly to courts (see Recommendation 21 above). Such a provision would allow pleadings to include alleged non-compliance to be joined to the original complaint.

Litigation costs

Litigation costs are a significant barrier to accessing justice in discrimination complaints. The current costs regime in the Federal Court and Federal Magistrates Court, where costs follow the event, represents a significant impediment to pursuing discrimination complaints. For many of PIAC's clients, the risk of an adverse costs order is sufficient to dissuade them from pursing a discrimination complaint in the Federal courts, even when they have a strong claim.

Due to the complexity with the existing discrimination definitions, proceedings can be lengthy and incur significant legal costs, frequently in the tens of thousands of dollars. It is not unusual for respondents to retain large law firms and senior and junior counsel to represent them and costs, even on a party/party basis can be significant. Due to the risk of an adverse costs order, many strong discrimination

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141 See *Access for All* above n 134 above at [60] where Collier J left open the prospect of an incorporated association having standing if all of its members were aggrieved by the conduct; *IW v City of Perth* (1997) 191 CLR 1, where Toohey J (at 30) and Kirby J (at 77) found that the appellant was a person aggrieved and had standing; and in *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537, 548-549, where the applicant was held to be a person aggrieved as its members were affected by the discriminatory conduct.

142 *Charles v Fuji Xerox Australia Pty Ltd* (2000) 105 FCR 573.

complaints settle. This removes any precedent impact a successful court decision might have. Other times, clients often opt to file their complaint under State and Territory legislation which provide a presumption in favour of each party paying their own costs.[143]

Although there are some ways to alleviate paying an adverse costs order (eg cost capping[144], legal aid indemnities and private indemnities) the availability of these are uncertain and limited. PIAC submits that the federal courts should be made a no-costs jurisdiction for discrimination complaints. This will ensure consistency with General Protection claims under the Fair Work Act and State and Territory anti-discrimination laws. It will improve access to justice for individuals who have been victims of discrimination. PIAC notes that the Productivity Commission made a similar recommendation in its Report.[145]

Although the jurisdiction should generally be no costs, PIAC submits that in some circumstances it may be appropriate to make a costs order. If a party has conducted the matter in a way to add unnecessary delay then the court should have the discretion to make a costs order. This is consistent with the existing powers in the court rules. Secondly, if a matter is not dismissed at an early stage as frivolous or vexatious and proceeds to hearing it may be appropriate to make a costs order.

Thirdly, PIAC submits that where a discrimination matter is a public interest matter and the complainant is successful, the court should to able to make a public interest costs order, to allow the complainant to recover its costs. PIAC supports the recommendations of the Australian Law Reform Commission in its report *Costs Shifting - who pays for litigation*[146] regarding the availability of a public interest costs order. The availability of such an order recognises the benefits to the whole community in having discrimination laws enforced and allows for the costs of pursuing such litigation to be spread more broadly than on the individual who has suffered discrimination or harassment. A public interest costs order would also allow consideration to be given to the resources of the respondent, which are often large well-resourced organisations who have the benefit of litigation insurance and tax deductibility for litigation costs. PIAC submits that it in such circumstances it would be appropriate for a successful complainant to be able to recover their legal costs.

Representation

A related issue to litigation costs is the costs of paying for legal representation. Some had predicted that the move to enforcement by the federal courts would result

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143 PIAC's experience is supported by the research of Beth Gaze and Rosemary Hunter who found that the costs rules in the federal courts operate as a barrier to access and a disincentive. See Beth Gaze and Rosemary Hunter, *Enforcing human rights: an evaluation of the new regime* (2010) 8.3.

144 Under *Federal Court Rules 2011* Rule 40.51 and *Federal Magistrates Court Rules 2001* Rule 21.03.

145 Productivity Commission, above n 121**Error! Bookmark not defined.**, Recommendation 13.4.

146 Australian Law Reform Commission, *Costs Shifting - who pays for litigation*, Report No 75 (1995), Recommendation 47.

in increased representation of complainants on a no-win no-fee basis.[147] However, as the Discrimination Law Experts' Group note in their submission, there is no evidence that this has occurred.[148]

Many complainants do not currently pay for their legal representation, as they are usually represented by community legal centres, a trade union or advocacy body, legal aid or by a pro bono private lawyer.[149] However, given the limited resources of such organisations, the ability to recover their costs in discrimination matters is an important source of additional income. As a result, if the federal courts become a no-costs jurisdiction for discrimination matters it may be difficult for complainants to find legal representation.

PIAC is concerned that the existing disability discrimination legal centres that operate throughout Australia continue to be funded under a new Act. These specialist community legal centres provide important advice, legal representation ad advocacy to people with disability. Even under a consolidated act people with disability will continue to be an important group in need of specialist representation

PIAC submits that consideration should be given to increasing the funding to community legal centres to assist in the legal representation of discrimination complainants. PIAC also submits that consideration should be given to broadening the availability of Commonwealth Legal Aid for discrimination matters to remove some of the existing problems.[150]

Remedies

Although the provision in the AHRC Act that refers to remedies, s 46PO(4), is broad and permits the court making any order it thinks fit, PIAC supports the Equality Act extending the list of orders that a court may make. In PIAC's experience, notwithstanding the wide terms of s 46PO(4), the power of the court to make mandatory injunctions is often contested by respondents in court. The power of the court to make corrective and preventative orders is particularly important for cases of systemic discrimination, in order to ensure future compliance. In PIAC's experience, it is very important for remedies to be broad and address systemic discrimination. For the vast majority of PIAC's clients their main aim in bringing a discrimination complaint is to ensure that the discrimination does not continue and the situation is improved for the wider community. For example, PIAC represented Greg Killeen in a disability discrimination complaint regarding wheelchair accessible taxis in NSW.[151] The remedies sought included an order that the respondents' vehicles be modified so that they comply with the Disability Transport Standards and that changes be

147 Senate Legal and Constitutional Legislation Committee, *Report on Human Rights Legislation Amendment Bill 1996* (1997).

148 Discrimination Law Experts Group, above n 9, 25.

149 Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 33 *UNSW Law Journal* 699, 708. Gaze and Hunter report that in their study only a minority of the complainants they interviewed paid for legal representation.

150 Ibid, 716-718, SDA Inquiry n 5 above, 75-77.

151 *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27.

made to the NSW Department of Transport Wheelchair Accessible Taxi Measurement Protocol. However, given the terms of s 46PO(4) there was some uncertainty about whether the Federal Court would make such remedial orders.

Including explicit powers to make such orders in a new Equality Act would also assist in conciliating disputes as it provides greater guidance to complainants and duty holders as to what types of orders are possible if the matter proceeds to court. This may assist in eliminating discriminatory practices and enhancing compliance with discrimination laws.

PIAC supports the recommendation of the Discrimination Law Experts Group that a power to make orders similar to s 108(3) of the NSW Act (making orders where the respondent's conduct affects persons other than the complainant) should be included in an Equality Act. This will assist in addressing systemic discrimination.

Damages and compensation

Damages in discrimination matters are very low compared to other legal claims such as torts. Discrimination law expert Chris Ronalds SC has noted '*courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment*'.[152] PIAC submits that explicit reference should be made to compensating a complainant for all loss, including past and future loss.

Victims of discrimination and harassment often suffer significant psychological distress. It is important that the courts take account of this loss in assessing damages. Courts have previously stated that the awarding of damages for hurt, humiliation and distress should be restrained but not too minimal as to diminish the respect for the public policy of the legislation.[153] PIAC submits that explicit reference should be made in the Equality Act to compensating a complainant for hurt, humiliation and distress. This may result in increases in the amount of damages awarded for such loss.

Civil penalty provisions

If litigation is to be commenced by the Commission (see Question 27 below) or other body in the absence of an individual complaint then consideration needs to be given to the type of remedies that could result. As outlined above, PIAC submits that the Equality Act should explicitly refer to the power to make injunctive and preventative remedies. However, in addition, PIAC submits that civil penalty provisions should be included in the Equality Act. Compensation payments in discrimination law are rather low and as such do not represent a significant deterrent. Civil penalty provisions would encourage compliance. Moreover it would bring consistency with the Fair Work Act, which provides for civil penalty provisions for contraventions of s 351 of up to $33,000 per contravention for a corporation, and $6,600 per contravention for an individual.[154]

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152 Chris Ronalds, above n 20, 223.

153 See *Hall v Sheiban* (1989) 20 FCR 217, 256 (Wilcox J).

154 Fair Work Act Part 4-1, Division 2.

Recommendation 22 – Standing

The Equality Act should include a provision that ensures an organisation has standing to bring a complaint on behalf of a person to both the Commission and the federal courts.

The Equality Act should have open standing to allow anyone to bring a complaint to enforce a breach of discrimination or harassment provisions. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).

Alternatively, organisations should have standing to bring discrimination complaints to the Commission and to the federal courts in their own right. The Equality Act should include the following criteria as guides to determine whether the organisation has standing:

- *the membership of the organisation or group; or*
- *if the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.*

Recommendation 23 – Litigation costs

The federal courts should be made a no-costs jurisdiction for discrimination matters.

Provision should be made for the courts to make a costs order when:

- *a party has conducted proceedings leading to unnecessary delays;*
- *the case is frivolous or vexatious; or*
- *the complaint is successful and the matter is classed by the court as a public interest matter.*

Recommendation 24 – Representation

Consideration should be given to increasing the funding to community legal centres and broadening the availability of Commonwealth legal aid for discrimination matters.

Recommendation 25 – Remedies

The new Act should include the power to make corrective and preventative orders in the list of orders that a court can make in a discrimination matter.

The list of orders should also include the power to make orders relating to conduct of the respondent that affects persons other than the complainant.

Recommendation 26 – Damages and compensation

The new Act should make explicit reference to a court being able to make orders for damages for all loss, past and future, including for hurt, humiliation and distress.

Recommendation 27 – Civil penalty provisions

The new Act should include the power of the court to impose civil penalty provisions for breach of discrimination or harassment provisions.

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?

Improving compliance

As discussed above, the current problem with the enforcement of discrimination laws at a federal level in Australia is that it relies on individual complaints. This places an enormous burden on individuals, who are often marginalised or vulnerable, requiring court action which is costly, lengthy and emotionally demanding. Given these impediments, there is little incentive for duty holders to comply as the risk of a complaint being brought to the courts is relatively low.

Also, the individual complaint-based system is reactive and as a result there are inadequate mechanisms to prevent discrimination. Moreover, the individual-complaint model means that complaints are resolved, at conciliation or through the courts, with a focus on individual remedies. Consequently, it is difficult for areas of systemic discrimination to be properly addressed, as remedies are often suited to individual circumstances only.

Improvements can be made to the existing system to address some of these problems by creating a no-costs jurisdiction in the federal courts and by changing the standing rules to permit organisations to bring complaints before the courts (see Question 26 above). However, PIAC submits that more additional changes are required to adequately address systematic discrimination. PIAC proposes that either the Commission, or another separate independent body, be empowered with a number of additional functions. These functions should include powers to:

- monitor duty holders' compliance with the Equality Act, including any Disability Standards or other Standards;
- investigate breaches of the Equality Act, including by acts of the States or Territories, of their own motion in the absence of an individual complaint; and
- commence litigation in court, of their own motion in the absence of an individual complaint.

PIAC submits that empowering a body to perform these functions will have a number of benefits. Currently, given the difficulties that face individuals in bringing discrimination complaints before the courts, in PIAC's experience, particularly in the area of disability discrimination, many duty holders breach discrimination law provisions on the basis of a calculation that it is unlikely that an individual will make a complaint. In many respects, such a calculation is a business decision based on weighing up the costs of compliance versus the legal costs should a complaint be made and need to be defended. As a result, as with any legal requirement, compliance is low unless the threat of action as a result of non-compliance is a genuine. Empowering a body, and ensuring it is adequately funded to undertake such monitoring, investigation and enforcement activities, will have a deterrent effect and encourage compliance. In addition, empowering a body to take such action will take the pressure off individuals, such as PIAC's clients, who bring proceedings in the public interest. Moreover, the Commission, or some other body, is more suited

than individuals to bring cases addressing systemic discrimination or harassment. Ideally the body would be strategic in the litigation it pursued focusing on areas where compliance is particularly low. Strategic intervention by an Equality body would assist in the development of discrimination law jurisprudence, which, despite a more than thirty-year history, remains undeveloped.

PIAC notes that empowering the Commission with these additional functions may result in criticism of the Commission and perceptions that the Commission is not a neutral conciliator and biased towards complainants. The separation in roles between Fair Work Australia and the Fair Work Ombudsman may provide useful guidance. Also jurisdictions that have commissions performing enforcement functions have been most successful when a separate body has been performing the complaint handling function.[155] Overseas experience suggests that it is preferable for separate bodies to perform the conciliation role and enforcement role so as to avoid potential conflicts of interest.[156]

For these reasons, PIAC suggests consideration should be given to separating the conciliation functions from the educative, investigative and enforcement function, to be performed by a new body.

Defining 'human rights' in the AHRC Act

PIAC supports amending the definition of 'human rights' to include the seven core human rights treaties to which Australia is a party. This will ensure consistency with the definition in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This will provide greater human rights protection, albeit limited to inquiries by the Commission, not individual protection of human rights through the courts. In addition, the treaties should be annexed as a schedule to the new Act.

Amicus curiae

PIAC has experience acting for clients in discrimination proceedings in which the Commission has appeared as amicus curiae or intervened. The current provisions relating to the amicus curiae functions of the Commissioners[157] and intervention role of the Commission[158] unnecessarily overlap. In addition to these provisions, interventions are governed by the rules of the courts.[159] PIAC submits that the provisions relating to intervention by the Commissioner and amicus by the Commissioners should be clarified. In addition, the powers to intervene and appear in appeals should be clarified.

PIAC supports the Commission being empowered to appear as of right. In PIAC's experience, although the Commission or Commissioners are reluctant to appear or intervene in proceedings without the parties' consent, it is appropriate the Commission have the power to do so. More generally, PIAC supports the ability of groups to appear as amicus curiae in public interest matters. PIAC notes that in its

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155 See Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2011), *Monash Law Review*, forthcoming 2012, 7.

156 Ibid.

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

158 See AHRC Act ss 11(1)(o), 31(j); RDA s 20(1)(e); SDA s 48(1)(gb); DDA s 67(1)(l).

159 *Federal Court Rules 2011*, Rule 9.12.

submission the Commission has not sought such a power to appear without leave of the court.

Discrimination Commissioners

PIAC submits that if an Equality Act extends discrimination protection to additional attributes, such as religion, housing status and being a victim of domestic violence (see Question 9), then new Discrimination Commissioners should be appointed for each of the additional attributes. The role of the specialist Commissioner is an important one as an advocate for a particular area and spokesperson.

The specialist Commissioners should have an obligation to report on the progress of equality for their particular attribute to Parliament on an annual basis. Annual reports to parliament provide an important opportunity to monitor the progress of achieving equality and human rights protection. In addition, PIAC submits that the Federal Government should be required to formally respond to such reports.

Ensuring the Commission is adequately resourced

PIAC submits that if the Commission is to carry out these additional functions it is important that it is adequately resourced to perform these roles.

Recommendation 28 – Creation of a new Equality body

A new independent Equality body, separate to the Commission, should be established to perform the following functions:

- *monitor duty holders' compliance with the Equality Act, including any Disability Standards or other Standards;*
- *investigate breaches of the Equality Act, including by acts of the States or Territories, of their own motion in the absence of an individual complaint; and*
- *commence litigation in court, of their own motion in the absence of an individual complaint.*

Recommendation 29 – Definition of human rights

The new Act should refer to the functions of the Commission in the area of human rights by reference to the seven core international human rights treaties to which Australia is a party. The treaties should be annexed as a schedule to the new Act.

The seven core international human rights treaties should be included in the schedule to the new Act.

Recommendation 30 – Amicus Curiae

The Commission should be empowered to appear as of right as amicus curiae.

Recommendation 31 – Discrimination Commissioners

Each protected attribute in the new Act should have a Discrimination Commissioner who is responsible for that attribute.

The Discrimination Commissioners should be required to report annually to Parliament on the achievement of equality in their specialist area. The Parliament should be required to respond to the reports.

Recommendation 32 – Commission funding

The Commission should be adequately resourced to carry out any additional functions under a new Act.

Abbreviations

ADA	*Age Discrimination 2002* (Cth)
AHRC Act	*Australian Human Rights Commission Act 1986* (Cth)
Commission	Australian Human Rights Commission
DDA	*Disability Discrimination Act 1992* (Cth)
Disability Transport Standards	*Disability Transport Standards for Accessible Public Transport 2002* (Cth)
Discussion Paper	Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011
Fair Work Act	*Fair Work Act 2009* (Cth)
NSW Act	*Anti-Discrimination Act 1977* (NSW)
RDA	*Racial Discrimination Act 1975* (Cth)
SDA	*Sex Discrimination Act 1984* (Cth)
SDA Inquiry	Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality* (2008)
UK Act	*Equality Act 2010* (UK)
Victorian Act	*Equal Opportunity Act 2010* (Vic)