SUBMISSION TO THE COMMONWEALTH ATTORNEY-GENERAL AND MINISTER FOR FINANCE AND DEREGULATION ON

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

ABOUT VICTORIA LEGAL AID

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. We assist people with their legal problems at locations such as courts, tribunals, prisons, and psychiatric hospitals as well as in our 15 offices across Victoria. We assist more than 80,000 people each year through Legal Help, our free phone assistance service. We are also proactive in delivering community legal education to disadvantaged Victorians.

Our specialist practice expertise

Under our Civil Justice portfolio we have a dedicated Social Inclusion and Equality team which holds weekly anti-discrimination law clinics and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification. In 2010-2011 the Social Inclusion and Equality subprogram provided 7,751 legal advices and 5,077 duty lawyer services, and handled approximately 600 substantive legal matters and 1,458 minor work matters. A significant proportion of these matters involved discrimination matters.

We assist clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Magistrates Court, using various legislation, including federal anti-discrimination legislation, the *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic). This submission includes case studies drawn from our actual practice experience. All client names have been changed.

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EXECUTIVE SUMMARY

This submission is a response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, released by the Federal Attorney-General's Department in September 2011 (the Discussion Paper). The Discussion Paper proposes a consolidation of current Federal anti-discrimination laws into a unified, consolidated Act and forms part of the Federal Government's proposed National Human Rights Action Plan.

Victoria Legal Aid (VLA) welcomes the Federal Government's commitment to improve the legislative responses to discrimination and to work towards a more complete and streamlined equality framework.

Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive, productive and will have better public health and education outcomes. Robust policy, legislative and community imperatives that promote both formal and substantive equality can also lead to a reduction in violence, crime and family breakdown.[1]

This submission and the proposed recommendations are based on our practical experience which clearly shows that there is currently inadequate legal protection against discrimination. While Federal anti-discrimination laws have contributed to reducing discrimination in some areas and promoting community awareness of the importance of equality, gaps in the legislative framework remain.

We see that even where legal redress may be available, many individuals do not make a complaint of discrimination, or can be disadvantaged when they do so. Individuals subject to discrimination often report feeling ashamed, intimidated and at risk of further ill treatment if they complain. Moreover, the current equality framework can be difficult to navigate, definitions of discrimination and exemptions vary across the different acts, the evidentiary burden on a complainant is onerous and redress is often inadequate.

Our submission identifies a number of key weaknesses in existing federal anti-discrimination laws and provides recommended responses in relation to the following key issues:

A Narrow and inconsistent interpretation of the law

B Overreliance on individual complaint processes

C Complexity of the law

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[1] See, for example, R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007) at <http://www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-discrimination/More-than-Tolerance.aspx> accessed on 6 April 2011; Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010) at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690> accessed on 6 April 2011.

D Difficulties of proof

E Certain attributes, areas and conduct are not covered

F Limited legal assistance and prohibitive costs

G Low awards of compensation

H Interaction of Federal anti-discrimination legislation with other laws

Our submission does not seek to respond to every question listed in the Discussion Paper. However, for ease of reference, we have summarised our recommendations in the table below under sub-headings that reflect the grouping of issues and topics in the Discussion Paper.

The case studies used throughout this submission are real. Where names have been used, they have been changed to protect the client's privacy.

RECOMMENDATIONS

We recommend that the following concepts be incorporated into the consolidation bill:

Meaning of Discrimination		*See page*
1.	The consolidation bill should include an objects clause that confirms the beneficial purpose of the legislation.	9 - 10
2.	There should be a positive obligation to eliminate discrimination, harassment and victimisation on all duty holders.	10 - 13
3.	The definition of discrimination should be simplified, including by removing the comparator test.	13 - 18
4.	After the complainant establishes a prima facie case, the burden of proving that an action is not unlawful should shift to the respondent.	19 - 21
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8.	There should continue to be a separate prohibition of sexual harassment, which extends to all conduct done other than in private.	25
9.	Consideration should be given to extending the protection provided with respect to race by section 18C of the RDA to all other protected attributes.	28

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10.	In addition to existing grounds, a consolidation bill should protect against discrimination on grounds of sexual orientation, gender identity, physical features, lawful sexual activity, status as a parent or carer, religion, political belief or activity, industrial activity, nationality, irrelevant criminal record, being a victim of violent crime, being a victim of family violence, homelessness and socio-economic status.	21 - 24
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13.	The right to equality before the law should be extended to all attributes (not just race).	24
14.	The consolidation bill should prohibit discrimination in all areas of public life, with a non-exhaustive list of areas that includes those already explicitly covered and the additional areas of law enforcement and corrections.	25 - 26
15.	Employers and principals should be vicariously liable for unlawful acts done 'in connection with' the person's employment or duties as an agent, unless they have taken 'all reasonable steps to prevent the employee or agent from doing the act'.	26 - 27
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19.	There should be provision for temporary exemptions to be granted in accordance with the principles and framework contained in the general limitations clause.	18
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20.	There should be a regulatory agency empowered to undertake self-initiated investigations and compliance action.	10 - 13
21.	There should be explicit protection of witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made.	19 - 21
22.	Parties should only be liable for their own legal costs unless there has been unreasonable behaviour. Alternatively, in matters of general public importance, parties should be entitled to protective costs orders.	29 - 31
23.	Courts should be provided statutory guidance regarding the amount of monetary compensation payable, with the aim of increasing these amounts.	29 - 31
24.	Review funding to legal aid and/or specialist community legal services and/or an independent agency to ensure that adequate assistance is provided to complainants.	29 - 31

KEY PROBLEMS AND RECOMMENDED RESPONSES

A Narrow and inconsistent interpretation of the law

A significant barrier to equality is that discrimination law is often narrowly understood and narrowly interpreted. For example, our experience in providing community legal education on discrimination suggests that while many people are familiar with the notion of formal equality, there is limited understanding about substantive equality, particularly with regard to special measures and indirect discrimination caused by treating people the same way regardless of their inherent needs.

There has also been some narrowness and inconsistency in the approach of judges to discrimination law. [2] For example, in cases where variations to workplace policies have been necessary to accommodate the protected attribute of the complainant, some judges have considered the variation to be a 'benefit' that may or may not be provided at the employer's discretion, rather than a measure that is necessary to alleviate the discriminatory impact of the policy.[3] As a result, an attempt to overcome systemic disadvantage caused by the blanket application of a policy is reduced to a request for a discretionary favour. This undermines the intention of the legislation, being to promote equality. The inconsistent case law also suggests that the success of a complaint of indirect discrimination depends largely on the individual adjudicator.[4]

Case study 1 – Non-discrimination is not 'special treatment'

> Our client, David, worked for a transport company in a role that enabled him to look after his daughter in the evenings when his ex-partner was working, and on alternate weekends when he had custody of his daughter. However, David was subsequently moved to a different role and told that he would have to work during evenings and on weekends. When David told his employer that this was not possible due to his responsibility to care for his daughter, his employer said that he was subject to the same rules as everybody else and was not entitled to any 'special treatment'. This was despite evidence showing that David's family responsibilities could have been accommodated with negligible cost and inconvenience to the employer. The impact of the decision on David was that he became jobless, then homeless and could not

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2 See, for example *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196, and *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92; 202 ALR 133.

3 See, for example the approach of Raphael FM in *Kelly v TPG Internet Pty Ltd* [2005] FMCA 291. Federal Magistrate Raphael held that an employer was not obliged to provide part-time employment to an employee on return from parental-leave. Although the employer refused a request for part-time employment, his Honour did not consider this a 'requirement' of full-time employment for the purpose of s5(2) of the SDA. Instead, Raphael FM held that the employer refused a requested 'benefit', in the form of a variation to the employee's contract, which would permit departure from the existing contractual requirement of full-time employment. Federal Magistrate Raphael's approach represents a strictly formal view of equality, which requires nothing more than like treatment. Compare the approach taken in *Kelly* with that taken in *Hickie v Hunt & Hunt* [1998] HREOCA 8 (extract at (1998) EOC 92-910) (*Hickie*), *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 160, *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 (*Mayer*), and *Howe v Qantas Airways Ltd* (2004) 118 FLR 1.

4 See above and also the narrow interpretation given to anti-discrimination law in *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196.

financially support his daughter.

The client chose to make a complaint under the Victorian *Equal Opportunity Act*, which provided more protection to him than the *Sex Discrimination Act*. However, the prospects of his complaint of indirect discrimination were uncertain due to the ambiguous and often narrow Victorian and Federal jurisprudence on indirect discrimination against parents and carers in similar situations.[5] As a result, he settled his complaint for a relatively low award of compensation.

An objects clause that sets out the beneficial purpose of the consolidation bill would clarify the application of the bill and guide decision-makers to respond more expansively and in a manner that promotes substantive equality. Such an objects clause would also contribute to an expanded community understanding of equality. In this regard, we endorse the objects clause recommended by the Discrimination Law Experts' Group at pages 7-8 of its submission, dated 13 December 2011.

Recommendation: response to narrow and inconsistent interpretation of equality law

We recommend that the consolidation bill include an objects clause that confirms the beneficial purpose of the legislation (Recommendation 1)

B Individual complaint processes alone are ineffective

A significant weakness of Australian anti-discrimination law is its reliance on individuals to hold discriminators to account. This is particularly problematic in situations of workplace discrimination and harassment, where complainants and witnesses are often financially dependent on the discriminator and discouraged from making a complaint or giving evidence by the potential repercussions within their workplace, as well as their industry. For various reasons, the large majority of people with legitimate complaints under Australian anti-discrimination law do not report the conduct or make a complaint.[6] It is our experience that clients are deterred by:

- fear of negative consequences for themselves, particularly in employment matters;
- shame and humiliation in connection with the conduct;
- difficulties proving the conduct, including due to:
    - witness reluctance to give evidence;
    - lack of access to documents, such as emails, and other information held by the perpetrator;
- the complexity of the law and legal processes;

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5 See above at n 3.

6 See, for example, Australian Human Rights Commission, *Sexual Harassment: Serious Business – Results of the 2008 Sexual Harassment National Telephone Survey* (October 2008), 2, which found that only 16% of people who had been sexually harassed in the workplace in the previous five years had formally reported the conduct or made a complaint, largely due to a lack of faith in the complaint process and fear of negative repercussions.

- disadvantage due to factors such as illiteracy, lack of education, disability and/or poor English-speaking skills;
- vulnerability caused by the detrimental psychological effects of the discrimination/harassment/vilification and/or personal circumstances;
- lack of free anti-discrimination law services; and
- the poor cost-benefit of litigation, even if the complaint is successful, due to the fact that compensation payments are low, and in any event, many complainants want non-monetary remedies such as an apology, a policy change or equal opportunity training in their workplace.

The following case study illustrates the difficulty with requiring vulnerable victims to hold their discriminators to account.

Case study 2 – a life-time of discrimination and harassment

Alice is a female with an interest in cars and motorbikes. She has worked in male-dominated fields her whole life and has been subjected to sexual harassment and discriminatory behaviour in almost every job.

- Alice was 15 when she started her first job as a casual petrol station attendant. She worked with an older full-time male who would regularly slap her on her bottom. It made her feel very uncomfortable, but she was too shy and embarrassed to say anything to anyone.
- Alice then worked as a receptionist. The owner of the company wanted Alice to date her son. The son would regularly come to the office, sit in the reception area and stare at Alice. During his visits, the owner would suggest to the son that he give Alice massages. Alice made excuses about why she did not want to date the owner's son, not wanting to cause offence.
- At about age 21 Alice worked at a truck company. Her male co-workers would constantly tell dirty jokes and talk about 'hot chicks' and what they 'do to their missus'. Among the many offensive comments that were made to her, Alice recalls sitting in a truck and the male colleague sitting next to her saying 'shut your legs, it's smiling at me'. Alice pretended that she didn't hear him.
- In her late twenties Alice worked for a motorbike retailer. A co-worker regularly made offensive sexual comments to her, including 'I'd like to tie you up and whip you', 'are you the type of girl who, if I came in a shot-glass, would drink it?', and asking male customers 'are her boobs the same size as your girlfriend's boobs?' The co-worker made these numerous offensive comments, and also forcefully grabbed Alice's buttocks, in front of Alice's manager and other co-workers. However, the manager would not take action against the co-worker in support of Alice.

Alice now suffers from depression, for which she is receiving treatment from a psychiatrist. She ended her relationship with her boyfriend because, even though she

describes him as 'the sweetest guy ever', she does not trust men anymore. Alice now works alone, due to a conscious decision that she has made not to be in a situation where she can be subjected to any further workplace harassment or discrimination. However, she misses making friends through work and the social interaction.

For the first time in her working life, Alice makes a complaint against her previous employer. While her former co-workers witnessed the harassment, they are unwilling to give evidence in support of Alice's complaints because of the likely negative consequences for them if they do so. Alice settles her claim for a relatively low amount of compensation due to the difficulties proving her complaint in court.

Alice's case is not isolated. Our extensive experience with clients in this area has highlighted that people are often reluctant to make complaints of discrimination and where they do so are often tentative about involving or implicating potential witnesses.

As noted above, in addition to providing one on one advice in these matters, VLA also conducts community legal education. Our common experience from these education sessions is that entire communities are unaware of their rights or how to exercise them. Even where there is awareness about discrimination laws, people often report feeling anxious about losing their job if they complain, about not being taking seriously and that the difficult process of complaining is not worth the effort. A positive duty to eliminate discrimination and a regulator who is empowered to enforce that duty may go some way to overcoming these limitations.

A positive duty to eliminate discrimination and harassment would require existing duty-holders to take proactive action to eliminate discrimination, sexual harassment and victimisation. This obligation is already implied by existing obligations not to discriminate and vicarious liability provisions, but is only imposed if a complaint is made.

We further submit that the Australian Human Rights Commission (**AHRC**) should be empowered to directly encourage, facilitate and enforce compliance with obligations under the bill without first receiving a complaint. The AHRC should be given similar powers and functions with respect to anti-discrimination laws to those powers and functions of the State agencies responsible for monitoring, enforcing and promoting workplace safety laws. This would help to remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation.

The AHRC should be empowered to commence an investigation regarding an alleged breach, without requiring an individual to lodge a complaint. In addition, the regulatory agency should be empowered to:

- investigate the allegations
- compel evidence for investigations
- agree to enforceable undertakings
- issue compliance notices
- issue administrative penalties.

In this regard, we support paragraphs 650 to 666 of the AHRC's submission of 1 September 2008 to the Senate Legal and Constitutional Affairs Committee inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality.[7]

Recommendation: responses to the ineffectiveness of individual complaints

The problems resulting from the present overreliance on individual complainants could be alleviated by:

1. imposing a positive obligation on duty holders to eliminate discrimination and harassment (Recommendation 2); and
2. empowering the AHRC to undertake self-initiated investigations and compliance action (Recommendation 20).

C Complexity

Anti-discrimination law suffers from a range of complexities, including:

- complicated definitions of discrimination;
- over-reliance on the term 'reasonable';
- numerous exceptions;
- the differences between the Federal anti-discrimination Acts;
- overlapping rights and obligations under these Acts and other legislation, such as the *Fair Work Act 2009* (Cth);
- overlapping State and Federal systems.

There are a number of potential avenues available to clients with complaints of discrimination. For example, a client with a complaint of workplace discrimination will generally have the option of making a complaint to the State agency (eg the Victorian Equal Opportunity and Human Rights Commission) or the AHRC or an adverse action application to Fair Work Australia. Clients may also have claims at common law, and under workers' compensation law. Choosing how best to proceed is difficult for lawyers, let alone unrepresented individuals, and involves weighing up the prospects of success under each option, the remedies that are available, the processes and limitations in each jurisdiction, the risk of an adverse costs order, and the availability of free legal assistance.

Due to the complexity of Australian anti-discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint.

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7 Available at: http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html.

In 2011 we provided advice in over 1000 discrimination matters. A number of these clients were obstructed from pursuing the most beneficial course of action because they had already lodged a complaint in one jurisdiction and were statutorily barred from initiating a complaint in the more appropriate forum, or the statutory limitation period had passed by the time that they received specialist legal advice.

The definitions

The difficulty of choosing the most appropriate jurisdiction is compounded by the complexity of the legislation, particularly the comparator test in the definitions of direct discrimination, and the generally complicated definition of indirect discrimination.

Comparator test

The comparator test, in particular, is unnecessarily confusing, and in many cases a hypothetical comparison is not possible. Take, for example, a disability service provider that unfairly discriminates against a client based on their particular form of disability. It may be inappropriate to compare the client to a person without a disability, because that person would not require or be eligible for the services in any event.[8]

The many problems with the comparator test are not resolved by clarifying what is or is not included in the definition of a particular attribute. This is because the courts have imbued the hypothetical comparator with the manifestations of the attribute (such as behaviour that is a manifestation of a disability) when constructing the circumstances for comparison 'that are not materially different': s5 DDA, s5 SDA, s 14 ADA and see, for example, *Purvis v New South Wales* (*Purvis*).[9]

A discrimination complaint should not fail simply because there is no comparator or because the comparator displays the very characteristics that resulted in the discriminatory treatment. Such an approach fails to ensure substantive equality and instead promotes identical treatment irrespective of difference and discriminatory consequences.

While the removal of the comparator test may appear to significantly broaden the application of anti-discrimination legislation, respondents can seek to justify their conduct by relying on a general defence in the form of a general limitations provision, which is discussed further below. We submit that this change would result in clearer and more consistent jurisprudence, as adjudicators would be empowered to reach fair decisions, even if a specific exception for the conduct does not apply, as was the case in *Purvis*.[10]

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8 Productivity Commission, *Review of the Disability Discrimination Act 1992*, (Productivity Commission Inquiry Report Vol 1, Report No 30), 30 April 2004, 308, referring to submissions by: Disability Action Inc, submission 43, 2; and National Council for Intellectual Disabilities, submission 112, 12.

9 [2003] HCA 62; 217 CLR 92; 202 ALR 133.

10 Kate Rattigan, 'The Purvis Decision: A Case for Amending the Disability Discrimination Act 1992?' (2004) 28 *Melbourne University Law Review* 532.

Indirect discrimination

The complicated definitions of indirect discrimination are also confusing and create overly burdensome hurdles for complainants. In particular, as indicated at page 12 of the Discussion Paper, under the indirect discrimination tests in the DDA and the RDA, the complainant must prove that the discriminator has imposed a requirement with which they cannot comply. This means that a requirement that disadvantages a person will be lawful as long as the person can manage to cope with the requirement, even if this takes extreme effort.[11] While a requirement may be unlawful if it causes the complainant 'serious disadvantage', as indicated in the Discussion Paper, we submit that this threshold is too high, and the indirect discrimination test should not contain an 'inability to comply' element. It should be sufficient that the complainant has been disadvantaged, and that the proposed proportionality/general limitations defence (discussed below) does not apply.

We have set out a proposed definition of discrimination below. This definition is based on the definition proposed by the Discrimination Law Experts' Group at pages 8-9 of its submission, dated 13 December 2011. However, we have replaced clause 4, titled 'Justifying discrimination' (discussed further below).

1. Unlawful discrimination

Discrimination is unlawful in public life unless it is justified within the scope and objects of this Act.

2. Definition of discrimination

Discrimination includes:

a) treating a person unfavourably on the basis of a protected attribute;

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

c) failing to make reasonable adjustments if the effect is that the aggrieved person experiences less favourable treatment under (a) or is disadvantaged under (b).

The conduct described in 2(a) and (b) is not mutually exclusive.

3. Public life and protected areas

For the purposes of this Act 'public life' includes work, education, the supply of goods and services, accommodation, clubs, the delivery of government programs, the disposition of land and superannuation.

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11 *Hinchliffe v University of Sydney* [2004] FMCA 85 (17 August 2004).

4. Justifying discrimination

The matters to be taken into account in deciding whether discrimination is not unlawful because it is justified include whether:

a) the impugned conduct is intended to achieve a legitimate purpose;

b) there is a rational connection between the conduct and the purpose;

c) the conduct is in fact reasonably necessary to achieve the purpose; and

d) the conduct is a proportionate means of achieving the purpose.

5. Burden of proof

The burden of proving that an act of discrimination is not unlawful because it is justified under section 1 lies on the person who did the act.

Justifying Discrimination

We recommend replacing clause 4 proposed by the Discrimination Law Experts Group with a proportionality/general limitations test based on the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* (**Siracusa Principles**).[12] The Siracusa Principles require that any limitations on human rights, such as the right to equality, should be necessary, pursue a legitimate aim, and be proportionate to that aim.

A general defence, in the form of the general limitations provision, is a simple and nuanced solution to the comparator test and the other complicating elements in the definitions of discrimination, such as the 'inability to comply' element.

We consider that a general limitations provision is also an appropriate response to the numerous specific exceptions in the Federal anti-discrimination acts. These exceptions, including exceptions that relate to religious institutions and clubs and associations are confusing and undermine the intended purpose of anti-discrimination legislation, being to

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12 UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* UN Doc E/CN.4/1985/4, Annex (1985). These principles are also reflected in the limitation provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) at s 7(2), and the *Human Rights Act 2004* (ACT) at s 28 (which are almost identical). Section 7(2) of the Charter provides that:
[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including –

a) the nature of the right; and

b) the importance of the purpose of the limitation; and

c) the nature and extent of the limitation; and

d) the relationship between the limitation and its purpose; and

e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

eliminate discrimination and promote equality.[13] The exceptions create an added layer of complexity to anti-discrimination laws; they are often overlooked due to being unexpected and scattered throughout the legislation. As a result, we recommend replacing the exceptions with a general defence. The example below shows how such a defence may be applied.

Limitations analysis example

A bar owner refuses entry to a person under 18. This conduct is permissible because:

a) the refusal is intended to achieve the legitimate purpose of complying with the bar owner's liquor licensing obligation not to allow entry to persons aged under 18;

b) there is a rational connection between the refusal and the purpose;

c) refusing the person entry is reasonably necessary to achieve the purpose of complying with the bar owner's licensing obligation; and

d) the refusal is a proportionate means of meeting the obligation.

A significant benefit of the general limitations provision is that it provides parties and decision-makers with a framework for making decisions about when discriminatory conduct should be permitted. Currently, anti-discrimination legislation requires decision-makers to strike a balance of reasonableness, which is an inherently subjective task. While there is some legislative guidance about the meaning of 'reasonableness', it does not empower a decision-maker with a framework to logically step through the decision-making process.

The ambiguity attached to 'reasonableness' is also problematic when advising clients about the merits of their potential claim. This can be particularly challenging when advising clients with a complaint of indirect discrimination in employment where the respondent has competing legal obligations such as a duty of care to other employees. In this context, the term 'reasonable' provides little guidance as to how competing interests should be balanced.

The proportionality/limitations test should be supplemented with guidelines and codes of practice produced by the AHRC.

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[13] We note that the Discussion Paper indicates that the proposed consolidation bill does not propose to remove the current religious exceptions. In light of this, we submit that religious organisations should be required to explicitly opt-in for coverage, which coverage is then automatically afforded. In this respect, we endorse the approach proposed in the submission of the LGBTI Health Alliance. That is, that religious bodies be given the opportunity to claim, as of right, an exemption enabling them to discriminate by lodging a written claim with the AHRC, which stipulates the grounds on which the organisation wishes to discriminate, the areas of operation within which the organisation wishes to discriminate; and the doctrines or beliefs that necessitate the discrimination.

Temporary exemptions

Organisations should continue to be able to apply for a temporary exemption from the operation of the Act. The general limitations provision recommended above at clause 4, in the proposed test for justifying discrimination, should be applied to determine whether to grant a temporary exemption.

Special measures provision

We submit that a uniform and stand-alone special measures provision is necessary to avoid unnecessary complexity, and to clarify that temporary special measures do not constitute discrimination. Rather, these measures are necessary to promote equality and eliminate entrenched discrimination. We recommend that the special measures provision in the consolidation bill be modelled on section 12 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**), which reflects a proportionality/general limitations test. This section provides a clear and adaptive framework for considering whether a measure is a special measure.

In the case study below, we provide an example of how the special measures provision could be applied in practice.

Special measures example, applying the framework set out in section 12 of the Equal Opportunity Act 2010 (Vic)

A maternity hospital has set up a "lactation clinic" and is employing midwives expert in lactation to assist women having serious issues with breast-feeding. The hospital is selecting female nurses (with mid wife and lactation qualifications) only. This selection criteria meets the requirements of a special measure, which are set out in s 12 of the Victorian *EO Act* for the following reasons.

a) The measure is being undertaken in good faith to promote substantive equality of health for women. The employment of only female midwives is intended to achieve this legitimate purpose by encouraging women to comfortably access the service, and overcome breast-feeding difficulties.

b) It is the experience of the hospital that many women with breast-feeding difficulties will not use the clinic if the midwife is male, so there is a rational connection between the requirement and the purpose.

c) The selection criteria is a proportionate means of meeting the needs of the service provided by the clinic.

d) Refusing male applicants to the position is justified because it is necessary to achieve the purpose of providing a legitimate service that meets the needs of clients.

Recommendation: response to the complexity of Federal anti-discrimination laws

It is acknowledged that some of the complexities that we have identified in Federal anti-discrimination laws are beyond the scope of the Consolidation Project. However, simplifying and clarifying Federal anti-discrimination legislation in the following ways could alleviate many

of the complexities and make the choice of jurisdiction easier.

- Simplify the definition of discrimination (Recommendation 3).
- Include a general limitations defence (Recommendation 17).
- Remove specific exceptions (Recommendation 18).
- Allow for temporary exemptions to be granted in accordance with the principles and framework contained in the general limitations clause (Recommendation 19).
- Include a single special measures provision, covering all attributes (Recommendation 6).

D Difficulties of proof

It is our experience that clients who suffer even the most severe discrimination, sexual harassment and victimisation regularly decide not to make a formal complaint due to difficulty proving the conduct. This is primarily due to the following reasons:

- there are no witnesses to the discrimination, harassment or victimisation;
- the witnesses are afraid of losing their jobs or of other negative ramifications if they support the complainant;
- the complainant does not have access to the names or contact details of witnesses, or to other information and documentation that is in the possession and control of the alleged discriminator.

These problems have been referred to as the employer's 'monopoly on knowledge'.[14] The following case study illustrates the effect that this power imbalance often has on complaints of discrimination.

Case study 3 – Fear of negative repercussions

Our client, Annie, a casual factory worker, is told by the factory manager that she must have sex with him or she will lose her job. Annie cannot afford to lose her job, and so she has sex with him at the workplace during work hours, when he demands that she do so. Annie becomes clinically depressed and, after almost two years, she refuses to have sex with him anymore. He victimises Annie by reducing her work hours, isolating her and unfairly disciplining her.

Recently, the manager has started sexually harassing Annie's co-worker, Belinda, by putting pornography on her computer, and touching his groin and telling Belinda that she must have sex with him if she wants to work there. Belinda refuses to do so and is also subsequently treated punitively.

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[14] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180 and Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213. See also Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] 31 *Sydney Law Review* 579, 583.

Belinda depends on her job to support her family, and is scared of being further punished by the manager if she complains. She does not want to give evidence in support of Annie or make a formal complaint of her own unless she can first find alternative employment. Without Belinda's evidence, Annie will have difficulty proving that the manager's conduct was unwelcome, so she does not pursue a complaint.

Alternatively, complainants are forced to settle their complaints for much lower amounts of compensation than what the conduct warrants, as shown by the following case study.

Case study 4 – Lack of access to evidence

Julie was a receptionist in a small company and lodged a complaint of serious sexual harassment against both the general manager of the company and his son, who was employed as Julie's manager. The complaint led to the termination of her employment. However, she did not have the contact details of former employees of the company who had witnessed the conduct, and current employees that had witnessed the conduct would not assist her. It was determined that Julie's prospects of success were low, and she settled her complaint for an amount that was less than the alleged harassment would warrant.

The significant power imbalance resulting from the respondent's monopoly on knowledge can be alleviated in the following ways.

1. Onus of proof

Once the complainant establishes a prima facie case of discrimination, the respondent should bear the onus of proving that the action was not unlawful. This is consistent with section 361 of the *Fair Work Act 2009* (Cth), which provides that the alleged reason for an action is to be presumed, unless proved otherwise. It is also consistent with provisions in the ADA, DDA and SDA that the respondent bears the onus of proving reasonableness in complaints of indirect discrimination.

It is important to note that our proposal to shift the onus of proof is limited to civil discrimination claims. Different policy considerations would come into play were the reversal of the onus of proof to be considered in a criminal context.

2. Statutory 'questionnaire procedure'

Complainants should have a right to ask the respondent questions that are relevant to their allegations prior to conciliation, as is the case in the United Kingdom and Ireland. The response should be admissible as evidence, and courts should be able to draw an adverse inference from a failure to respond.[15] In addition to assisting complainants, the questionnaire procedure can increase efficiency by enabling parties to better assess the merits of their case, leading to early settlement or withdrawal of a complaint.

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15 For a discussion of this procedure, see Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia', (2009) 31 *Sydney Law Review* 579.

3. Protection of witnesses and individuals who assist complainants

The victimisation provisions protect individuals who give or propose giving information to a person performing a power or function under the *Australian Human Rights Commission Act 1996*, or appearing as witness in a proceeding under the Act. However, these provisions do not protect a person who is providing information or support to the complainant or the complainant's lawyers. The consolidation bill should explicitly protect witnesses and individuals who assist complainants, including prior to any formal complaint being made.

Recommendation: responses to the difficulties of proof

We recommend the following responses to address difficulties of proof.

- Shift the onus of proving that an action is not unlawful to the respondent after an arguable prima facie case has been established by the complainant (Recommendation 4).
- Introduce a statutory 'questionnaire procedure' through which a complainant can obtain relevant information prior to conciliation (Recommendation 5).
- Explicitly protect witnesses and individuals who assist complainants, including prior to any formal complaint being made (Recommendation 21).

E Certain attributes, areas and conduct are not covered

This section addresses a range of gaps under the current legislative framework, including:

- the failure to protect certain attributes;
- the failure to address intersectional discrimination;
- limited areas of protection;
- vicarious liability; and
- harassment and offensive behaviour.

Attributes

Currently, Federal anti-discrimination legislation fails to protect, or adequately protect, against discrimination on many grounds that are covered by State and Territory anti-discrimination laws and the *Fair Work Act.* For example, the current Victorian EO Act prohibits discrimination on the grounds of physical features, lawful sexual activity, status as a parent or carer, religion, political belief or activity, industrial activity and nationality. We have assisted and provided advice to a number of clients with complaints of discrimination stemming from these attributes.

The lack of federal protection of these grounds results in protection against discrimination being inconsistent and dependant on the geographical location of the discrimination and the

jurisdiction of the relevant State or Territory tribunal.[16] This patchwork type response has been criticised by the UN Human Rights Committee[17], the UN Committee on Economic, Social and Cultural Rights,[18] the UN Committee on the Elimination of Racial Discrimination[19] and the UN Committee on the Elimination of Discrimination Against Women.[20]

It is our experience that the lack of a legal remedy in such situations reinforces the client's experience of marginalisation, and leaves clients feeling powerless and hopeless about the discrimination.

Case study 5 – Lack of remedy for discrimination

> A job-network provider discriminated against Chris, a receptionist at a gay venue, based on his sexual orientation and association with persons engaged in lawful sexual activity, by failing to provide him with standard job related supports. The job-network provider told Chris that it could not act differently due to a stipulation in its funding agreement with the relevant Commonwealth government department. There is no protection against discrimination based on lawful sexual activity and sexual orientation under Commonwealth law, and it is unlikely that proceedings can be brought against a Commonwealth department in the Victorian Civil and Administrative Tribunal under the Victorian *EO Act*, because the Tribunal is not invested with federal jurisdiction over the Commonwealth. Chris was therefore left without a legal remedy.

We recommend that Federal anti-discrimination legislation is broadened to cover the attributes listed above that are currently covered by the Victorian EO Act to promote legislative consistency and better protection.

Moreover, we recommend that the consolidation bill contemplate further broadening the range of attributes to include irrelevant criminal record, being a victim of a violent crime, being a victim of family violence, socio-economic status and homelessness.

As noted above, VLA is the largest provider of legal assistance in Victoria. Many of our clients have had contact with the criminal justice system and have a criminal record as a consequence. Our experience has been that these clients find it difficult to rehabilitate or reintegrate after serving a prison sentence. In particular, they report discrimination in employment, housing and other services on the basis of their criminal record. This discrimination regularly occurs even where the past criminal activity has no relevance to the job or service sought.

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16 *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania) and Rodney John Nichols* [2008] FCAFC 104.

17 Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, Ninety-fifth Session, 16 March - 3 April 2009, CCPR/C/AUS/CO/5.

18 Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia, Forty-second session, 4 - 22 May 2009, /C.12/AUS/CO/4.

19 Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia, CERD/C/AUS/CO/15-17, 27 August 2010 [10].

20 Committee on the Elimination of Discrimination Against Women, Concluding Observations: Australia, CEDAW/C/AUS/CO/7, 30 July 2010 [25].

Similarly, we have acted for clients who have been victims of rape. Upon disclosure of these incidents to employers and education providers they have been branded as 'overly sensitive', 'troublesome' and requiring 'special treatment'. Likewise, our family law practitioners report that victims of family violence are indirectly discriminated against by employers who fail to provide flexible work conditions. Moreover, clients have reported a reluctance to report family violence to their employers for fear of embarrassment or being treated differently.

Over 90 per cent of VLA clients are in receipt of some form of social security entitlement. We often hear complaints from clients that they are deemed ineligible for rental properties because they receive Centrelink benefits, even where they can afford the rent. Discrimination in rental accommodation is even more acute where an individual has had a period of homelessness and is unable to account for periods where they were not in stable accommodation.

Recommendation: response to the failure to protect certain attributes

We welcome the Government's commitment to introduce protection against discrimination on the basis of a person's sexual orientation or gender identity and make the following further recommendations.

We encourage the Government to also introduce protection against discrimination on the following grounds (Recommendation 10):

- physical features
- lawful sexual activity
- status as a parent or carer
- religion
- political belief or activity
- industrial activity
- nationality
- irrelevant criminal record
- being a victim of violent crime
- being a victim of family violence
- homelessness
- socio-economic status.

Discrimination against an associate of a person with an attribute should also be prohibited, and the coverage of this protection should extend to all protected attributes (Recommendation 11). This is currently the case under the Victorian EO Act and is a feature of the DDA and the RDA. As stipulated in the Discussion Paper, this will create consistency and clarity in the consolidation bill.

Intersectional discrimination

It is our experience that Victoria's most vulnerable community members experience multiple forms of disadvantage and discrimination. This is often referred to as intersectional discrimination. Currently, anti-discrimination law often fails to acknowledge the compounding effect of intersectional discrimination, and it is difficult to make complaints of discrimination based on multiple attributes because a complaint must be made under a number of separate statutes, each with differing definitions and defences. This issue will be somewhat alleviated by the consolidation of Federal anti-discrimination legislation, but explicit acknowledgement of intersection discrimination is still necessary.

Recommendation: response to intersectional discrimination

We recommend that the test for discrimination in the consolidation bill should explicitly state that reference to a protected attribute is a reference to one or more protected attributes (Recommendation 12).

The removal of the comparator test would also assist complainants who have experienced intersectional discrimination, as making comparisons is difficult and often fails to recognise the compounded disadvantage caused (Recommendation 3).

Equality before the law

Australia has an obligation to protect the right to equality before the law as a signatory to various international human rights treaties.[21] Currently, the right to equality before the law is provided for in section 10 of the RDA but is not specifically protected in the SDA, the DDA or the AHRCA. While there may be few instances of non-compliance with this obligation, the ramifications and systemic nature of the discrimination in those instances is significant. For example, in 2006 changes to social security legislation meant that a number of our female clients who were receiving Centrelink payments before the amendments were no longer eligible for parenting payment benefits where they left their relationship – even if the relationship was abusive. This legislative anomaly had the consequent and possibly unintended effect of discriminating against women. An equality before the law provision would have provided a legal recourse to address this situation.

Recommendation: response to lack of equality before the law provision

The right to equality before the law should therefore be extended to all attributes (not just race) (Recommendation 13).

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[21] Article 26 of the *International Covenant on Civil and Political Rights*, provides:

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

Protected areas of public life

Discrimination is often systemic and multifaceted, and can occur within a range of cultural institutions and areas of public life. Our experience as one of the largest free anti-discrimination legal practices in Victoria is that the law can play an effective role in addressing discrimination in all fields of public life. The law can effect attitudinal change and challenge prejudicial stereotypes.

We consider that the consolidation bill should provide broad protection against discrimination by prohibiting discrimination in any field of public life, as is the case under section 9 of the RDA. To avoid ambiguity, we recommend that the consolidation bill contain a non-exhaustive list of areas that are protected, which reflects those areas already covered by the RDA, SDA, DDA and ADA.

In addition, we recommend that this list include the areas of law enforcement and corrections. There is currently uncertainty around when the police and correctional service providers are subject to anti-discrimination legislation. Some case law suggests that the police and correctional service providers are only prohibited from discriminating against persons to whom they are providing a service. The Full Federal Court has held that the "the meaning of 'service' is not simple to resolve" and that the provision of transport or accommodation to prisoners may or may not amount to a service or facility for the purpose of anti-discrimination legislation.[22]

As a matter of public policy, it is imperative that law enforcement agencies and correctional service providers act in a non-discriminatory manner that promotes equality. These agencies and service providers exercise considerable power within our community, and this power should be exercised as much as possible in a manner that respects every individual's right to equality. As human beings, prisoners are entitled to all human rights, except those that are necessarily restricted due to their incarceration. In *Castles v Secretary of the Department of Justice & Ors*, Emerton J confirmed that "…the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty."[23] Similarly, criminal suspects are entitled to equal protection of their human rights, subject to any justifiable limitation.

Case study 6 – Lack of remedy for discrimination

> Sinead is profoundly deaf. Her primary language is Auslan. She can speak English well, but cannot hear or lip-read. Sinead visited her mental health case manager in a state of distress. As it was close to 5.00 pm Sinead's case manager recommended that she be taken by the police to the emergency department at the hospital. When the police officers arrived, Sinead asked them to write anything they were saying down. The officers continually failed to do so, adding to Sinead's distress.
>
> Sinead sat with the officers for two hours in the waiting room. At one point she asked if she could go outside to have a cigarette. The officers communicated that she could not. Sinead asked why she could not, but the officers only answered her verbally,

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22 *Rainsford v Victoria* [2008] FCAFC 31 [9]. See also *Commissioner of Police (NSW) v Mohamed* [2009] NSWCA 432.

23 [2010] VSC 310, [108].

without writing it down for Sinead. This increased Sinead's confusion, distress and frustration, and, having not received a reason as to why she could not go outside for a cigarette, she attempted to leave of her own volition. This escalated to the point where the officers restrained Sinead and strapped her down, adding again to her distress.

Had the officers accommodated Sinead's disability by explaining in writing why she could not leave, the situation would not have escalated to this point. This is a clear case of a failure to reasonably accommodate disability. However, under the current law it is unclear whether in apprehending, transporting and detaining Sinead, the Police were providing a "service" within the meaning of s 24 of the DDA.

Law enforcement agencies and correctional service providers may limit the right to equality by acting in a discriminatory way if such action is justified according to a proportionality test/general limitations provision, and there are likely to be many situations where restrictions on the rights of prisoners and criminal suspects will be clearly justifiable according to such general limitations provision.

Recommendation: response to limited protection of areas

The consolidation bill should prohibit discrimination in all areas of public life, with a non-exhaustive list of areas that includes those already explicitly covered and the additional areas of law enforcement and corrections (Recommendation 14).

Vicarious liability

Cases of workplace discrimination or harassment often involve unlawful conduct by an officer or employee. Our casework experience is that it is often the case the employer was aware of and could have taken steps to address or prevent the unlawful conduct but did not do so, as occurred for example in Annie's and Julie's cases described above.

Employers, principals and those in control of workplaces should be liable for unlawful conduct that they could have prevented. This obligation should mirror the obligation of employers, principals and others under occupational health and safety legislation with respect to workplace safety issues. In this regard, we urge the Government to extend the vicarious liability provision to those who manage and control a workplace, in the same way that such an obligation is imposed by section 26 of the *Occupational Health and Safety Act 2004* (Vic). This section provides as follows.

> *Duties of persons who manage or control workplaces*
>
> *(1) A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.*
>
> *(2) The duties of a person under subsection (1) apply only in relation to matters over which the person has management or control.*

Recommendation: response to issue of vicarious liability

We submit that employers and principles should be vicariously liable for unlawful acts done 'in connection with' the person's employment or duties as an agent, unless they have taken 'all reasonable steps to prevent the employee or agent from doing the act' (Recommendation 15).

We further recommends that the consolidation bill extend vicarious liability for workplace discrimination and harassment to those who manage and control the workplace (Recommendation 16).

Harassment

Attributes

Currently sexual harassment is unlawful under the SDA and harassment on the basis of a disability is prohibited by the DDA. We submit that the consolidation bill should prohibit attribute-based harassment behaviour in respect of all protected attributes. There is no principled reason why people should be protected from harassment in relation to certain attributes, such as race or disability, and not others. The harm to the victim that is caused by attribute-based harassment can be significant, whether the attribute is, for example, race, religion, sex, disability, sexual orientation or age. For example, clinical research shows that homophobic societal attitudes compounded with discrimination, marginalizsation, stigma and victimisation experienced by lesbian, gay and bi-sexual individuals contributes to psychological distress and higher rates of suicide.[24]

Areas

In line with our submission that individuals should be protected from discrimination in all areas of public life, we submit that protection from attribute-based harassment should also be extended to all areas of public life, including the areas already explicitly covered by Federal anti-discrimination legislation. In the event that our submission in regard to the coverage of the consolidation bill is not adopted more generally, we submit that protection from attribute-based harassment specifically be extended to cover conduct done anywhere other than in private.

Sexual harassment

We submit that regardless of whether or not the protection from attribute-based harassment is extended, a separate protection against sexual harassment be retained. We submit that there is significant educative value in having a stand alone sexual harassment provision, regardless of whether the conduct caught by the provision might also be covered by protections against sex discrimination or a general prohibition of harassment. Further, a prohibition against sexual harassment reflects the unique nature and history of this form of harassment as compared to harassment based on other attributes.

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[24] Michael Benibgui, *Mental Health Challenges and Resilience in Lesbian, Gay, and Bisexual Young Adults: Biological and Psychological Internalization of Minority Stress and Victimization*, Condordia University (2010), available at < http://gradworks.umi.com/NR/67/NR67340.html>, accessed on 18 January 2012.

Again, in line with our submission in regard to areas of public life, we submit that the protection against sexual harassment not be limited to specific areas of public life. It is our experience that this aspect of the current law provides women with inadequate protection from sexual harassment. We refer favourably to section 118 in the Queensland *Anti-Discrimination Act 1991*, which prohibits sexual harassment in all relationships, both public and private.[25]

Case study 7 – inadequate reach of attribute-based harassment laws

> Juanita's neighbours were renovating their property. This meant that there were tradesmen at the neighbouring property all day Monday to Saturday. Juanita had to travel past her neighbour's property to go to work and back each day. When she was walking past, the tradesmen would shout sexual comments to and about Juanita, such as "I wouldn't mind filling her hole".
>
> Juanita dreaded leaving the house and the prospect of having to walk this gauntlet every day. She found it highly distressing, intimidating and humiliating. In a very real way it impeded her ability to participate in society on an equal basis because of her sex. However, because Juanita and the tradesmen were not in a relationship covered by the enumerated areas of public life, Juanita had no legal redress. Had the abuse been racially-based, then Juanita would have been protected by Part IIA of the RDA. Likewise, had the sexual harassment occurred in Queensland, Juanita would have been protected by s 118 of the *Anti-Discrimination Act 1991* (Qld).

Recommendation: response to issues of harassment

We recommend that the consolidation bill include the following features to better protect individuals against harassment.

- A general prohibition of attribute-based harassment in public life (Recommendation 7).
- A separate prohibition of sexual harassment, which extends to all conduct done other than in private (Recommendation 8).

Vilification

Note: For the sake of simplicity, we refer to the conduct prohibited by section 18C of the RDA as 'vilification'. However, we emphasise that we do not intend to import any statutory definition of vilification from State or other anti-discrimination legislation by doing so.

Section 18C of the RDA prohibits public acts that are reasonably likely to offend, insult, humiliate or intimidate someone where the act is done because of the person's race. This provision attempts a complex balancing act between freedom of speech and freedom from vilification. While acknowledging these complexities, we submit that consideration should be given to extending the protection provided with respect to race by section 18C of the RDA to other protected attributes.

We note, however, that any broad prohibition of vilification should be qualified by giving due

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[25] Rees, Lindsay, Rice, *Australian Anti-Discrimination Law* (Federation Press, Annandale, NSW, 2008) p 509.

regard to the context of the conduct and the harm caused. Not all attribute-related conduct will reach the threshold levels of seriousness and harm for it to constitute unlawful vilification. In considering whether this is the case, a particularly relevant factor will be the history of discrimination suffered by persons with the relevant attribute. For example, in *McLeod v Power*,[26] the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, called him, among other things, 'you fucking white piece of shit' and 'fuck you whites, you're all fucking shit'. Federal Magistrate Brown noted that '[w]hite people are the dominant people historically and culturally within Australia. They are not in any sense an oppressed group, whose political and civil rights are under threat'.[27] His Honour suggested that it is 'drawing a long bow' to use the RDA to protect 'whites' as a group, and this was not the primary purpose of the RDA.[28]

Recommendation: response to issues of vilification

We recommend that consideration be given to extending the protection provided with respect to race by section 18C of the RDA to other protected attributes (Recommendation 7).

F Limited legal assistance and prohibitive costs

Limited legal assistance

The importance of legal assistance in anti-discrimination matters has been recognised as a priority in the National Partnership Agreement on Legal Assistance Services (**NPA**). In keeping with its obligations under the NPA, in the last 12 months VLA has expanded its capacity to provide advice, assistance and education in this area and is the largest provider of broad ranging free anti discrimination advice and assistance in Victoria. However this practice is still relatively small and does not meet current demand.

We also the fund a number of community legal centres who provide anti-discrimination services. These centres also report being unable to meet the significant demand for assistance. Our experience in this area clearly shows that applicants will often choose not to pursue a discrimination complaint in court because they cannot afford legal representation, and are not eligible for legal aid.

The inability to meet demand in this area is confirmed by Julian Gardner's, 2008 report, *An Equality Act for a Fairer Victoria* which found that the legal services currently available in this jurisdiction are limited and dispersed particularly those services that are free and independent.[29]

Case study 8 – lack of access to legal representation

> John suffered workplace discrimination that caused him to leave his employment and require psychiatric treatment. When he sought legal aid he was unemployed with no savings, living on a friend's couch, and unable to make child-care payments. He was

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26 (2003) 173 FLR 31.
27 Ibid, 44.
28 Ibid.
29 Gardner Report, 76.

> granted legal assistance, and we commenced acting for him in relation to a complaint of discrimination against his former employer.
>
> The complaint did not resolve at conciliation. However, John subsequently chose to settle the matter rather than proceed to hearing, which he had wanted to do. This was largely due to the uncertainty surrounding his ongoing eligibility for legal representation by us – John would not be eligible for legal aid if he regained employment, which he was ready to do, he could not afford a private lawyer, and his complaints were not suitable for a no-win, no-fee arrangement.

Engaging a private lawyer is rarely a financially viable option in this area of the law due to the low awards of compensation, and the fact that complainants are often seeking non-monetary remedies, such as changes to workplace policies, cessation of discriminatory conduct or an apology. It is our experience that most people are deterred from pursuing a complaint of discrimination if they do not have legal representation.

As a result, we consider it essential that funding to legal aid and/or specialist community legal services is regularly reviewed to ensure that complainants receive adequate legal assistance.

Prohibitive costs

Our practice experience also indicates that some clients will not pursue a potentially meritorious claim of discrimination for fear of incurring an adverse costs order. Under the current framework, the usual principle that costs follow the event applies. This is a significant disincentive bearing in mind the power imbalance between many complainants and respondents and the fact that people who are financially vulnerable and disadvantaged are more likely to experience discrimination.

> We submit that a statutory presumption that parties are only liable for their own legal costs unless there has been unreasonable behaviour would increase access to justice for complainants. This approach would bring the approach to legal costs in federal anti-discrimination legislation in line with the relevant provisions of the *FWA* and state and territory anti-discrimination laws.
>
> Alternatively, parties should be entitled to protective costs orders in matters of general public importance. In the United Kingdom, courts make a range of protective costs orders in public interest matters, including that there be no order that one or both parties pay costs, or that the amount of costs payable by one or more parties be capped to a certain amount.[30]
>
> In Australia, a protective costs order was made in unlawful discrimination proceedings in *Corcoran v Ferguson* [2008] FCA 864. Justice Bennett of the Federal Court took into account a range of factors, including the public interest in the unlawful discrimination proceedings and the applicant's financial position, and limited the amount of costs that would be payable by the applicants if unsuccessful. In this regard, we refer favourably to the submission of Ron Merkel SC and Alistair Pound to the National Human Rights

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[30] See, for example, *R (on the application of Compton) v Wilshire Primary Care Trust* [2009] 1 All ER 978.

Consultation Committee, which sets out a proposed statutory test for protective cost orders at paragraph 66. (The submission of Mr Merkel and Mr Pound is available at: http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/5FD33321462D4755CA2576070016079A/$file/Alistair_Pound_and_Ron_Merkel_AGWW-7T27RL.doc)

Recommendation: responses to problem of prohibitive costs

We recommend that the following steps be taken to address the prohibitive costs of bringing complaints of discrimination.

- Include a statutory presumption that parties are only liable for their own legal costs unless there has been unreasonable behaviour (Recommendation 22).
- Alternatively, parties should be entitled to protective costs orders in matters of general public importance (Recommendation 23).
- Review funding to legal aid and/or specialist community legal services and/or an independent agency to provide adequate legal assistance to complainants (Recommendation 24).

G Low awards of compensation

As indicated previously, it is our experience that individuals are deterred from pursuing complaints of discrimination due to the low cost-benefit of doing so. This is partly due to the low amounts of compensation that are awarded in anti-discrimination matters, which do not adequately off-set the time and expense of pursuing a complaint.

Case study 9 – low cost-benefit

Eduardo is of Afro-Cuban descent and has dark skin. He was refused entry by a nightclub because, according to the bouncer, "the owner doesn't want Africans in here". At the time there were also two other men with dark skin who had just been refused entry – one man of Sri-Lankan descent and one man of African descent. The three men did not know each other, but they were deeply offended by the conduct and called the Police. The bouncer repeated the policy in front of the Police officer, but the officer said that it was up to the venue to decide who will enter its premises, and that there was nothing the Police could do.

Eduardo was deeply distressed by the conduct and it triggered a psychological injury, but he did not have the names or contact details of the witnesses, or the bouncer.

Eduardo decided not to pursue a complaint of discrimination against the venue because of the low amount of compensation that he would be likely to receive (approximately $5,000), even if successful, and the risk that he might not succeed due to a lack of corroborating evidence, and then be subject to an adverse costs order.

Recommendation: response to low awards of compensation

To address this issue, we recommend that statutory guidance be given to courts regarding the amount of monetary compensation payable, and that courts be directed to take into account both past and future effects of the discrimination on the complainant (Recommendation 23).

H Interaction of Federal anti-discrimination legislation with other laws

The consolidation bill should not override any State or Territory anti-discrimination law that more strongly promotes the right to equality. Unless the consolidation bill explicitly states that it is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of eliminating unlawful discrimination and giving effect to Australia's obligations under United Nations human rights instruments, there is a risk that the consolidation bill will stifle legislative progress at a State and Territory level.

There was recently an example of this occurring in Victoria. Following the recent review of the Victorian EO Act, the Victorian Government stated that it could not amend the EO Act to prohibit single-sex clubs from discriminating in relation to membership because this would be inconsistent with the exception that permits such discrimination under the SDA.[31] The Victorian Government considered that, to the extent of the inconsistency, such an amendment would be constitutionally invalid.[32]

Recommendation: response to issues of interaction with other laws

The consolidation bill should explicitly state that it is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of eliminating discrimination and giving effect to Australia's obligations under the United Nations human rights instruments on which the legislation is based (Recommendation 25).

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31 Legislative Assembly of Victoria, Equal Opportunity Bill, Statement of Compatibility (Rob Hulls), 10 March 2010, 776.

32 Ibid.