



## A Fairer, Simpler Law for All

The Human Rights Law Centre's submission on the *Human Rights and Anti-Discrimination Bill 2012*

December 2012

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Freedom. Respect. Equality. Dignity. **Action.**

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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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# Contents

Glossary	1
1. Introduction	2
1.1 Background	2
1.2 Scope of this submission	2
1.3 Applicable international human rights obligations	4
1.4 Summary of recommendations	4
2. Objects of the Consolidated Act	9
3. Meaning of Discrimination	10
3.1 The legal test for discrimination	10
3.2 Attribute based harassment	11
3.3 Reasonable adjustments	12
3.4 Vilification	13
3.5 Burden of proof	13
3.6 A positive duty	17
3.7 Special measures	20
4. Protected Attributes	24
4.1 Protected attributes under international human rights law	24
4.2 Sexual orientation, gender identity, gender expression and intersex status	26
4.3 Criminal record	28
4.4 Attributes covered only in work related areas	29
4.5 Religious belief/activity	31
4.6 Social status/origin	32
4.7 Victim of domestic/family violence status	34
4.8 Family and carer responsibilities	36
4.9 Characteristics extension and marital status	37
4.10 Intersectional discrimination	37
5. Protected Areas of Public Life	39
5.1 Equality before the law	39
5.2 Protected areas of public life	41
5.3 Volunteers	42
5.4 Clubs and member-based associations	43
5.5 Partnerships	44
6. Exceptions and Exemptions	44
6.1 Defence of justification	44
6.2 Exceptions for religious organisations	46
6.3 Review of the exceptions	50
7. Complaints and Compliance	50
7.1 Human rights framework for complaints and compliance	50
7.2 Role and functions of the Commission	51
7.3 Representative proceedings	54
7.4 Litigation costs	55
7.5 Remedies	56
7.6 Resourcing	57
7.7 Commission members	58

## Glossary

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The following defined terms and acronyms are used throughout this submission.

<i>Age Discrimination Act 2004</i> (Cth)	ADA
Australian Human Rights Commission	Commission
<i>Australian Human Rights Commission Act 1986</i> (Cth)	AHRCA
Convention on the Elimination of All Forms of Discrimination against Women	CERD
Convention on the Rights of Persons with Disabilities	CRPD
<i>Disability Discrimination Act 1992</i> (Cth)	DDA
<i>Equality Act 2010</i> (UK)	UK Act
<i>Fair Work Act 2009</i> (Cth)	FWA
Human Rights & Anti-Discrimination Bill 2012	HRAD Bill
Human Rights Law Centre	HRLC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
Lesbian, Gay, Bisexual, Transgender and Intersex	LGBTI
<i>Racial Discrimination Act 1975</i> (Cth)	RDA
<i>Sex Discrimination Act 1984</i> (Cth)	SDA
United Nations Human Rights Committee	HRC
ILO C156 Workers with Family Responsibilities Convention, 1981	Workers with Family Responsibilities Convention

# 1. Introduction

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## 1.1 Background

This submission responds to the *Human Rights and Anti-Discrimination Bill 2012*, released by the Attorney-General, Nicola Roxon, and Minister for Finance and Deregulation, Penny Wong, in November 2012 (the HRAD **Bill**). The HRAD Bill consolidates the *Australian Human Rights Commission Act 1986* (Cth) (**AHRCA**), *Age Discrimination Act 2004* (Cth) (**ADA**), *Disability Discrimination Act 1992* (**DDA**), *Racial Discrimination Act 1975* (Cth) (**RDA**) and the *Sex Discrimination Act 1984* (Cth) (**SDA**).

The Human Rights Law Centre (**HRLC**) has previously made several submissions advocating for a human-rights based approach to anti-discrimination law reform.<sup>1</sup> The HRLC has also played a role in coordinating and facilitating NGO engagement in the consolidation of Federal anti-discrimination laws, including by:

- conducting NGO workshops on anti-discrimination law reform in 2010, 2011 and 2012;
- hosting a national conference on equality law reform in 2011. The Conference was attended by over 100 advocates, business leaders, lawyers, academics, community leaders and policy makers;<sup>2</sup> and
- creating and moderating a website ([www.equalitylaw.org.au](http://www.equalitylaw.org.au)) designed to encourage and facilitate discussions about anti-discrimination law reform. The website contains links to submissions by NGOs, blogs by expert commentators, links to relevant media and domestic and international resources.

This submission is informed by the above activities and by the HRLC's experience and expertise in international human rights law.

## 1.2 Scope of this submission

The HRLC welcomes the HRAD Bill, which is a culmination of many years of research, discussion and advocacy around the need to strengthen, modernise and streamline Federal anti-discrimination laws. While there are aspects of the HRAD Bill that could be improved, the HRLC's view is that Bill improves

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<sup>1</sup> See, for example, HRLC submission to the Legal and Constitutional Affairs Committee on the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality. (<http://www.hrlc.org.au/womens-rights-submission-senate-review-sex-discrimination-act>); HRLC submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the Sex and Age Discrimination Legislation Amendment Bill 2010 (<http://www.hrlc.org.au/gender-and-age-equality-submission-to-inquiry-into-the-sex-and-age-discrimination-legislation-amendment-bill-26-oct-2010>); HRLC paper, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality*, (<http://www.hrlc.org.au/addressing-systemic-discrimination-and-promoting-equality-submission-re-governments-consolidation-of-federal-anti-discrimination-laws-11-may-2011-2>); HRLC submission to the Attorney General responding to the Discussion Paper on the Consolidation of Federal Anti-Discrimination Laws, (<http://www.hrlc.org.au/outdated-equality-laws-must-be-strengthened-to-meet-australias-human-rights-obligations-under-international-law-23-january-2012>) .

<sup>2</sup> <http://www.equalitylaw.org.au/elrp/events/>

protections against unfair treatment and makes anti-discrimination laws more effective, accessible and cost-efficient.

This submission does not cover all aspects of the HRAD Bill. We have narrowed our focus to those questions to which Australia's human rights obligations are most relevant. This approach is consistent with the recommendations of the National Human Rights Consultation Committee which, in 2009, recommended that the Federal Government audit and amend legislation – particularly anti-discrimination legislation – to ensure compliance with Australia's international human rights obligations.<sup>3</sup>

Human rights-based reforms to anti-discrimination law have also been recommended by UN treaty bodies. In 2009, the Human Rights Committee (**HRC**), the treaty body responsible for monitoring State parties' compliance with the International Covenant on Civil and Political Rights (**ICCPR**), noted that:<sup>4</sup>

[T]he rights to equality and non-discrimination are not comprehensively protected in Australia in federal law.

In December 2012, the HRC asked Australia to:

Please provide information on the measures taken to adopt federal legislation, covering all grounds of discrimination by all relevant actors as envisaged by the Covenant, and to provide comprehensive protection of the rights to equality and non-discrimination.

The Committee on Economic, Social and Cultural Rights, the treaty body responsible for monitoring State parties' compliance with the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), has also commented that:<sup>5</sup>

[T]he State party's anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights.

A human rights framework can inform and guide domestic policy in complex areas such as discrimination and equality. The international human rights framework has been at the forefront of recognising the more insidious forms of discrimination, including indirect, systemic and compounded discrimination.

The HRLC submits that drawing on the experience and expertise reflected in international human rights standards will enhance the effectiveness of the HRAD Bill and will assist Australia to meet its obligations under international human rights law.

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<sup>3</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, (2009), [Recommendation 4].

<sup>4</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, Ninety-fifth Session, 16 March - 3 April 2009, CCPR/C/AUS/CO/5.

<sup>5</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, Forty-second session, 4 - 22 May 2009, /C.12/AUS/CO/4.

### 1.3 Applicable international human rights obligations

Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.<sup>6</sup>

Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality.<sup>7</sup> These obligations arise under the ICCPR, ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), Convention on the Rights of Persons with Disabilities (**CRPD**), and the Convention on the Rights of the Child (**CRC**).

For example, Article 2(2) of ICESCR requires that State Parties ‘undertake to guarantee that the rights enunciated in the present Covenant will 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’. The Committee on Economic, Social and Cultural Rights has confirmed that this obligation extends to the requirement to ensure substantive equality.<sup>8</sup>

Article 2(1) of the ICCPR provides that States Parties are obligated to respect and ensure the rights 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’.

Article 26 of the ICCPR further provides that:

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

The rights to equality and freedom from discrimination bring with them a guarantee that individuals will have the right to effective protections and remedies before courts and tribunals, as discussed below in section 7.1.

Enacting laws that effectively address discrimination and promote equality is, therefore, central to the Australian Government’s fulfilment of its international human rights obligations.

### 1.4 Summary of recommendations

The HRLC makes the following recommendations for the Bill.

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<sup>6</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

<sup>7</sup> See, eg, International Covenant on Civil and Political Rights (**ICCPR**) arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights (**ICESCR**); Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**); Convention on the Elimination of Racial Discrimination (**CERD**); Convention on the Rights of Persons with Disabilities (**CRPD**), art. 5.

<sup>8</sup> UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].

**Recommendation 1:** The objects clause in the HRAD Bill should be maintained and amended in line with recommendations 2 to 6 of the Discrimination Law Experts Group submission.

**Recommendation 2:** The unified definition of discrimination should be maintained.

**Recommendation 3:** Section 19(2)(b) should be amended to provide that unfavourable treatment includes (but is not limited to) conduct that humiliates or intimidates the other person or has the intent or effect of nullifying or impairing their enjoyment of human rights on an equal footing.

**Recommendation 4:** The reasonable adjustments provisions in the HRAD Bill should be replaced with a stand-alone obligation to make reasonable adjustments for persons with protected attributes.

This stand-alone obligation should not be a 'permanent exception'.

**Recommendation 5:** Section 51 should be amended to prohibit vilification on the basis of all protected attributes, and s 51(2)(a) amended to provide that conduct of a person is vilification if the conduct is reasonably likely, in all the circumstances, to seriously offend, insult, humiliate or intimidate another person or a group of people.

**Recommendation 6:** The shifting burden in section 124 of the HRAD Bill should be maintained.

**Recommendation 7:** The HRAD Bill should be amended to include a positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

**Recommendation 8:**

The HRAD should be amended to include a separate special measures provision for race that contains a stricter 'sole purpose' test

Section 21(2) be amended to clarify that:

- the purpose of a special measure is to further the objects of the legislation;
- the party seeking to undertake a special measure has the burden of proving that the measure is a special measure; and
- the participation of the proposed beneficiaries should be included in sub-clause (b), rather than the proposed 'reasonable person' test.

Section 21(2) should also include a reference to appropriateness, legitimacy and proportionality.

The Explanatory Memorandum be amended to include:

- an explanation that there is a clear distinction between temporary special measures to accelerate the achievement of substantive equality, and other general social policies adopted to improve the realisation of rights by particular groups. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of particular groups cannot be characterised as being temporary special measures; and

- clarification that the onus rests with the party seeking to (ie the state) to demonstrate that a law, policy or program is a special measure. Justification for introducing a special measure should include references to concrete goals and targets, timetables, the reasons for choosing one type of measure over another, as well as the accountable institution for monitoring implementation and progress.

**Recommendation 9:** The HRAD Bill should be amended to include a non-exhaustive list of protected attributes and, to that end, should prohibit discrimination on the basis of a person's 'other status'.

**Recommendation 10:** The definition of 'sexual orientation' in the HRAD Bill be retained.

**Recommendation 11:** The definition of 'gender identity' in the HRAD Bill be amended in line with the *Anti-Discrimination Act 2023* (Tas) including the separation of part B of the definition into a separately described protected attribute for intersex people.

**Recommendation 12:** The HRAD Bill should be amended to include 'criminal record' as a protected attribute and protection should be extended to all areas of public life.

Alternatively, the mandated review of exceptions to be conducted in 3 years should explicitly consider the inclusion of the criminal record attribute.

**Recommendation 13:** The HRAD Bill should be amended to extend protections for the attributes set out in s 22(3) to all areas of public life.

If this recommendation is not adopted, the wording of s 22(3) should be amended in line with recommendation 12 of the Discrimination Law Experts Group submission.

**Recommendation 14:** The HRAD Bill should be amended to provide that discrimination on the basis of 'religion' is unlawful in all areas of public life.

The HRAD Bill and/or Explanatory Notes should be amended to clarify that the 'religion' attribute extends to not having a religious belief.

**Recommendation 15:** The HRAD Bill should be amended to extend or define the protected attribute of 'social origin' to include 'social status'. 'Social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

**Recommendation 16:** The HRAD Bill should be amended to include a person's 'status as a victim of domestic or family violence' as a protected attribute in all areas of public life.

Alternatively, 'status as a victim of domestic or family violence' should be included as a protected attribute in relation to work place discrimination only.

**Recommendation 17:** The HRAD Bill should be amended to provide that discrimination on the basis of 'family responsibilities' is unlawful in all areas of public life.

This attribute of 'family responsibilities' should be described as 'family and carer responsibilities' and amended to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer's household.

**Recommendation 18:** The extended meaning of having a protected attribute in s 19(4) of the HRAD Bill be maintained.

The inclusion of the protected attribute of 'marital or relationship status' be maintained.

**Recommendation 19:** The specific protections against intersectional discrimination in the HRAD Bill should be maintained subject to the minor amendments proposed by the Discrimination Law Experts Group (recommendation 12).

**Recommendation 20:** Section 60 of the HRAD Bill should be extended to apply to all protected attributes.

**Recommendation 21:** Sections 22(1) and (2) should be maintained with amendments reflecting the recommendations 26 to 28 of the Discrimination Law Experts Group.

**Recommendation 22:** The protections for volunteers contained in the HRAD Bill should be retained.

**Recommendation 23:** Section 35(2)(b) should be removed from the HRAD Bill.

The definition of 'clubs and membership organisations' should be defined to remove 'volunteer associations' as defined in the model *WHS Act* from the operation of the HRAD Bill.

**Recommendation 24:** The HRAD Bill should continue to apply to all partnerships regardless of size.

**Recommendation 25:** Section 23 be maintained with the following amendments:

- Section 23(3)(b) be amended to provide that the legitimate aim must be consistent with the objects of the Act.
- Section 23(3)(c) be amended to require a 'rational connection test' in place of the existing wording.

**Recommendation 26:** The religious exceptions in the HRAD Bill should be removed and in favour of reliance of the existing general defence of justification.

**Recommendation 27:** Religious organisations or schools that wish to rely on the religious exceptions in the HRAD Bill should be required to publicly disclose and lodge a notice to that effect with the Commission and communicate their intention to discriminate to any prospective employees, students, customers and/or others potentially impacted by the proposed discrimination.

**Recommendation 28:** The HRAD Bill should be amended to provide for consultation requirements in line with recommendation 46 in the Discrimination Law Experts Group submission.

In addition, compliance codes should be regularly reviewed by the Commission.

**Recommendation 29:** The Commission's formal inquiry functions should be expanded to empower it to inquire into any human rights issues or concerns arising in Australia.

**Recommendation 30:** The Federal Government should be required to substantively respond, within a specified timeframe, to any report provided to it by the Commission following an inquiry or investigation.

**Recommendation 31:** The Commission should be empowered to investigate human rights abuses across the private sector and each state and territory.

**Recommendation 32:** The Commission should be empowered to enter into enforceable undertakings and issue compliance notices for breaches of human rights.

**Recommendation 33:** The Commission and Special-Purpose Commissioners should be empowered to intervene, as of right, in all cases that raise significant human rights or equality issues.

**Recommendation 34:** Special-Purpose Commissioners should also be empowered to appear as amicus curiae in appeals to the High Court from discrimination decisions made by the Federal Court and Federal Magistrates Court.

**Recommendation 35:** The HRAD Bill should make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

**Recommendation 36:** The no-costs jurisdiction for discrimination complaints be maintained in the HRAD Bill with amendments to effect the following:

- Limit costs orders against complainants to situations where the claim was frivolous, vexatious or without foundation.

Alternatively,

- Amend s 133 to require the court to take into account factors such as the tax subsidies available for the respondent, the financial means of the parties, any other vulnerabilities of the parties, and the public interest in the case.
- Encourage higher awards of compensation, to cover legal costs
- Ensure free legal assistance is available.

**Recommendation 37:** The HRAD Bill should be amended to encourage Courts to make corrective and preventative orders, in addition to financial awards to victims of discrimination.

Guidance should be provided about the scale of financial awards to ensure that awards made by the Courts adequately reflect the seriousness of the harm caused by unlawful discrimination, either by the Federal Government or the Commission.

**Recommendation 38:** Legal aid bodies, community legal centres and the Commission must be adequately funded and supported to ensure the effective operation of the HRAD Bill.

**Recommendation 39:** Section 160 of the HRAD Bill be amended to include a LGBTI Commissioner or explicitly vest responsibility for LGBTI issues with another member of the Commission such as the President.

## 2. Objects of the Consolidated Act

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The objects of the HRAD Bill will have a significant impact on how the legislation is framed and interpreted. This is because, pursuant to the *Acts Interpretation Act 1901* (Cth), courts and tribunals are required to prefer ‘the interpretation that would best achieve the purpose or object of the Act’.<sup>9</sup> This means a court or tribunal may actively look for and apply an interpretation that promotes the purpose or objects of the Act.<sup>10</sup>

The HRLC commends the objects clause proposed in the HRAD Bill and endorses the suggestions made by the Discrimination Law Experts Group to enhance the usefulness of the clause.<sup>11</sup>

The express and unequivocal linkage to the core international human rights treaties to which Australia is a party is a positive development. This express statement will assist courts and tribunals to understand the scope and degree of Australia’s commitment to eliminating discrimination and promoting substantive equality. It will also enable the HRAD Bill to respond to ongoing developments in international human rights law.

A second positive development in the objects clause is the recognition of substantive equality. As the Committee on Economic, Social and Cultural Rights explains, substantive equality is concerned ‘with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience’.<sup>12</sup> In addition to equal opportunities, substantive equality is concerned with equal outcomes. In order to achieve substantive equality, Australia must work to eliminate those forms of discrimination that have become institutionalised in laws, policies, practices and social structures – otherwise known as systemic discrimination.

Finally, we applaud the HRAD Bill for removing the limitations currently in the ADA, DDA and SDA which mention the aim of eliminating discrimination and promoting equality only ‘as far as possible’. The SDA also refers to giving effect to ‘certain provisions’ of CEDAW.<sup>13</sup> These qualifiers have been the subject of criticism in the past. For example, in response to the 2008 Senate Committee’s inquiry into the SDA, the Commission noted that the numerous qualifications in the SDA result in ‘a qualified

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<sup>9</sup> *Acts Interpretation Act 1901* (Cth), s 15AA.

<sup>10</sup> See also *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [388-389].

<sup>11</sup> Discrimination Law Experts Group, *Submission of Discrimination Law Experts Group to Senate Legal and Constitutional Affairs Committee: Inquiry into Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2012) (**Discrimination Law Experts Group Submission**), 10-11.

<sup>12</sup> The Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [7].

<sup>13</sup> *Sex Discrimination Act 1984* (Cth), s 3(a).

commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA'.<sup>14</sup>

We support the amendments recommended by the Discrimination Law Experts Group submission and support the reasons outlined in their submission.<sup>15</sup>

**Recommendation 1:**

The objects clause in the HRAD Bill should be maintained and amended in line with recommendations 2 to 6 of the Discrimination Law Experts Group submission.

## 3. Meaning of Discrimination

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### 3.1 The legal test for discrimination

We support the proposed unified test for discrimination contained in the HRAD Bill and suggest minor amendments to respond to concerns raised about the scope of s19(2)(b) discussed below in section 3.2.

The simplified unified definition of discrimination is consistent with the HRLC's submission to the AGD Discussion Paper and will overcome many of the difficulties and complexities posed by the current definitions and promote greater understanding and, ultimately, compliance. In particular, we welcome the removal of the formal 'comparator test', which is the source of significant complexity, uncertainty and unpredictability in the current law.

We welcome the removal of the terms 'direct' and 'indirect' and the clarification in the Explanatory Notes that this is to remove any perception that the two concepts are mutually exclusive.<sup>16</sup> These changes align with the recommendations made in the HRLC's previous submissions. A complainant should not be required to particularise their complaint as one form of discrimination to the exclusion of the other. Such distinctions lead to unnecessary complexity, therefore making it difficult for complainants to enforce their rights to equality and non-discrimination.

**Recommendation 2:**

The unified definition of discrimination should be maintained.

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<sup>14</sup> Human Rights and Equal Opportunity Commission, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act (2008)* [102].

<sup>15</sup> Discrimination Law Experts Group Submission, recommendations 2 to 6.

<sup>16</sup> Explanatory Notes, [104].

## 3.2 Attribute based harassment

### Harassment

The HRLC welcomes the explicit acknowledgement in s 19(2)(a) that harassment is a form of unfavourable treatment and therefore unlawful discrimination if based on a protected attribute. This principle is well-established in domestic case law, as noted in the Explanatory Notes at [106]. For example, the International Declaration on Principles of Equality provides that:

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Section 19(2)(a) will clarify and simplify the law, given that express protections against harassment vary considerably among Australian jurisdictions. The DDA, for example, deals with disability-based harassment in the context of employment, education and the provision of goods and services, while the ADA and RDA do not deal explicitly with harassment in any context. The SDA deals with 'sexual harassment' as unwelcome conduct of a sexual nature, but does not deal with sex-based harassment more broadly.

### Conduct that offends, insults or intimidates the other person

The HRLC appreciates that the drafters' intention was most likely for s 19(2)(b) to further explain the type of conduct that may constitute harassment (and therefore unlawful discrimination). A similar provision in the SDA (prohibiting harassment 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated') has operated for many years without imposing an undue limitation on free speech.

Nevertheless, the wording of 19(2)(b) has given rise to a concern that it could be interpreted in a manner which gives it a broader application than was apparently intended.<sup>17</sup>

In response, the HRLC suggests that section 19(2)(b) could be amended to provide that unfavourable treatment includes (but is not limited to) conduct that humiliates or intimidates the other person or has the intent or effect of nullifying or impairing their enjoyment of human rights on an equal footing.<sup>18</sup>

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<sup>17</sup> James Spigelman, 'Where do we draw the line between hate speech and free speech?' (Human Rights Orator, Sydney, 20 December 2012), available at: [www.humanrights.gov.au/about/media/hnews/2012/132\\_12.html](http://www.humanrights.gov.au/about/media/hnews/2012/132_12.html).

<sup>18</sup> This definition is consistent with that provided for under established principles and standards of international law: see, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20 (2009), [7] as reflected in s 9 of the RDA.

**Recommendation 3:**

Section 19(2)(b) should be amended to provide that unfavourable treatment includes (but is not limited to) conduct that humiliates or intimidates the other person or has the intent or effect of nullifying or impairing their enjoyment of human rights on an equal footing.

**5.3 REASONABLE ADJUSTMENTS**

The HRAD Bill removes the reasonable adjustments obligation from the definition of discrimination in the DDA in favour of an exception that clarifies that if a reasonable adjustment could have been made then the conduct is not justifiable, claiming that it maintains the status quo of the DDA.<sup>19</sup> The HRLC disagrees and shares the Discrimination Experts Group's view that this represents a diminishing of protections for people with disability.<sup>20</sup>

Instead, the HRLC supports the inclusion of a stand-alone reasonable adjustments provision that explicitly states that a failure to make reasonable adjustments for a person with any protected attribute constitutes discrimination. A contravention of this provision should enable a complaint of discrimination to be made.

Although failing to make reasonable adjustments is not explicitly proscribed in other federal anti-discrimination laws it is, nonetheless, implicit in the concept of indirect discrimination as explained in the AGD Discussion Paper.<sup>21</sup> This is because a failure to make reasonable adjustments – or treating all people alike – can impact unfairly on people with a protected attribute, giving rise to indirect discrimination. Given that such treatment already constitutes discrimination, a stand-alone obligation would simply clarify the existing rights and obligations of parties.

For example, a school's refusal to provide an Auslan interpreter for a deaf student may constitute indirect disability discrimination (by imposing an unreasonable condition or requirement that the student access education in English) or a failure to make reasonable adjustments for the child with a disability. Similarly, a failure by a mining company to provide women's toilets on-site could be characterised as indirect sex discrimination against women (by imposing an unreasonable condition that disadvantages female employees) or a failure to make reasonable adjustments for female employees.

In order to make rights and obligations clearer and achieve consistency, the HRAD Bill should be amended to include a stand-alone provision which explicitly states that a failure to make reasonable adjustments for a person with any protected attribute constitutes discrimination. A contravention of this provision should enable a complaint of discrimination to be made.

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<sup>19</sup> Explanatory Notes, [166].

<sup>20</sup> Discrimination Law Experts Group Submission.

<sup>21</sup> Attorney-General's Department, *Discussion Paper on the Consolidation of Anti-Discrimination Laws* (2012), [58]

**Recommendation 4:**

The reasonable adjustments provisions in the HRAD Bill should be replaced with a stand-alone obligation to make reasonable adjustments for persons with protected attributes.

This stand-alone obligation should not be a 'permanent exception'.

### 3.4 Vilification

The HRLC submits that s 51 of the HRAD Bill should be amended to prohibit vilification on the basis of all protected attributes in all areas of public life.

The same rationale that underpins these protections on the basis of race – namely the aim of 'prohibiting behaviour which affects not only the individual but the community as a whole'<sup>22</sup> – is equally important for all protected attributes. Failing to extend these protections to all attributes protected under the HRAD Bill establishes an unnecessary and unjustified hierarchy.

In order to alleviate concerns about the overbroad application of the prohibition on vilification and consequent limitation on free speech and to ensure that the wording of the HRAD Bill reflects existing jurisprudence, the words 'offend' and 'insult' should be amended to 'seriously offend' and 'seriously insult'.

**Recommendation 5:**

Section 51 should be amended to prohibit vilification on the basis of all protected attributes, and s 51(2)(a) amended to provide that conduct of a person is vilification if the conduct is reasonably likely, in all the circumstances, to seriously offend, insult, humiliate or intimidate another person or a group of people.

### 3.5 Burden of proof

The HRLC strongly supports the introduction of a shifting, or shared, burden of proof in s 124 of the HRAD Bill, a critically important provision to achieve an accessible and effective anti-discrimination law. We note that this amendment does not constitute a 'reversal' of the onus of proof.

A shifting burden of proof would improve the effectiveness and efficiency of the law and bring Australia into line with international best practice. There are both strong justifications and legal precedent for adopting this position in the new anti-discrimination legislation. Put simply, a shifting burden of proof

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<sup>22</sup> Second reading speech, *Racial Hatred Act 1995* (Cth), 15 November 1994, [3336].

recognises that the complainant is best placed to explain how they have been treated, but the respondent is best placed to explain why the treatment occurred.<sup>23</sup>

### Widespread support

The vast majority of submissions made in response to the AGD Discussion Paper recommended changing the burden of proof in anti-discrimination matters. The change is supported by the AHRC, legal experts, leading human rights bodies and community and advocacy organisations who work on the ground assisting vulnerable people.<sup>24</sup> These submissions amplify previous calls for reform to this area of discrimination law, including earlier recommendations of the Senate Standing Committee on Legal and Constitutional Affairs.<sup>25</sup>

### Rationale for changing the burden of proof

Reforming the burden of proof would improve access to justice and enhance the efficiency and effectiveness of discrimination law. The problems associated with the burden of proof pose a real and significant barrier to effective legal protections against discrimination.

Presently, legal protections against discrimination rely on the victim (the 'complainant') to pursue a complaint against the alleged discriminator (the 'respondent'). The AHRC handles complaints in the first instance and attempts to resolve them through conciliation. However, if conciliation is unsuccessful it is up to the complainant to prove to a court – on the basis of complex legal tests – that the unlawful discrimination occurred. This 'burden of proof' weighs too heavily on complainants who, as noted above, are typically the more vulnerable party

Problems arise for complainants especially in relation to proving causation. This is because, in addition to proving the factual circumstances giving rise to the alleged discrimination, the complainant must also prove that they were treated unfavourably or disadvantaged because of a prohibited reason (i.e. sex, race, age or disability).<sup>26</sup> This is an inherently difficult task which is made more complex

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<sup>23</sup> Dominique Allen, 'Improving the Effectiveness of the Sex Discrimination Act: Recommendations from the 2008 Senate Inquiry' (2009) 22 AJLL 100, p 104.

<sup>24</sup> For example, the following submissions to the Discussion Paper recommended a change to burden of proof: Australian Centre for Disability Law, p 2; Australian Human Rights Commission, recommendation 14, p 17; Castan Centre for Human Rights Law (Monash University), pp 11–14; Discrimination Law Experts' Group; Gay & Lesbian Rights Lobby, recommendation 3, p 14; Human Rights Law Centre, recommendation 6, pp 11–12; National Association of Community Legal Centres, pp 18–19; National Aboriginal and Torres Strait Islander Legal Service, recommendation 5, p 10; Public Interest Law Clearing House, recommendation 4, p 11; University of Cambridge (United Kingdom), recommendation 8, p 37.

<sup>25</sup> Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting equality* (2008), [6.46-6.51].

<sup>26</sup> For example, an Indian man refused a private rental property would need to prove that the real estate agent declined his application, in part, due to his race. A woman overlooked for training opportunities by her in the workplace would need to prove that her family responsibilities contributed to the employer's decision.

because respondents 'rarely advertise their prejudices'<sup>27</sup> and unlawful discrimination is often 'infused with, or disguised by, seemingly neutral factors'.<sup>28</sup>

It means that the complainant must provide evidence about the respondent's state of mind when the discrimination occurred. Complainants rarely have access to this information. Any evidence that may assist in proving causation, such as documents, records and statistical data, is usually in the respondent's possession. The complainant may not even know that such evidence exists, or what form it takes.

Often, at the conciliation stage, the respondent will proffer an alternative explanation for its conduct, which does not give rise to unlawful discrimination. Without access to the relevant evidence, it is extremely difficult for the complainant to assess the veracity and strength of that 'innocent' explanation, let alone prove it to be untrue.

Faced with these barriers, many complainants are discouraged from enforcing their rights and simply give up, or settle on nominal or inadequate terms. This is problematic because informal settlements often reflect the parties' relative bargaining power and vulnerabilities, rather than the seriousness of the conduct or the harm caused. While settlements may be desirable in certain circumstances, this is not the case where one party – the victim – comes to the bargaining table at a significant tactical disadvantage due to technical legal barriers.

The very high rates of informal settlements also mean that courts are precluded from making findings of discrimination and, therefore, fail to send a message to the community that discrimination will not be tolerated.

Once a complaint is made, the individual complainant also bears the onus of proving, on the basis of complex legal tests, that the unlawful discrimination occurred.<sup>29</sup> For example, in direct discrimination claims, the complainant must prove they experienced unfavourable treatment on the basis of, or because of, the protected attribute. As noted in the AGD Discussion Paper, this is problematic because 'it requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair'.<sup>30</sup> This is a reason why a significant number of discrimination claims fail, are never brought, or are resolved at conciliation on the basis of settlement arrangements that do not accurately reflect the seriousness of the issue.

#### Australian legal principles and comparative jurisdictions

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<sup>27</sup> *Glasgow City Council v Zafar* [1998] 2 All ER 953 per Lord Wilkinson, cited with approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196 [40].

<sup>28</sup> Australian Human Rights 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, 1 September 2008, p 66.

<sup>29</sup> Save that, in indirect discrimination cases, the respondent bears the onus of proving that condition, requirement or practice that was otherwise discriminatory was reasonable in the circumstances.

<sup>30</sup> AGD Discussion Paper, [52].

Shifting and shared burdens of proof are by no means radical, nor are they inconsistent with Australia's legal history and traditions. Frameworks such as 'innocent until proven guilty' are simplistic and inappropriate transplants of criminal law concepts into civil law matters.

Put simply, it makes sense for the law to require the party with the best access to evidence to produce it.<sup>31</sup> International best-practice reflects this. According to discrimination law experts, 'All major comparable countries use some mechanism to require the respondent to produce evidence of the basis for their action', including the USA, the UK, Canada and the European Union.<sup>32</sup>

Similar provisions already feature in other areas of Australian civil law, such as consumer protection.<sup>33</sup> Federal anti-discrimination laws also already adopt a shared burden, albeit to a limited degree in cases involving indirect discrimination.<sup>34</sup>

The common law also enables a judge to draw an adverse inference where particular evidence is in the domain of one party who fails to adduce it. A shared burden, rather than representing a significant departure from the general law, 'would be an appropriate and adapted extension' of that well-established rule in *Jones v Dunkel*.<sup>35</sup>

Effective models exist in the *Fair Work Act 2009* (Cth) (**FWA**) and in comparative jurisdictions overseas.<sup>36</sup> In the FWA, for example, once a prima facie case for unlawful adverse action (including discrimination) is established by the complainant, the respondent bears the onus of proving that its conduct was not done because of a prohibited reason.

The *Equality Act 2010* (UK) (**UK Act**) provides that '[i]f there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred', unless the respondent shows that it did not contravene the provision.<sup>37</sup> The England and Wales Court of Appeal has commented that the law makes 'good sense given that a complainant can be expected to know how or why he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.'<sup>38</sup>

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<sup>31</sup> Similar comments were made by the England and Wales Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142.

<sup>32</sup> Discrimination Law Experts Group Submission to AGD Discussion Paper, 12.

<sup>33</sup> See, for example, *Australian Consumer Law*, s 4, which places an *evidentiary* burden on a respondent to produce evidence that it had reasonable grounds for making a representation as to future matters in claims involving misleading and deceptive conduct and unconscionable conduct; Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010*, [2.22 – 2.27]. See also *Australian Investment and Securities Commission Act 2001*, s 12BB.

<sup>34</sup> In most federal anti-discrimination acts, the respondent must prove that a condition, requirement or practice which allegedly gave rise to indirect discrimination was 'reasonable in the circumstances': *Age Discrimination Act* s 15(2); *Sex Discrimination Act*, s 7C; *Disability Discrimination Act*, s 6(4).

<sup>35</sup> (1959) 101 CLR 298 as cited by the AHRC, above n 7 at p 67.

<sup>36</sup> AGD Discussion Paper, [50]

<sup>37</sup> *Equality Act 2010* (UK), s 136. The UK adopted the shifting burden of proof to respond to EU Directives on this issue, as noted by the University of Cambridge, above n **Error! Bookmark not defined.** [36].

Preferred model

The HRLC supports the shifting burden of proof in s 124 of the HRAD Act. As noted by the Discrimination Law Experts Group, section 124 imposes a real evidentiary burden on a complainant and only when it is discharged does it shift to a respondent. The threshold is higher than the terms of the *Fair Work Act 2009* (Cth), for example, and will deter frivolous claims.

The shifting burden benefits both complainants and duty-holders by taking a common sense approach and enabling each party to 'tell their side of the story' at an appropriate time. This will enable parties to reach the central issues in dispute earlier and avoiding time-consuming and costly legal argument on preliminary matters.

**Recommendation 6:**

The shifting burden in section 124 of the HRAD Bill should be maintained.

### 3.6 A positive duty

The HRLC considers that the HRAD Bill should be strengthened through the inclusion of positive duties to fulfil Australia's obligations under international human rights law and to address and prevent discrimination at a systemic level.

In accordance with international human rights law, Australia has a positive duty to provide effective protections against discrimination, which incorporates an obligation to strive towards achieving substantive equality.<sup>39</sup>

The HRC has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.<sup>40</sup> The UN High Commissioner for Human Rights has also described Australia's obligations under Article 2(2) of the ICESCR as a duty to 'detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them'.<sup>41</sup>

One way for Australia to better achieve this objective is to impose a positive duty on both the public and private sectors.

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<sup>38</sup> *Igen Ltd v Wong* [2005] EWCA Civ 142.

<sup>39</sup> ICCPR art 26.

<sup>40</sup> Human Rights Committee, General Comment 18 above n 6 [10]. See also Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women* [11].

<sup>41</sup> UN Council on Economic, Social and Cultural Rights, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

### Benefits of a positive duty

The attraction of a positive duty to promote equality and eliminate discrimination is that it is proactive, rather than reactive. In other words, it would promote equality by requiring beneficial conduct rather than by punishing misconduct.

Imposing a positive duty would also go a long way to relieving the individual burden presently placed on individual complainants to enforce their human rights. The proactive promotion of equality also seeks to reduce the overall harm caused by discrimination in the community, instead of merely providing redress after the damage has already been done. In other words, a positive duty recognizes that 'prevention is better than cure'.<sup>42</sup>

The introduction of a positive obligation to promote equality and eliminate discrimination would encourage duty-holders to examine their existing policies and practices with a view to proactive compliance. It would also simplify and streamline the positive duties already imposed under federal laws.

It is anticipated that the introduction of a positive duty would not require duty-holders to develop entirely new systems. As a matter of best-practice, many organisations already have compliance frameworks in place for eliminating discrimination and identifying possible areas of non-compliance. For example, many employers already have policies, process and training in place designed to promote equality. In part, these measures may be designed so that the employer can rely on the 'reasonable precautions' if a discrimination complaint is made against it.<sup>43</sup> Those same employers would also have processes and systems in place to ensure that reasonable adjustments are made for persons with a disability. Depending on the organisation, they may also have an employment opportunity or workplace diversity program in place. The introduction of a positive duty would bring aspects of compliance together in a streamlined way. It would encourage duty holders to engage in a due diligence exercise and extend those existing frameworks, where necessary, to better promote diversity and inclusiveness.

### Framing the positive duty

In order to meet Australia's international legal obligations the positive duty should apply across the public and private sectors.

Historically, Australia's anti-discrimination laws have not distinguished between the public and private sectors. Introducing such a distinction would not only lead to inconsistent outcomes, it would also open the door to unnecessary complexities in identifying what is 'public' and what is 'private'.

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<sup>42</sup> This comment was also made on the introduction of the *Equal Opportunity Act 2010 (Vic)*: second reading speech, 10 March 2010, [785].

<sup>43</sup> The Reasonable precautions defence, which is available under each of the federal anti-discrimination acts, prevents an employer from being vicariously liable if it can establish that it took all 'reasonable precautions' to prevent unlawful discrimination from occurring in the workplace.

In framing a positive duty, regard should be had to ensure that it:

- places positive obligations to assess, monitor, consult and take remedial action to address discrimination where necessary;
- is sustainable and enforceable;
- takes into account the duty-holder's size and resources; and
- is normative, as opposed to a box-ticking exercise.

Compliance with a positive duty to promote equality and eliminate discrimination would, necessarily, be contextually dependent. Larger organisations would need to demonstrate a more sophisticated approach to compliance management than small businesses.

#### Positive duties under existing Australian laws

There are some examples of a positive duty under the DDA. For example, following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the DDA was amended to make 'explicit the positive duty to make reasonable adjustments for a person with disability'.<sup>44</sup> The duty has been incorporated into the definitions of both direct and indirect discrimination (sections 5(2) and 6(2) respectively). In effect, the amendments provide a cause of action for a failure to take positive action to make reasonable adjustments.<sup>45</sup>

Commonwealth employers also have positive duties to promote equality by maintaining 'employment opportunity programs' or 'workplace diversity programs'.<sup>46</sup> Similarly, the *Workplace Gender Equality Act 2012* (Cth) imposes limited obligations on employers to develop and implement workplace programs to ensure equality of opportunity for women, although those protections are not particularly strong.

At the state level, section 15 of the *Equal Opportunity Act 2010* (Vic) includes a positive duty aimed at encouraging proactive self-regulation. The Act requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The Victorian Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people.

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<sup>44</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), 8 [35].

<sup>45</sup> Nonetheless, what is described as a positive duty is still limited in the sense that there is not a proactive obligation on service providers or government agencies to ensure that existing structural features that may disadvantage people with disability are removed or altered. See Commission 'Improved rights protection for people with disability' (2009) <[http://www.hreoc.gov.au/legal/publications/improved\\_dda2009.html](http://www.hreoc.gov.au/legal/publications/improved_dda2009.html)>.

<sup>46</sup> *Public Service Act 1999* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth).

*Positive duties in comparative jurisdictions*

The introduction of a positive duty would also be consistent with emerging international best-practice. A number of comparable jurisdictions, such as South Africa, the United Kingdom, Canada and the United States, have incorporated a proactive positive duty to equality into anti-discrimination laws.<sup>47</sup>

Northern Ireland's positive duty has created a new openness on the part of policy makers to a greater range of perspectives from diverse groups. This has reportedly brought about shifts in consultation, monitoring and policy assessment procedures and encouraged greater public access to information and public services, particularly for minority ethnic groups and people with disabilities.<sup>48</sup>

Similar beneficial results have been measured in relation to the positive duties incorporated in the *Race Relations Amendment Act 2000* (UK). Evaluation of this duty has revealed that around two-thirds of authorities subject to the obligation and 89% of central government considers that the positive duty has been beneficial.<sup>49</sup>

**Recommendation 7:**

The HRAD Bill should be amended to include a positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

### 3.7 Special measures

The HRLC supports the inclusion in the Exposure Draft of provisions relating to the adoption of special measures. Special measures are an essential aspect of the range of measures that should be adopted to eliminate discriminate and ensure substantive equality. However, aspects of the special measures provision currently contained in the HRAD Bill do not conform with international human rights standards. Accordingly, the HRLC recommends that:

- a separate special measures provision be included that applies specifically to racial or ethnic groups or individuals, with a stricter scrutiny applied than is currently contained in section 21; and
- there be a general special measures provision that applies to all other protected attributes, with a lower level of scrutiny applied than is currently contained in section 21.

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<sup>47</sup> *Equality Act 2010* (UK), Part II, Chapter 1; *Northern Ireland Act 1998* (UK) s 75, sch 9; *Fair Employment and Treatment (NI) Order 1998*;

*Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equity Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equal employment opportunity* (US).

<sup>48</sup> Christopher McCrudden, 'The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis', in *Equal Rights and Human Rights – Their Role in Peace Building* (Committee on the Administration of Justice, 1999), 11-23.

<sup>49</sup> Ross Schneider, Commission on Racial Equality, *Towards Racial Equality: An Evaluation of The Public Duty to Promote Race Equality and Good Race Relations in England and Wales*, 2003.

The HRLC notes that our position has changed since our last submission - this updated position better reflects international human rights law and, in particular, the different approach taken to special measures by the Committee on the Elimination of Racial Discrimination.

### Race Discrimination

In the context of special measures for particular racial or ethnic groups or individuals, the HRLC has the following concerns with section 21 of the Exposure Draft.

#### *'Sole or dominant purpose'*

The HRLC is concerned that the proposed 'sole or dominant purpose' test in section 21(2)(a) of the Exposure Draft is inconsistent with Article 1(4) of CERD. Article 1(4) specifically stipulates that special measures must be taken 'for the *sole purpose* of securing adequate advancement of certain racial or ethnic groups or individuals' (emphasis added).

Certain racial or ethnic groups have been subject to 'persistent or structural disparities and de facto inequalities resulting from the circumstances of history'.<sup>50</sup> CERD has explained that 'the reference to 'sole purpose' limits the scope of acceptable motivations for special measures within the terms of the Convention'.<sup>51</sup> A sole purpose test only allows for one purpose, which in this case must be the purpose of 'securing the adequate advancement' of the relevant group. The 'sole purpose' restriction within article 1(4) has been interpreted as a safeguard against the misuse of special measures.<sup>52</sup>

Accordingly, a separate special measures provision for race should be included, which contains a stricter 'sole purpose' test.

### Participation of the affected group

The special measures provision in the HRAD Bill does not contain any requirement for participation of the affected group in the design and implementation of special measures. Both international and Australian domestic law is clear that the participation of the intended beneficiaries is an important, and perhaps essential, element of a special measure. In this respect, the 'reasonable person' test provided for in section 21(2)(b) is problematic.

In order to constitute a special measure under article 1(4) of CERD, the measure must be taken for the sole purpose of the advancement of the intended beneficiaries. The notion of advancement must be considered from the perspective of the beneficiaries, rather than that of the benefactor. The

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<sup>50</sup> CERD, *General Recommendation No. 32: The meaning and scope of special measures in the International Covenant on the Elimination of All Forms of Racial Discrimination*, 24 September 2009, [22].

<sup>51</sup> CERD General Recommendation No. 32, [21].

<sup>52</sup> Loper, K 'Substantive Equality in International Human Rights Law and its Relevance for the Resolution of Tibetan Autonomy Claims' 37 N.C. J. Int'l L. & Com. Reg. 1 at 21.

requirement for consultation with those affected by a special measure was affirmed by CERD in its General Recommendation No. 32.<sup>53</sup>

States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

This accords with the principle that measures designed to secure the advancement of a particular group must have the buy-in and support of that group.

Furthermore, where measures have a potentially negative effect or impose a burden on a particular group or community, they may only be special measures when enacted with the *consent* of the affected people.<sup>54</sup> This approach was confirmed by Brennan J in *Gerhardy v Brown*, who emphasised that those intended to benefit from a special measure should agree to it.<sup>55</sup>

The presence or absence of the participation, or indeed consent, of those affected by a measure is relevant both to the question of the 'sole purpose' of the measure and to the question whether the measure is an 'advancement'.

#### Protected Attributes Other Than Race

The HRLC considers that a lower level of scrutiny than the proposed 'sole or dominant purpose' test should apply to all protected attributes other than race. The test should be broadened to ensure a more enabling approach to the adoption of special measures. This would be consistent with the approach taken by the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 25,<sup>56</sup> as well as the existing test contained in the *Sex Discrimination Act 1984* (Cth). This position ensures that employers and other organisations are not substantially limited from undertaking positive measures towards achieving substantive equality.

#### General Drafting

In addition to the specific aspects discussed above, in order to ensure compliance with international human rights standards the HRLC recommends that section 21(2) be amended to clarify that:

- the purpose of a special measure is to further the objects of the legislation;

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<sup>53</sup> CERD General Recommendation No. 32, [18].

<sup>54</sup> See, eg, Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), 261; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) at [20] – [21].

<sup>55</sup> (1985) 159 CLR 70, at 135, 139.

<sup>56</sup> CEDAW, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, available at [http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf).

- the party seeking to undertake a special measure has the burden of proving that the measure is a special measure; and
- the participation of the proposed beneficiaries should be included in sub-section (b), rather than the proposed 'reasonable person' test.

In addition to the concept of necessity, the HRLC also considers that section 21(2) should include a reference to appropriateness, legitimacy and proportionality. Article 1(4) of CERD specifically incorporates a proportionality requirement through the words 'requiring such protection as may be necessary'.<sup>57</sup> The CERD Committee has identified that a measure needs to be proportionate to be considered a special measure.<sup>58</sup>

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.

#### Comments on the Explanatory Memorandum

The HRLC considers that it would be useful for the Explanatory Memorandum to include:

- an explanation that there is a clear distinction between temporary special measures to accelerate the achievement of substantive equality, and other general social policies adopted to improve the realisation of rights by particular groups. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of particular groups cannot be characterised as being temporary special measures;<sup>59</sup> and
- the onus rests with the party seeking to (ie the state) to demonstrate that a law, policy or program is a special measure. Justification for introducing a special measure should include references to concrete goals and targets, timetables, the reasons for choosing one type of measure over another, as well as the accountable institution for monitoring implementation and progress.<sup>60</sup>

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<sup>57</sup> When considering whether limits on rights are 'necessary', both international and foreign domestic jurisdictions frequently use the principle of proportionality in making that assessment : Carolyn Evans & Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act*, 173 - 177.

<sup>58</sup> General Recommendation No. 32 at [16].

<sup>59</sup> See CEDAW General Recommendation No 25 at [19], CERD General Recommendation 32 at [14]-[15].

<sup>60</sup> See CEDAW General Recommendation No 25 at [28], [36].

**Recommendation 8:**

The HRAD should be amended to include a separate special measures provision for race that contains a stricter 'sole purpose' test

Section 21(2) be amended to clarify that:

- the purpose of a special measure is to further the objects of the legislation;
- the party seeking to undertake a special measure has the burden of proving that the measure is a special measure; and
- the participation of the proposed beneficiaries should be included in sub-clause (b), rather than the proposed 'reasonable person' test.

Section 21(2) should also include a reference to appropriateness, legitimacy and proportionality.

The Explanatory Memorandum be amended to include:

- an explanation that there is a clear distinction between temporary special measures to accelerate the achievement of substantive equality, and other general social policies adopted to improve the realisation of rights by particular groups. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of particular groups cannot be characterised as being temporary special measures; and
- clarification that the onus rests with the party seeking to (ie the state) to demonstrate that a law, policy or program is a special measure. Justification for introducing a special measure should include references to concrete goals and targets, timetables, the reasons for choosing one type of measure over another, as well as the accountable institution for monitoring implementation and progress.

## 4. Protected Attributes

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### 4.1 Protected attributes under international human rights law

The HRLC has previously recommended the expansion of the list of protected attributes to give effect to Australia's international human rights obligations.

The HRC in 2009 expressed concern that the rights to equality and non-discrimination are not comprehensively protected under federal law and recommended that Australia 'adopt Federal legislation, covering all ground and areas of discrimination to provide comprehensive protection for the

right to equality and non-discrimination'.<sup>61</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights has recommended that Australia 'enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds.'<sup>62</sup>

*A non-exhaustive list of protected attributes*

The HRLC has previously recommended that, consistent with Australia's international human rights obligations, the HRAD Bill should contain a non-exhaustive list of protected attributes which, in addition to the attributes already protected, specifically includes the following:

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|--|---|
| ▪ sexual orientation                             | ▪ religious belief/activities                                   |
| ▪ gender identity                                | ▪ political belief/activity                                     |
| ▪ intersex status                                | ▪ trade union membership/industrial activity                    |
| ▪ criminal record                                | ▪ family responsibilities                                       |
| ▪ social status                                  | ▪ characteristics which are extensions of other characteristics |
| ▪ status as a victim of domestic/family violence | ▪ other status  |

Each of the attributes listed above are afforded specific protection under international human rights law, or fall into the legal category of 'other status'. The HRLC makes a number of further specific recommendations below in relation to specific attributes.

Both the ICCPR<sup>63</sup> and ICESCR<sup>64</sup> prohibit discrimination on the basis of a number of prescribed attributes as well as any 'other status'. International jurisprudence from the UN Human Rights Committee establishes that the term 'other status' refers to a clearly definable group of people linked by their common status.<sup>65</sup>

Based on the criteria adopted by the HRC, for example, it is clear that discrimination on the grounds of 'irrelevant criminal record', 'homelessness' and 'social status' would fall within the definition of 'other status'. While we maintain that these attributes should be specifically protected in the HRAD Bill – not merely covered by an 'other status' attribute – these are all good examples of emerging forms of discrimination which international human rights law has come to recognise. Non-exhaustive lists of protected attributes have been used in other jurisdictions, including South Africa, which extends protections to victims of discrimination on the basis of specified characteristics as well as any other

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<sup>61</sup> United Nations Human Rights Committee, Concluding Observations: Australia, UN CCPR, 59<sup>th</sup> session, 12 CCPR/C/AUS/CO/5 (2009).

<sup>62</sup> United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations: Australia, UN CESR, 42<sup>nd</sup> session, [14], E/C.12/AUS/Co (2009).

<sup>63</sup> See ICCPR, art 2(1) and 26.

<sup>64</sup> ICESCR, art 2.

<sup>65</sup> See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses HRC decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

grounds which 'cause or perpetuate systemic disadvantage or cause unequal enjoyment of fundamental rights.'<sup>66</sup>

The inclusion of 'other status' as a protected attribute in HRAD Bill would ensure its consistency with Articles 2(1) and 26 ICCPR and Article 2(2) of the ICESCR. It would also enable the Consolidated Act to be flexible and responsive to new or evolving problems of discrimination.

**Recommendation 9:**

The HRAD Bill should be amended to include a non-exhaustive list of protected attributes and, to that end, should prohibit discrimination on the basis of a person's 'other status'.

## 4.2 Sexual orientation, gender identity, gender expression and intersex status

The HRLC welcomes the Federal Government's commitment to include new protections from discrimination on the bases of sexual orientation and gender identity.

The HRLC urges the Committee to consult with the LGBTI community and its representative bodies about the appropriateness of the definitions in the HRAD Bill and particularly refers the committee to the submissions of the Victorian Gay & Lesbian Rights Lobby (**VGLRL**), A Genda Agenda, Transgender Victoria (**TGV**) and Organisation Intersex International Australia (**OII**).

### Sexual Orientation

The term 'sexual orientation' is often used to encompass concepts such as homosexuality, heterosexuality, lesbianism and bisexuality. The HRLC supports a broad, inclusive definition of sexual orientation which is not restricted to these binaries and labels and thus supports the definition of 'sexual orientation' contained in the HRAD Bill. We support the use of the term 'sexual orientation' over the term 'sexuality' and encourage the committee to consider the submissions of the VGLRL and other LGBTI groups in this regard.

**Recommendation 10:**

The definition of 'sexual orientation' in the HRAD Bill be retained.

### The importance of imputation and association

We support the HRAD Bill definition's coverage perceived or imputed sexual orientation or gender identity, to cover circumstances where the discriminator bases their conduct on wrongful assumptions about a person's sexual orientation or gender identity.

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<sup>66</sup> *Equality and Prevention of Unfair Discrimination Act 2000* (Act No. 4 of 2000) (South Africa).\.

### Gender identity

We support the inclusion of the 'gender identity' attribute but recommend amendments in line with the positions of A Gender Agenda, TGV, OII and the VGLRL.

The definition of 'gender identity' should be amended to encompass gender expression. This refers to the way that a person expresses gender through their outward presentation, such as style of dress, haircut, make-up, mannerisms, tone of voice etc. This offers explicit protection for individuals who suffer discrimination who are perceived by some to deviate from certain gender stereotypes. Butch lesbians, for example, often suffer discrimination due to their gender presentation and expression.

The requirement that people identify as a particular gender 'on a genuine basis' should also be removed, as it is contradictory with other aspects of the HRAD Bill (for example, the 'association' and 'imputation' coverage) and is likely to create legal uncertainty, given the term is not defined. The Explanatory Notes do not explain the rationale behind the inclusion of this requirement.

The HRAD Bill was prepared prior to the introduction of the *Anti-Discrimination Amendment Bill 2012* (Tas) in Tasmania, which addresses both of the concerns above. Given paragraph [85] of the Explanatory Notes provides the current definition of gender identity aligns with 'the highest current standards of State and Territory practice', there is good reason to consider revising the definition in light of developments in Tasmania.

### Intersex status

The 'gender identity' purportedly protects intersex people from discrimination. However, the definition of gender identity misunderstands and incorrectly describes intersex people, and inadequately protects them from discrimination as a result.

Protection for intersex Australians is not an issue of identity, it is an issue of protecting them on the basis of their biological differences that may result in discrimination.<sup>67</sup> Issues of sex differences are not related to gender – the inclusion of intersex people under the heading 'gender identity' creates unnecessary confusion in this regard. More importantly, any effective protection for intersex people requires the protected attribute to be defined without any reference to gender identification. Accordingly, inclusion of intersex people under the term 'gender identity' is inappropriate.

Government programs that have been designed for LGBTI Australians have specifically understood that sex and gender are two distinct issues and that intersex people, while sharing similarities with other members of the LGBTI community, have their own specific differences that require protection from discrimination, stigma and prejudice.

The HRLC supports the recommendation of OII and other LGBTI organisations that part B of the definition of 'gender identity' be separated into its own protected attribute. The HRAD Bill should adopt the definition used in the *Anti-Discrimination Amendment Bill 2012* (Tas), which has been endorsed and supported by OII and other LGBTI organisations.

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<sup>67</sup> Organisation Intersex Australia International Ltd, *Submission on the proposed federal Human Rights and Anti-Discrimination Bill* (2012), 1.

**Recommendation 11:**

The definition of 'gender identity' in the HRAD Bill be amended in line with the *Anti-Discrimination Act 2023* (Tas) including the separation of part B of the definition into a separately described protected attribute for intersex people.

### 4.3 Criminal record

The HRLC has previously recommended that criminal record should be included as a protected attribute in a consolidated federal anti-discrimination law. We strongly oppose the exclusion of criminal record from the list of protected attributes in s 17 of the HRAD Bill, and further note that the exclusion of this attribute, which is currently protected under the AHRCA, is inconsistent with the Government's stated commitment to non-diminution of any existing protections in the equality law consolidation process.

#### Rationale for inclusion

Persons with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.<sup>68</sup> This form of discrimination persists despite research demonstrating that a person's prior criminal record is an unreliable indicator of future behaviour and that discrimination is an impediment to rehabilitation, social reintegration and workforce participation.<sup>69</sup>

#### Australia's international law obligations

Australia has ratified the International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*<sup>70</sup>, which requires all parties to:

...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

In addition to specifying certain grounds of non-discrimination, the ILO 111 also leaves room for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further

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<sup>68</sup> Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform*, 2005 <[http://www.jobwatch.org.au/uploaded\\_files/144623crvpr0706.pdf](http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf)>.

<sup>69</sup> UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young: 'Criminal careers of those born between 1953 and 1978', *Home Office Statistical Bulletin* 4/2001. See also: Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, 6; Australian Law Reform Commission 'Spent Convictions' 1987, (ALRC 37).

<sup>70</sup> ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

grounds, including 'criminal record'.<sup>71</sup> Therefore, there is an obligation on Australian governments to pursue policies to ensure that discrimination on the ground of criminal record is eliminated.

Removal of criminal record from the jurisdiction of the Commission raises leave unclear how Australia will comply with these obligations.

#### Alignment with State and Territory protections

The laws of a small number of States protect against criminal record discrimination. Spent convictions schemes operate in all States and Territories with the exception of Victoria. These schemes assist in preventing discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.<sup>72</sup> The *Fair Work Act 2009* (Cth) also prohibits dismissal on the basis of criminal record.<sup>73</sup> Protecting against criminal record discrimination at a federal level would better align federal law with existing best practice among States and Territories and ensure that important social policy objectives are advanced, that is, reintegrating and rehabilitating offenders and breaking the cycle of crime and disadvantage.

#### The application of the justification defence

If 'criminal record' was included as a protected attribute the application of the justification defence in the HRAD Bill would ensure that employers and others would be able to discriminate on the basis of a person's criminal record when it was reasonable and proportionate to do so for a legitimate aim.

#### **Recommendation 12:**

The HRAD Bill should be amended to include 'criminal record' as a protected attribute and protection should be extended to all areas of public life.

Alternatively, the mandated review of exceptions to be conducted in 3 years should explicitly consider the inclusion of the criminal record attribute.

## 4.4 Attributes covered only in work related areas

The HRAD Bill proposes to make discrimination on the following grounds unlawful in relation to work and work related areas only:

- Family responsibilities

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<sup>71</sup> *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth). Other grounds of discrimination added by this regulation include: age; medical record; impairment; marital status; mental, intellectual or psychiatric disability; nationality, physical disability; sexual preference; and trade union activity.

<sup>72</sup> In every Australian state and territory, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia the spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

<sup>73</sup> *Fair Work Act 2009* (Cth), Div 2, s 382.

- Medical history
- Political opinion
- Religion
- Social origin
- Nationality or citizenship
- Industrial history

The recognition of the unlawfulness of workplace discrimination in the basis of these attributes is welcome. The regime under the AHRCA which allowed for complaints which, in proven, failed to give rise to a remedy was confusing for employers and complainants alike. However, the HRLC recommends that the scope of protection be expanded to all areas of public life rather than limited to work and work related areas. The HRLC is concerned that limiting the protections of these attributes to work and work-related areas creates unfairness and raises issues of inconsistency and workability of the legislation.

Limiting the protection to work and work related areas also imposes an arbitrary and unfair limitation on the protections for these affected groups and effectively creates a hierarchy of class 'A' and class 'B' attributes. There is no principled reason for the limitation of protections in this way.

Arguments regarding consistency, simplicity and regulatory burden would tend towards extending protections to all areas of public life rather than the limited scope of work, given that State and territory laws already provide general coverage for various of these attributes.

Further, we endorse the Discrimination Law Experts Group's concern regarding the drafting of s 22(3) and recommend amendment of this provision to align with the drafters' intention regarding coverage.

#### *Australia's international human rights obligations*

As is the case with criminal record discrimination, discrimination against individuals on the basis of religion, political opinion, social origin, nationality and industrial activity is covered by ILO 111.<sup>74</sup>

These grounds are also enshrined in other international instruments. For example, Article 26 of the ICCPR refers to protection from discrimination on grounds that include religion, political or other opinion and national or social origin.

To achieve consistency and compliance with international human rights law, protections for the attributes set out in s 23(3) should be extended to all areas of public life.

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<sup>74</sup> Note, the ground of family responsibilities is covered by another ILO convention and CEDAW and discussed further below.

**Recommendation 13:**

The HRAD Bill should be amended to extend protections for the attributes set out in s 22(3) to all areas of public life.

If this recommendation is not adopted, the wording of s 22(3) should be amended in line with recommendation 12 of the Discrimination Law Experts Group submission.

#### 4.5 Religious belief/activity

The HRLC has previously recommended the inclusion of religious belief and/or activity as a protected attribute and welcomes the introduction of the new attribute of religion in the HRAD Bill, albeit limited to the area of work. The HRLC continues to recommend that coverage be extended to all areas of public life and minor amendments to clarify the scope and meaning of the attribute 'religion'. According to [98] of the Explanatory Notes the word 'religion' is said to take its ordinary meaning.

##### Rationale for protection in 'all areas of public life'

Including religious belief and/or activity as an additional protected attribute in the HRAD Bill would reduce inconsistencies between Federal and State and Territory laws and strengthen protections for vulnerable communities within Australia in line with Australia's human rights obligations, including those arising under the ICCPR and ICESCR.

The volume of inquiries and complaints made to equal opportunity regulators in other Australian jurisdictions relating to religious discrimination and/or vilification also evidences the need for greater protections at the federal level. In particular, 'Islamophobia' and discrimination against people of Muslim backgrounds has been an increasing problem in Australia. This has been reflected in a number of recommendations made in the Universal Periodic Review of Australia by the Human Rights Council and other reviews by United Nations treaty bodies. Considerable research exists which evidences the discrimination experienced by Muslim Australians, both on the basis of race and religion.<sup>75</sup>

##### The need to protect those with no religious beliefs

The HRLC supports the recommendation of the Discrimination Law Experts Group that the attribute of religion should be broadly defined to include not having a religion or religious belief, consistent with international human rights law. The Human Rights Committee has issued a General Comment on Article 18 (freedom of thought, conscience, religion and belief) of the ICCPR which responds directly to this issue, stating that:

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<sup>75</sup>See, eg, Scott Poynting, Report to the Human Rights and Equal Opportunity Commission, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2011* (19 April 2004) <[http://www.hreoc.gov.au/racial\\_discrimination/isma/research/UWSReport.pdf](http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf)>; Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria (The Ongoing Impact of September 11 2001)* (11 December 2008) <[http://www.islamicwomenswelfare.org.au/files/iwwcv\\_race\\_faith\\_report.pdf](http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf)>.

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.<sup>76</sup>

The HRAD Bill or Explanatory Notes should explicitly note that such beliefs are protected.

**Recommendation 14:**

The HRAD Bill should be amended to provide that discrimination on the basis of 'religion' is unlawful in all areas of public life.

The HRAD Bill and/or Explanatory Notes should be amended to clarify that the 'religion' attribute extends to not having a religious belief.

#### 4.6 Social status/origin

The HRLC has previously recommended the inclusion of 'social status' as a protected attribute. The Exposure Draft includes 'social origin' as a protected attribute and limits the scope of protection to work and work related areas. The Explanatory Notes to the Exposure Draft state that the term 'social origin' 'takes its ordinary meaning'.

The HRLC recommends that social origin should be extended to include 'social status' in order to include homeless persons and those who are at risk of – or recovering from – a period of homelessness. 'Social status' is defined to mean a person's status as homeless, unemployed or a recipient of social security payments.<sup>77</sup> Protection for this attribute should also extend to all areas of public life, due to the significant vulnerability of homeless people and the evidence of the discrimination they face in a range of areas.

We commend the submissions of the PILCH Homeless Persons Legal Clinic and the Public Interest and Advocacy Centre to the committee for more detail on the issues discussed below.

#### Rationale for amendment

Research has shown that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment. For example, a 2006 study by the PILCH Homeless Persons Legal Clinic found that amongst the 183 people experiencing homelessness that were surveyed, almost 70 per cent were treated unfairly in the area of accommodation, on the grounds of homelessness or social status. A

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<sup>76</sup> UN HRC General Comment No.22 on Article 18 available at <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>

<sup>77</sup> Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

further 60 per cent experienced unfair treatment on the same grounds in the area of goods and services.

Moreover, discrimination on the basis of homelessness is often compounded by other forms of discrimination, such as discrimination on the basis of a person's disability or status a victim of domestic/family violence. Indeed the Australian Government has recognised the many causes of homelessness in its White Paper, including long term unemployment, people experiencing issues relating to mental health and emotional wellbeing, substance abuse and family breakdown.<sup>78</sup>

The Special Rapporteur on Adequate Housing has stated that:<sup>79</sup>

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

Similarly, the Committee on Economic, Social and Cultural Rights acknowledges that:<sup>80</sup>

A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

Undoubtedly, homelessness is a human rights issue. As referred to above, international human rights bodies acknowledge that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. The HRC has found a difference between employed and unemployed persons to constitute discrimination on the basis of 'other status'.<sup>81</sup>

Despite the strong evidence that discrimination on the ground of social status is prevalent, it currently remains lawful in all Australian jurisdictions.

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<sup>78</sup> Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), *The Road Home: A National Approach to Reducing Homelessness* (2008), Foreword, <[www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm](http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm)> (viewed 2 August 2009).

<sup>79</sup> M Kothari, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (E/CN.4/2005/48), [3].

<sup>80</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, 2 July 2009 <<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>>

<sup>81</sup> *Cavalcanti Araujo-Jongens v Netherlands* (418/90).

*Social status discrimination in comparative jurisdictions*

A number of overseas jurisdictions provide legal protections against social status discrimination. For example, in New Zealand, the *Human Rights Act 1993* prohibits discrimination on the basis of 'employment status', which is defined as being unemployed, receiving an income support benefit or receiving accident compensation payments.<sup>82</sup>

Similarly, the Canadian *Charter of Rights and Freedoms 1982*, which contains a non-exhaustive list of prohibited grounds of discrimination,<sup>83</sup> has been interpreted to provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor.

Discrimination on the basis of 'source of income' is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term 'receipt of public assistance'.<sup>84</sup> The province of Québec has human rights legislation prohibiting discrimination on the ground of 'social condition'.

In the United States, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution – which provides equal protection of the law – has been interpreted as prohibiting discrimination on the basis of status, including socio-economic status and homelessness.<sup>85</sup>

In Europe, the right to freedom from discrimination on the grounds of 'social origin' is recognised in Article 14 of the European Convention on Human Rights (**ECHR**). Commentators have argued that the attribute of 'social origin' includes the ground of 'social status'.<sup>86</sup> The United Kingdom's *Human Rights Act 1998* (UK) (**UK HRA**), which was enacted to give legislative effect to the ECHR, incorporates Article 14 of the ECHR and provides equivalent protections against 'social origin' and, by extension, 'social status' discrimination.

**Recommendation 15:**

The HRAD Bill should be amended to extend or define the protected attribute of 'social origin' to include 'social status'. 'Social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

**4.7 Victim of domestic/family violence status**

The HRLC has previously recommended a person's 'status as a victim of domestic or family violence' be included as a protected attribute. As discussed below, this would assist Australia to improve substantive equality between the sexes, as required under international human rights law.

<sup>82</sup> Human Rights Act 1993 (NZ) s 21 sub-s 2

<sup>83</sup> Article 15(1) provides that 'Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination'.

<sup>84</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>>.

<sup>85</sup> See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

<sup>86</sup> See, for example, Lynch and Stagoll, above n 77.

### Rationale for inclusion

The United Nations Committee on the Elimination of Discrimination Against Women acknowledges that gender-based violence, such as domestic or family violence, is a form of discrimination of itself, which compounds other inequalities in public life. The Committee has said:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and **impair their ability to participate in family life and public life on a basis of equality.**<sup>87</sup> (Emphasis added).

For these reasons the Committee has called on all member states, including Australia, to take 'all legal and other measures that are necessary to provide effective protection of women against gender-based violence'.<sup>88</sup>

The inclusion of 'status as a victim of domestic or family violence' as a protected attribute would play an important role in protecting Australians, especially women, from both the immediate and consequential harm resulting from domestic or family violence.

### The importance of protection in the workplace

Such protections are especially important in the workplace. Financial independence is vital for many women trying to escape violent relationships. Hence, maintaining secure, paid employment often provides a pathway for women out of domestic/family violence situations.<sup>89</sup> Research has shown, however, that victims of domestic/family violence tend to experience discrimination and inequality in the workplace.<sup>90</sup> A survey conducted by the Australian Domestic and Family Violence Clearinghouse found that being a victim of domestic/family violence limited workers' capacity to obtain secure employment. It also resulted in workers being tired, distracted, unwell or late, thereby limiting their ability to hold down jobs and progress in the workplace.<sup>91</sup> Many victims do not disclose the reasons for their decline in performance either for fear of the consequences or because they believe the information is not relevant in the employment context, which compounds the harm they suffer.

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<sup>87</sup> Committee on the Elimination of Discrimination Against Women, General Comment No. 19, 11<sup>th</sup> session, 1992 at paragraph 23.

<sup>88</sup> Committee on the Elimination of Discrimination Against Women, General Comment No. 19, 11<sup>th</sup> session, 1992 at paragraph 24(t).

<sup>89</sup> Australian Law Reform Commission, *Family Violence – Commonwealth Laws, Discussion Paper No 76* (August 2011) at paras 14.11 – 14.13, available at: [www.alrc.gov.au/publications/family-violence-and-commonwealth-laws0dp-76-summary](http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws0dp-76-summary).

<sup>90</sup> Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law*, Working Paper, 12 December 2011. See also: Braaf and Meyreing, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011, < [www.austdvclearinghouse.unsw.edu.au/financial\\_security.htm](http://www.austdvclearinghouse.unsw.edu.au/financial_security.htm).>; VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (March 2010) 47; McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

<sup>91</sup> L McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

Incorporating this protection in the HRAD Bill would encourage victims to speak-up about domestic/family violence within a protective framework.

*Discrimination in other areas of life*

Discrimination against victims of domestic/family violence is not limited to the workplace. Victims of domestic violence also tend to experience discrimination in access to goods and services and the provision of housing. Given that women are disproportionately affected by domestic/family violence, this type of discrimination contributes to the substantive inequalities that women experience in *all* aspects of public life. It also impacts on women's equal enjoyment of other rights, such as the right to health.<sup>92</sup>

*Conclusion*

Including a person's 'status as a victim of domestic violence' as a protected attribute in the HRAD Bill would go some way towards realising women's rights and promoting substantive equality in Australia. The HRLC recommends that the HRAD Bill be amended to include this new protected attribute. Domestic and family violence should be defined broadly to include both physical and non-physical forms of violence (such as emotional and economic abuse) perpetrated by a family member or other person who is in a domestic relationship with the victim.<sup>93</sup>

**Recommendation 16:**

The HRAD Bill should be amended to include a person's 'status as a victim of domestic or family violence' as a protected attribute in all areas of public life.

Alternatively, 'status as a victim of domestic or family violence' should be included as a protected attribute in relation to work place discrimination only.

## 4.8 Family and carer responsibilities

The HRLC welcomes the inclusion of the protected attribute of 'family responsibilities' and protections in relation to work and work related areas, consistent with Australia's obligation to prevent discrimination against workers with family responsibilities under international law. However, the HRLC supports the extension of these protections to all areas of public life.

In addition, while the HRAD Bill would cover carer responsibilities implicitly to a considerable extent, it would be improve the clarity of the legislation to explicitly extend the description of the family responsibilities attribute to include carer responsibilities.

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<sup>92</sup> E.g. research undertaken by VicHealth has shown that family violence is the leading contributor to death, disability and illness in women aged 15 – 44 years. See VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004), 8.

<sup>93</sup> Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discriminaton Law*, Working Paper, 12 December 2011 at pp 16 – 17.

The definition of ‘family and carer responsibilities’ should include domestic relationship and cultural understandings of family, including kinship groups, and members of the carer’s household. As noted by the AHRC, this would assist situations, including many Aboriginal and Torres Strait Islander communities, where situation are cared by for extended family members.

The HRLC supports the submissions of ERA and the Discrimination Law Experts Group that recommend a more expansive and inclusive definition of ‘family responsibilities’.

**Recommendation 17:**

The HRAD Bill should be amended to provide that discrimination on the basis of ‘family responsibilities’ is unlawful in all areas of public life.

This attribute of ‘family responsibilities’ should be described as ‘family and carer responsibilities’ and amended to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer’s household.

#### 4.9 Characteristics extension and marital status

The HRLC welcomes the extended meaning of having a protected attribute in s 19(4) of the HRAD Bill. This provision ensures that, for example, a child of a same sex couple is protected against discrimination at school on the basis of his parents’ sexual orientation. Discrimination against an individual on the basis that they are perceived to be ‘of middle eastern appearance’ when they are, in fact, a completely different racial or ethnic identity, would also be unlawful.

The HRLC also supports the extension of the attribute of marital status to include relationship status. This provides important and welcome coverage for de-facto same sex and other LGBTI couples.

**Recommendation 18:**

The extended meaning of having a protected attribute in s 19(4) of the HRAD Bill be maintained.

The inclusion of the protected attribute of ‘marital or relationship status’ be maintained.

#### 4.10 Intersectional discrimination

The HRLC welcomes the introduction of protections against discrimination on a *combination* of protected attributes, in order to better recognise and address intersectional discrimination.

Background

The concept of intersectional discrimination recognises the multi-layered and complex discrimination experienced by people because of their overlapping and inextricably linked attributes.

For example, a government policy may impact unequally on Aboriginal women, despite the fact that Aboriginal men and non-Aboriginal women are reasonably able to comply with that policy. In this example, it is the combination of race and gender which forms the ground of the unequal treatment. This is an example of intersectional discrimination. Compare this with a situation whereby an employer denies an employee the opportunity to undergo training because she is a woman and subsequently refuses her a promotion because she is Aboriginal. In the second example, the current laws can respond to the discrimination by compartmentalising the discriminatory acts.

### Rational for protection

In circumstances involving intersectional discrimination, complainants may be deterred from pursuing their right to equality beyond the Commission stage because they feel that the law does not adequately account for their experiences.<sup>94</sup> While it may be possible to discuss cases involving intersectional discrimination informally at the Commission stage, complainants experiencing intersectional discrimination face extreme challenges when it comes to particularising and proving the discrimination before a Court. Hence, access to justice is limited for victims of intersectional discrimination.

### International human rights law principles

Intersectional discrimination also presents a significant barrier to achieving substantive equality, as recognised under international human rights law. For example, the CEDAW Committee has stated that:<sup>95</sup>

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.

Further, in its 2006 Concluding Observations on Australia, the CEDAW Committee specifically noted the compounded discrimination faced by Indigenous, refugee and minority women and women with disabilities.<sup>96</sup>

Likewise, the HRC has stated that:<sup>97</sup>

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<sup>94</sup> See Beth Gaze, Submission No 50 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sex Discrimination Report, 2.

<sup>95</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30th Session, 2004, [12].

<sup>96</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5.

<sup>97</sup> Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) [30].

Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

The Committee on the Elimination of Racial Discrimination also considered this issue in their General Comment on the gender-related dimensions of racial discrimination, stating:<sup>98</sup>

Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

Acknowledging intersectional discrimination in the Consolidated Act would assist the law to respond to circumstances where person's experience of discrimination does not fit into a particular box, such as 'sex', 'age', 'race' or 'disability' discrimination. Sometimes people are treated unfavourably for a number of reasons that cannot be logically and clearly separated out from one another.

The Discrimination Law Experts Group has identified a drafting problem in their submission which appears to present an unintended consequence in relation to some complaints. Section 22(3) should be amended in line with recommendation 12 of their submission.

**Recommendation 19:**

The specific protections against intersectional discrimination in the HRAD Bill should be maintained subject to the minor amendments proposed by the Discrimination Law Experts Group (recommendation 12).

## 5. Protected Areas of Public Life

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### 5.1 Equality before the law

The HRLC strongly opposes the restriction of the equality before the law protection to the attributes of the RDA. The Government has failed to present a cogent policy basis for this position. Indeed, the exclusion of other protected attributes from the benefit of s 60 contradicts the objects clause of the HRAD Bill, which is drafted in reference to 'all' people.

The HRAD strongly supports the expansion of s60 to all protected attributes, consistent with Australia's obligations under international law, the recommendations of previous inquiries and the

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<sup>98</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25: Gender related dimensions of racial discrimination*, 20/03/2000.

Government's own stated purpose of addressing 'inconsistencies' in federal anti-discrimination law through the consolidation process.<sup>99</sup>

### Background

As noted in the AGD Discussion Paper, the right to equality before the law requires all individuals to be treated equally by the law and to be afforded equal protection of the law. Therefore, equality before the law is concerned with operation and effects of laws rather than the acts of individuals.<sup>100</sup> It requires all laws enacted by the government to be non-discriminatory.<sup>101</sup>

### International human rights law obligations

The right to equality before the law is a cornerstone of Australia's international human rights obligations. Indeed, this right is the focus of the specific instruments on which our Federal anti-discrimination laws are based.

For example, Article 26 of the ICCPR states:

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. (Emphasis added)

Similarly, Article 12 of the CRPD states as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

...

Article 15(1) of CEDAW also provides that 'States Parties shall accord to women equality with men before the law'.<sup>102</sup>

Despite very clear statements under each of these instruments, the right to equality before the law is not protected in the SDA, the DDA, the ADA or the AHRCA.<sup>103</sup> The RDA is the exception of the four

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<sup>99</sup> Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of Anti-Discrimination Legislation', (Joint media release, 21 April 2010).

<sup>100</sup> *Mabo v Queensland* (1989) 166 CLR 186 per Deane J at 230; *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514 per Goldberg and Hely JJ at 523 [34].

<sup>101</sup> UN Human Rights Committee, General Comment No. 18 above n 6.

<sup>102</sup> See also CEDAW, art. 2(c).

<sup>103</sup> This is despite the right to equality before the law being stated as an object of the *Disability Discrimination Act* (s 3(b)) and the *Age Discrimination Act* (s 3 (b)). The preamble to the *Sex Discrimination Act* states that: '...every individual is equal before the law and under the law, and has the right to the equal protection and equal benefit of

Federal anti-discrimination laws. Section 10 of the RDA provides for a general right to equality before the law, which we discussed, in some detail, in our previous submission.<sup>104</sup>

The failure to consistently guarantee the right to equality before the law represents a significant gap in the protection of human rights in Australia. This means that Australia is not currently complying with its obligations under international human rights instruments.<sup>105</sup>

This gap has been the subject of criticism by human rights organisations and prominent inquiries over several years.<sup>106</sup> For example, as noted in the AGD Discussion Paper, the 2008 inquiry conducted by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs into the effectiveness of the SDA recommended that it be amended to include a general equality before the law provision modelled on section 10 of the RDA.<sup>107</sup> The Australian Law Reform Commission made a similar recommendation in the report of their inquiry into the effects of Federal laws on the right of women to equality before the law, as discussed in our previous submission.<sup>108</sup>

Concerns about the effect of a broad right to equality before the law on particular groups – such as people with disabilities who are subject to special legal regimes like the guardianship and mental health legislation – can be overcome by the operation of a general limitations clause, or a simple qualification that the right to equality before the law does not preclude appropriate and effective legislative safeguards that are consistent with international human rights law.

**Recommendation 20:**

Section 60 of the HRAD Bill should be extended to apply to all protected attributes.

## 5.2 Protected areas of public life

The HRLC welcomes the expansion of protections to ‘all areas of life’ consistent with the current protections under the RDA and Australia’s obligations under international human rights law.

This level of protection is consistent with international human rights law. For example, broad protections are provided for under the CEDAW and CRPD, both of which define discrimination by reference to conduct in the ‘in the political, economic, social, cultural, civil or any other field’ Section 9 of the RDA broadly prohibits conduct based on race which interferes with the enjoyment of ‘any

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the law, without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy.’ However, the preamble to the *Sex Discrimination Act* has no legal effect.

<sup>104</sup> See also, for example, *Canadian Charter of Rights and Freedoms* s 15.

<sup>105</sup> For example, Arti 2(c) and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 12 of the Convention on the Rights of Persons with Disabilities.

<sup>106</sup> For example see Australian Human Rights Commission, *Submission to the Enquiry into the Effectiveness of the Sex Discrimination Act 1984*, 2008 [207-208]; Productivity Commission, *Review of the Disability Discrimination Act 1992* (Cth), (2004) 233.

<sup>107</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Report of the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, Recommendation 9 at 11.25.

<sup>108</sup> ALRC, *Equality Before the Law: Justice for Women*, ALRC 69.

human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. While the RDA, in addition, specifies areas in which discrimination is prohibited these sections are for the avoidance of doubt only and do not limit the general right contained in section 9.

This approach provides a much clearer, simpler framework for duty-holders and complainants to understand and operate within and also addresses the current inconsistency among the Federal Anti-Discrimination laws. For example, the AHRCA, DDA and SDA adopt the approach of prohibiting discrimination in connection with specific activities (such as hiring and firing in employment) or specific areas of public life (such as work, education, the provision of goods and services and the administration of Commonwealth laws and programs). The end result is that, while these acts cover a variety of activities in public life, the protections are piecemeal, fragmented and complex. The current formulation under these Federal anti-discrimination laws is not consistent with Australia's international human rights obligations.

The HRLC also supports the amendments to s 22 recommended by the Discrimination Law Experts Group.<sup>109</sup>

**Recommendation 21:**

Section 22(1) and (2) should be maintained with amendments reflecting the recommendations 26 to 28 of the Discrimination Law Experts Group.

### 5.3 Volunteers

The HRLC supports the inclusion of volunteers under the definition of employment and their protection from discrimination in areas of public life. We note that 'public life' would include, for example, volunteers who perform work in the not-for-profit organisations, government bodies, schools and emergency services. By contrast, we expect that volunteering outside 'public life' would include volunteering to co-ordinate a book club for a group of friends or help a neighbour tend their garden.

Not only do volunteers make an important contribution to public life, volunteering also provides people with engagement and participation opportunities. For example, a person with a disability or parental responsibilities may engage in voluntary work to assist their transition into paid employment. In that sense, protection for volunteers is important for achieving overall substantive equality.

While volunteers are already protected from discrimination under the RDA and some state and territory anti-discrimination laws, those current protections are ad-hoc and insufficient to meet Australia's international legal obligations.

**Recommendation 22:**

The protections for volunteers contained in the HRAD Bill should be retained.

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<sup>109</sup> Discrimination Law Experts Group Submission, 22-23.

## 5.4 Clubs and member-based associations

The HRLC welcomes the absence of blanket exceptions for clubs and member-based associations and supports the exceptions for clubs and membership-based association in the terms of s 35(1) and 35(2), particularly given it represents a harmonisation of confusing and inconsistent provisions in the current Federal anti-discrimination laws.

The HRLC supports the requirement that the exclusion of particular groups must be consistent with the objects of the HRAD Bill, recognising that attribute-based clubs play an important role in promoting substantive equality. However, the HRLC is concerned at the blanket exception for single-sex clubs, for which no justification is provided in the Explanatory Notes. Single-sex clubs are not required to limit membership in a way which is consistent with the objects of the HRAD Bill. To allow the continuation of ‘gentlemen’s clubs’, for example, perpetuates gender inequality.<sup>110</sup>

The HRLC does not support the definition of ‘club or membership based organisation’ in the HRAD Bill given the confusing requirement of ‘provides and maintains its facilities, in whole or in part, from the funds of the organisation’.

The HRLC supports the addition of a provision which excludes ‘volunteer associations’ – as defined by the Model Work Health and Safety Act (**WHS Act**) – from the obligations of non-discrimination and the positive promotion of equality under the Consolidated Act.

The WHS Act defines a ‘volunteer association’ to mean:<sup>111</sup>

...a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

The explanatory memorandum to the WHS Act clarifies that a ‘community purpose’ is intended to cover philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity, and sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.<sup>112</sup>

Applying the same, or substantially similar test in the Consolidated Act, may improve consistency and ease the regulatory burden on clubs and member-based associations, although the HRLC recommends that the area of sport should be treated separately and subject to particular consideration.

### **Recommendation 23:**

Section 35(2)(b) should be removed from the HRAD Bill.

The definition of ‘clubs and membership organisations’ should be defined to remove ‘volunteer associations’ as defined in the model *WHS Act* from the operation of the HRAD Bill.

<sup>110</sup> Rachel Ball and Melanie Schleier, ‘Anti-discrimination laws that discriminate’, *The Drum*, <http://www.abc.net.au/unleashed/27506.html>

<sup>111</sup> *Model Work Health and Safety Act* (revised draft 23 June 2011), s 5(8).

<sup>112</sup> Explanatory memorandum, *Model Work Health and Safety Act* (7 December 2010), [31] – [32].

## 5.5 Partnerships

The HRLC welcomes the application of the HRAD Bill to all partnerships, regardless of size, in line with our previous recommendation.

Federal anti-discrimination laws are currently inconsistent in their application to partnerships. The RDA currently applies to all partnerships. However, the DDA only applies to partnerships of 3 or more people while the SDA and ADA apply to partnerships of 6 or more.

The HRAD Bill achieves consistency and brings protections to the highest level, the RDA, consistent with the federal government's commitment.

### **Recommendation 24:**

The HRAD Bill should continue to apply to all partnerships regardless of size.

## 6. Exceptions and Exemptions

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### 6.1 Defence of justification

The HRLC supports the inclusion of a general exception of justification in place of a variety of ad-hoc and inconsistent permanent exceptions and defences such as unjustifiable hardship. However, the HRLC is concerned that section 23 is overbroad and diminishes protections against discrimination and recommends a number of amendments to strengthen and clarify the intention of the provision.

#### Advantages of a general defence of justification

Replacing a larger number of permanent exceptions with a single general exception simplifies the law and promotes greater understanding, as well as providing duty-holders with greater flexibility to defend discriminatory conduct. A well drafted clause (see amendments proposed below) would also encourage considered and transparent decision making.

A general exception such as s 23 allows a nuanced balancing of rights in cases where the individual's right to non-discrimination may conflict with another right or freedom. This stands in contrast to the existing permanent exceptions, which are often arbitrary, inflexible, broad and unreasonable. Many also protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups, hence perpetuating inequality.

#### Alignment with international human rights law

This insertion of a general exception for justified conduct is also consistent with international human rights law. International law recognises that not all differentiation constitutes unlawful discrimination. For example, the HRC has observed that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'<sup>113</sup>

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<sup>113</sup> HRC, General Comment No 18, above n 6.

Necessity, proportionality and legitimacy (in terms of legitimate bases for restricting non-absolute human rights) are well-established principles of international and comparative human rights law.<sup>114</sup>

This framework can be found in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant of Civil and Political Rights*, and is reflected in the ‘reasonable limitations test’ in section 7(2) of the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic).<sup>115</sup>

A legitimate end or purpose may include the protection of national security; public safety, order, health or morals; or the rights and freedoms of others. A ‘proportionate’ response must be necessary for achieving the legitimate aim or purpose. A proportionate response – that is, a response that is rational, appropriate and adapted – must also impair rights to the minimal reasonably extent possible. In other words, it can only impinge on an individual’s right to non-discrimination in the most minimal way. These principles should be applied to s 23 in the HRAD Bill.

#### Concerns regarding the breadth of section 23

As a preliminary point, direct discrimination is not currently subject to a general exception and, therefore, the imposition of any general defence must be approached with care so as to not lead to a reduction of protections.<sup>116</sup>

We endorse the recommendation of the Discrimination Law Experts Group that the following measures be applied to the HRAD Bill:

- the defence must be drafted narrowly in accordance with human rights principles and construed narrowly in accordance with the objects of the HRAD Bill and the beneficial nature of the legislation; and
- the objects of the HRAD Bill must be focused clearly and unequivocally on the achievement of substantive equality across all attributes and areas of public life.

Unless these principles are applied there is a real risk that duty-holders will seek to defend discriminatory conduct on the basis of a profit motive or administrative efficiency.

We recommend amendments to s 23 to clarify that:

- a legitimate aim must be consistent with the objects of the Act;
- a ‘rational connection test’ is required between the conduct and the objectives of the conduct; and
- specific consideration to cost and feasibility of engaging in other conduct need not be a requirement when determining whether conduct is justified.

#### Amendment: The legitimate aim

The words ‘a proportionate means of achieving a legitimate aim’ is imported from international human rights law

However, the HRAD Bill requires that ‘legitimacy’ merely ‘take account’ of the objects of the Act. in order to be consistent with international law

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<sup>114</sup> In Canada, for example, exceptions to discrimination are only lawful if they are: (1) for a pressing and substantial objective; and (2) rationally connected and proportionate to that objective; and (3) give rise to the minimal discrimination necessary to achieve the objective: *R v Oakes* [1986] VSCR 103.

<sup>115</sup> *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).*

<sup>116</sup> See Discrimination Law Experts Submission, 24.

As discussed above, in an international human rights law context a legitimate end or purpose may include the protection of national security; public safety, order, health or morals; or the rights and freedoms of others. The Discrimination Law Experts Group has noted that the private context of discrimination law differs from the assessment of State action in relation to the individual, and thus, the greater need to confine the meaning of this term.

Amending s 23 to expressly require the legitimate aim to be consistent with the objects of the Act is an appropriate safeguard for this general exception.

***Amendment: Require a 'rational connection'***

The wording in sub-section 23(3)(c) is unnecessarily complex and risks diminishing protections against direct discrimination. This provision is also inconsistent with proportionality tests in comparative jurisdictions such as Canada and international human rights principles. Instead, the HRLC recommends that s 23(3) should be replaced with a 'rational connection test', that is, a rational connection is required between the conduct and its aim.

A determination using the current drafting of 'reasonable person' test carries a risk that discriminatory views that are commonly held will influence the outcome. A rational connection test similar to that adopted in the Canadian authority of *R v Oakes*<sup>117</sup> would simply require evidence of the effect or likely effect of the conduct rather than what a reasonable person might believe the effect would be.

This approach would also be consistent with international human rights principles, outlined above.

***Recommendation 25:***

Section 23 be maintained with the following amendments:

- Section 23(3)(b) be amended to provide that the legitimate aim must be consistent with the objects of the Act.
- Section 23(3)(c) be amended to require a 'rational connection test' in place of the existing wording.

## 6.2 Exceptions for religious organisations

The HRLC acknowledges, with disappointment, the existence of broad exceptions for religious organisations and schools in the HRAD Bill and the lack of explanation or justification for these provisions. The HRLC looks forward to the Committee's seeking to establish or verify the need for these exceptions through the collection of evidence from religious organisations and schools.

Arbitrary exemptions from discrimination for religious bodies and organisations do not give any consideration to their relevance and justification in modern, Australian society. These broad exemptions are manifestly inappropriate and inconsistent with Australia's human rights obligations and international best-practice.

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<sup>117</sup> See note [114], above.

### The breadth of the religious exceptions

The HRAD maintains permanent exceptions largely in the terms of the ADA and SDA, although, notably, age has been removed from the affected protected attributes. Specifically, discrimination is permitted when it:

- conforms to the doctrines, tenets or beliefs of the relevant religion; or
- is necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>118</sup>

The exceptions are ostensibly designed to protect religious freedom. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights. However, freedom of religion is not an absolute right, meaning that freedom of religion can be limited in certain circumstances. In cases where the right to freedom of religion conflicts with other rights, for example the right to equality, neither right should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed. If it cannot be shown that the discrimination is reasonable and proportionate, such discrimination should not be permitted under law.

The exceptions outlined above are extremely broad and while they may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exceptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.

Currently, the religious exceptions set up a regime whereby religious freedom cannot ever be curtailed in the name of equality. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.

### Specific religious exceptions

The HRAD Bill contains exceptions for religious groups conducting specific activities, namely:

- (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 selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice;

In the HRLC's opinion, the exceptions in subsections (a) – (c) are likely to be permissible in accordance with the defences in the HRAD Bill a human rights-based limitations analysis (i.e. the limitation on the right to equality is a reasonable and proportionate means of achieving a legitimate end, being the protection of religious freedoms).

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<sup>118</sup> *Age Discrimination Act 2004* s 35; *Sex Discrimination Act 1984* s.37(d).

However, the remaining provisions are overly broad and would allow for both permissible and impermissible limitations on the right to equality. For example, the exception for education institutions may permit a school that receives substantial government funding to refuse to enroll a child whose parents are in a de facto relationship. A religious body could provide a legal entitlement for a profit-making church-run accommodation service to evict a pregnant woman into homelessness. Neither of these examples is likely to meet the standard of a reasonable and proportionate measure to achieve a legitimate aim and should therefore not be sanctioned by law.

The sanctioning of such discrimination has the potential to cause significant harm to the community. Consider, for example, a Same Sex Attracted or Gender Questioning young person who, at the election of his or her parents, is sent to a school with homophobic religious teachings and other practices. The harm the student may suffer, either through direct discrimination or as a consequence of the messages (both overt and implicit) imparted by the school, is extremely concerning, especially considering the vulnerability of LGBTI young people to depression, self-harm and suicide.

The HRLC considers that it is incongruous for the Government to take the positive step of introducing protections on the basis of sexual orientation and gender identity on one hand, and entrench discrimination towards these groups through broad permanent exceptions on the other.

***Recommendation 26:***

The religious exceptions in the HRAD Bill should be removed and in favour of reliance of the existing general defence of justification.

*Commonwealth funded goods and services*

The HRLC welcomes the limitation on discrimination by religious service providers in aged care settings and strongly recommends this exclusion be extended to all government funded service delivery and, in particular, service delivery to vulnerable groups in other settings. As a matter of principle, public money should not fund discrimination, particularly against vulnerable groups.

If the vulnerability of older LGBTI people in aged care settings has been acknowledged and responded to, the HRLC urges the committee to respond to the vulnerability of people in other settings and extend the aged care exclusion to other areas. These include the following:

- mental health services;
- disability services, including in home care services identical to in home aged care services;
- health services;
- youth services;
- housing and homelessness services;
- schools;
- services for the unemployed; and
- other social or community services.

As well as pre-existing vulnerability, the recipients of these services are often not able to choose or elect to receive services from a non-faith based service providers. For example, regional, rural or remote locations often have limited health, education and other services.

*Discrimination in employment by government funded service-providers*

The HRLC also recommends that the HRAD Bill be amended to limit the ability of government funded service providers to discriminate in the area of employment. This recommendation extends to aged care providers as well as other service providers.

***Recommendation 26:***

Religious organisations and schools in receipt of government funding should be prevented from relying upon the religious exceptions in ss 32-33 of the HRAD Bill.

Alternatively, the limitation applicable to aged care services in s 33(3) should be extended to vulnerable people in analogous settings, for example:

- mental health services;
- disability services, including in home care services identical to in home aged care services;
- health services;
- youth services;
- housing and homelessness services;
- schools;
- services for the unemployed; and
- other social or community services.

In addition and/or in the alternative, the HRAD Bill should be amended to prohibit religious organisations and schools in receipt of government funding from discriminating in the area of employment.

*Transparency and accountability in reliance on permanent exceptions*

A further problem with the existing exceptions and exemptions for religious organisations is the lack of transparency surrounding their operation. Those interacting with religious organisations and schools able to rely on the exceptions may be unaware of the potential for discrimination.

If the exceptions are to be maintained, it is vital that information be communicated to potential employees, customers, students and others on the receiving end of discriminatory conduct. This information can impact on important decisions such as choice of school or employer.

To this end, the HRLC recommends that a system be put in place whereby any religious organisation that wishes to be exempted from the operation of the HRAD provide written notice to any customers, employees, students or others that it intends to discriminate against.

In addition or, as an alternative, the religious organisation should lodge with the Commission a notice which specifies the exempted policy or practice.

As well as forewarning potential victims of discrimination but this requirement for notice would ensure accountability to the wider community. When the body that wishes to discriminate receives public funds or where the discrimination in question has some other public impact, there exists a greater need for accountability.

Such a requirement may also encourage religious bodies to assess whether the discrimination is necessary and appropriate in each case.

**Recommendation 27:**

Religious organisations or schools that wish to rely on the religious exceptions in the HRAD Bill should be required to publicly disclose and lodge a notice to that effect with the Commission and communicate their intention to discriminate to any prospective employees, students, customers and/or others potentially impacted by the proposed discrimination.

### 6.3 Review of the exceptions

The HRLC supports section 47 that proposes the Minister review the exceptions. The HRLC recommends the review be public, transparent, principles and guided by international legal principles, such as necessity, proportionality and legitimacy. In the interests of transparency, the Australian public should be given reasons why the exceptions (if any) are retained following the review.

## 7. Complaints and Compliance

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### 7.1 Human rights framework for complaints and compliance

The obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims.<sup>119</sup> With the right to an effective remedy also comes the right to a fair trial, which ensures that the legal system is fair and accessible to complainants. In light of these obligations, the HLRC submits that the HRAD Bill must contain appropriate structures to ensure that discrimination is effectively investigated and enforced by both individuals and other relevant bodies, as set out below.

A significant weakness of Australia's current anti-discrimination law system is its reliance on a complaints-based system, where the burden rests solely on the victim to pursue a remedy for the discrimination they have suffered. A large portion of individuals with meritorious complaints do not report the conduct or make a complaint.<sup>120</sup> For this reason, the HRLC supports measures to address

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<sup>119</sup> Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>120</sup> For example, see Victoria Legal Aid's submission to the HRAD Bill, 22.

systemic discrimination, including a range of measures relevant to the compliance and other functions of the Commission.

## 7.2 Role and functions of the Commission

We refer to and reiterate the recommended additional powers of the Commission, as set out in the HRLC's previous submissions. Conferring additional functions and powers on the Commission would enable it to contribute more effectively to law-making and systemic problems. While the inclusion of 'soft' pro-active compliance powers is welcome, additional enforcement powers would also enable the Commission to engage with duty-holders and work with them to promote compliance. Such powers would be consistent with other regulatory schemes such as privacy, workplace safety and consumer protection.

A summary of the HRLC's recommendations for the powers of the Commission is set out below, together with discussion and recommendations relating to the new powers in the HRAD Bill.

### Guidelines, Disability Standards and Action Plans

The HRLC supports the maintenance of disability standards and the retention of the voluntary Action Plan provisions and broadening to all attributes. Action Plans can be effective in promoting compliance, thereby addressing discrimination at a systemic level. We agree it is appropriate that compliance with a plan should be merely a relevant factor in a discrimination case, rather than a defence to a complaint. Similarly, we support the Commission's power to provide reviews of policies and programs on application under section 64, promoting greater understanding and compliance with the law.

### Compliance codes

A compliance code can provide a complete defence to discrimination under the HRAD Bill and potentially under State and Territory law. Given this significant impact, it is important for the consultation processes in the HRAD Bill to be improved. We endorse the recommendations made by the Discrimination Law Experts Group in this regards and also suggest that the views of State and Territory equal opportunity regulators should play a significant role in shaping federal government policy in this area.

In addition, the HRLC recommends that compliance codes are regularly reviewed and to ensure they comply with the objects of the Act and do not go any further than necessary.

#### **Recommendation 28:**

The HRAD Bill should be amended to provide for consultation requirements in line with recommendation 46 in the Discrimination Law Experts Group submission.

In addition, compliance codes should be regularly reviewed by the Commission.

### Public inquiries

The HRLC supports the inclusion in the HRAD Bill of the power of the Commission to conduct inquiries, including own motion inquiries. However, the HRLC remains of the view that inquiries should

be able to extend to broader human rights concerns, such as issues arising in private sector or by state and territory bodies. The Commission's inquiry powers are further undermined by a lack of enforceability. Although the Commission can make recommendations to the Federal Government, there is no obligation to respond. The Consolidated Act should require the Federal Government to respond, in a timely manner, to findings or recommendations contained in Commission reports that are tabled in Parliament. In its response, the Federal Government should be required to indicate how it will address the recommendations.

**Recommendation 29:**

The Commission's formal inquiry functions should be expanded to empower it to inquire into any human rights issues or concerns arising in Australia.

**Recommendation 30:**

The Federal Government should be required to substantively respond, within a specified timeframe, to any report provided to it by the Commission following an inquiry or investigation.

*Investigations and other enforcement options*

The Commission's inquiry functions should also be expanded so that it may investigate human rights concerns across all states and territories, including in the private sector. The Commission should be able to initiate and pursue such investigations on its own motion, rather than on the basis of a particular complaint. This would enable the Commission to more effectively address systemic discrimination. It would also relieve the burden that is currently placed on individual complainants, as discussed above.

To ensure that such investigations lead to a real change, investigative powers would need to be accompanied by additional enforcement options.

For example, the Commission should be empowered to enter into an agreement, sometimes described as an enforceable undertaking, with a party to the effect that it will take particular steps to ensure its compliance with the law. Such agreements should be registered with the Federal Court and, once registered, ought to be treated as an order of the Court. Where the substance of an investigation cannot be resolved by agreement, the Commission should be empowered to issue a compliance notice (with maximum financial penalties), or commence proceedings in the Federal Court on its own motion for breaches of the Consolidated Act.

The existence of these powers would have a normative impact, even where such powers are not actually used. In other words, there would be an additional impetus on duty-holders to engage with the Commission on an informal basis, working towards compliance, in order to avoid the need for a formal investigation or compliance notice. The HRLC believes that concerns about conflicts of interests – or perceived conflicts – could be adequately addressed by ensuring confidentiality of the complaints

process and introducing internal structures within the Commission designed to avoid conflicts of interest.

**Recommendation 31:**

The Commission should be empowered to investigate human rights abuses across the private sector and each state and territory.

**Recommendation 32:**

The Commission should be empowered to enter into enforceable undertakings and issue compliance notices for breaches of human rights.

*Intervention and amicus curae*

We reiterate the recommendations set out in the HRLC's previous submission, *Advance Australia Fair*, regarding the powers of the Commission and Special-Purpose Commissioners to intervene and/or act as amicus in legal proceedings.

The Commission currently has the power to intervene, with the Court's leave, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment.<sup>121</sup> The HRLC maintains that the Commission and Special-Purpose Commissioners should be empowered to intervene, as of right (i.e. without requiring the Court to grant leave), in all cases that raise significant human rights or equality issues.

These measures would enable the Commission and Special-Purpose Commissioners to facilitate the establishment of clear and principled jurisprudence in this area of the law. This is important because the establishment of strong legal precedents acts as a deterrent to future discriminatory conduct, thereby minimising future costs (financial and non-financial) of discrimination on society.

**Recommendation 33:**

The Commission and Special-Purpose Commissioners should be empowered to intervene, as of right, in all cases that raise significant human rights or equality issues.

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<sup>121</sup> *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o)

**Recommendation 34:**

Special-Purpose Commissioners should also be empowered to appear as amicus curiae in appeals to the High Court from discrimination decisions made by the Federal Court and Federal Magistrates Court.

### 7.3 Representative proceedings

The HRLC is disappointed that the HRAD Bill does not provide for representative complaints of discrimination.<sup>122</sup>

As discussed above, the Federal anti-discrimination framework places an onerous burden on individuals to enforce their rights to equality through complaints. Enabling the Commission and public interest organisations to pursue representative complaints would go some way towards relieving this burden on individuals. Such a change would also have the potential to produce positive outcomes that reach beyond the circumstances of one individual, thereby contributing to systemic change and substantive equality.

The AHRCA currently permits representative complaints to the Commission.<sup>123</sup> However, it is extremely difficult for the representative body to pursue the matter in the Federal Courts if the complaint is unresolved at the Commission stage. This is because, unless the representative body is itself 'aggrieved' by the discrimination, it will not be an 'affected person' for the purposes of s 46PO(1) of the AHRCA, meaning that it may not bring proceedings before the Court. The situation is further complicated by s 33D(1) of the *Federal Court of Australia Act 1976* (Cth), which provides that only a person who has a 'sufficient interest' to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding against the respondent on behalf of other persons who have the same or similar claim against the respondent. Hence, the aggrieved person on behalf of whom a representative complaint is made may be forced to pursue their claim through the courts on their own.

The HRLC maintains that the Commission and public interest organisations with a legitimate interest in particular subject matter should have standing to commence and pursue discrimination proceedings on behalf of aggrieved persons, particularly where the claim involves a systemic problem that affects a wide class of persons.<sup>124</sup>

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<sup>122</sup> Human Rights Law Resource Centre, above n **Error! Bookmark not defined.**, [Recommendation 4]; Human Rights Law Centre, *Realising the Right to Equality*, 46.

<sup>123</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

<sup>124</sup> Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008), Recommendation 21.

**Recommendation 35:**

The HRAD Bill should make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

## 7.4 Litigation costs

The HRLC welcomes the change to a ‘no costs’ jurisdiction reflected in the HRAD Bill with one qualification, detailed below.

### Rationale for change

The federal laws currently provide no special protection from the risk of adverse costs orders in discrimination matters, beyond the general discretion of judges with regards to costs. This presents a significant barrier to access to justice, especially for victims of discrimination who, due to their vulnerability and financial situation, tend to be risk-averse.<sup>125</sup> This compounds the inequality experienced by victims of discrimination.

Presently, costs follow the event in proceedings under the Federal anti-discrimination acts. In other words, the unsuccessful party to the litigation must pay both parties’ costs although the Courts have discretion as to the basis on which costs are awarded.

### Examples from other jurisdictions

This is not the case in all jurisdictions. The FWA for example, establishes a no-cost jurisdiction, requiring parties to bear their own costs unless a court or tribunal determines, for example, one party pursued a claim that was frivolous, vexatious or without reasonable prospects of success. Similarly, under Victorian anti-discrimination law there is a rebuttable presumption against costs being awarded. In a 2004 report on the efficacy of the DDA, Australia’s Productivity Commission recommended that parties should be required to bear their own costs, subject to a discretion to award costs in accordance with statutory guidelines that had been developed for the family law jurisdiction.<sup>126</sup>

### The disadvantages of a no costs jurisdiction

This change will mean that applicants will not ordinarily be able to recover their legal costs, even if they are successful. In turn, this may lead to difficulties in obtaining legal representation, given the potential legal costs may exceed the traditionally and/or unpredictably low awards of compensation. A lack of legal representation presents a significant barrier to access to justice and will act to deter complainants from bringing legal proceedings.

As explained by the Discrimination Law Experts Group submission, ‘the formal symmetry in relation to litigation costs is illusory,’ given the tax subsidies available for respondents and the common disparity in financial means between complainants and defendants.<sup>127</sup>

### Additional proposals for consideration

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<sup>125</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), 369.

<sup>126</sup> *Ibid*, recommendation 13.4, 396.

<sup>127</sup> Discrimination Law Experts Group Submission, 36.

The HRLC recommends that consideration be given to the following proposals to ameliorate the risks of the no costs jurisdiction.

- Limit costs orders against complainants to situations where the claim was frivolous, vexatious or without foundation.
- Require the court to take into account factors such as the tax subsidies available for the respondent, the financial means of the parties, any other vulnerabilities of the parties, and the public interest in the case.
- Ensure free legal assistance (see below).
- Encourage higher awards of compensation (see below).

**Recommendation 36:**

The no-costs jurisdiction for discrimination complaints be maintained in the HRAD Bill with amendments to effect the following:

- Limit costs orders against complainants to situations where the claim was frivolous, vexatious or without foundation.

Alternatively,

- Amend s 133 to require the court to take into account factors such as the tax subsidies available for the respondent, the financial means of the parties, any other vulnerabilities of the parties, and the public interest in the case.
- Encourage higher awards of compensation, to cover legal costs (see below).
- Ensure free legal assistance is available (see below).

## 7.5 Remedies

Australia has an obligation under international human rights law to provide effective remedies for discrimination.

As noted in the AGD Discussion Paper, the Federal Courts already have broad powers to award any remedy they see fit in discrimination cases. In reality, however, courts have tended to award low-level financial compensation or, very occasionally, reinstatement to the victim's former job (where the discrimination led to the termination of employment).

A simple cost-benefit analysis causes many complainants to settle their matters at the conciliation stage for amounts that do not necessarily reflect the seriousness of the issue. For example, between 1 January 2004 and 31 December 2004, the median financial payment obtained by complainants under the SDA in conciliation was \$5,700.<sup>128</sup> This situation gives rise to serious

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<sup>128</sup> Human Rights and Equal Opportunity Commission, *Five Years On: An Update on the Complaint Handling Work of the Human Rights and Equal Opportunity Commission*, 7 December 2005, <[www.hreoc.gov.au/complaints\\_information/publications/five\\_years\\_on.html](http://www.hreoc.gov.au/complaints_information/publications/five_years_on.html)>.

concerns that Australia is failing to provide adequate remedies for victims of discrimination. It also limits the normative and deterrent powers of anti-discrimination laws. The impact of these low payments will be compounded by the change to the no costs jurisdiction.

To address these concerns, the Consolidated Act should contain a list of alternatives – such as corrective and preventative orders – which are available to the Federal Courts.<sup>129</sup> For example, a court may order an employer to provide further training to staff, or update its policies and procedures regarding discrimination.

The HRLC recommends that the Commission be empowered to issue guidelines on compensation payable in discrimination matters to assist the Court in determining appropriate award amounts.

Alternatively, the Federal Government could provide guidance about the scale of financial awards to ensure that awards made by the Courts adequately reflect the seriousness of the harm caused by unlawful discrimination. This may be achieved, for example, through guidelines or the explanatory memorandum to the Consolidated Act.

**Recommendation 37:**

The HRAD Bill should be amended to encourage Courts to make corrective and preventative orders, in addition to financial awards to victims of discrimination.

Guidance should be provided about the scale of financial awards to ensure that awards made by the Courts adequately reflect the seriousness of the harm caused by unlawful discrimination, either by the Federal Government or the Commission.

## 7.6 Resourcing

Australia has an obligation to ensure that victims of discrimination have access to effective remedies through our legal system. Maintaining appropriate funding to legal aid and community legal centres – which assist victims of discrimination in navigating the legal systems – is a vital component of this obligation.

Accessibility of the legal system depends on awareness of legal rights and of available procedures to enforce those rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful.<sup>130</sup> In many instances, ‘injustice results from nothing more complicated than lack of knowledge’.<sup>131</sup>

In a 2009 submission to the Federal Government, the Law Council of Australia stated that:<sup>132</sup>

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<sup>129</sup> The same recommendation was made by the Standing Committee on Legal and Constitutional Affairs in its report, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 (Recommendation 23).

<sup>130</sup> Victorian Law Reform Commission (VLRC), *Civil Justice Review Report 14*, 2008, 607.

<sup>131</sup> Chief Justice Murray Gleeson, ‘Conference Opening and Keynote Address’ (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).

<sup>132</sup> Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.

The Law Council of Australia has further stated that ‘when legal assistance is not available to the economically and socially disadvantaged in our community, the integrity of the justice system is challenged’.<sup>133</sup>

It is equally important to ensure that the Commission receives enough funding to enable it perform the functions that it is given, which may include broader powers to investigate, initiate and participate in litigation and enforcement.

**Recommendation 38:**

Legal aid bodies, community legal centres and the Commission must be adequately funded and supported to ensure the effective operation of the HRAD Bill.

## 7.7 Commission members

Section 160 of the HRAD Bill provides the Commission consists of a President and seven Commissioners. Each of the current Special-Purpose Commissioners is preserved. However, there is no provision made for carriage of Sexual Orientation and Gender Identity issues by any of these members. While the HRLC recognises the resourcing and other constraints and organisational drivers, this omission creates an unfortunate hierarchy of attributes and entrenches inequality between the attributes. If portfolio responsibility for SOGI issues will, in practice, rest with the President, then this should be clearly stated in the legislation so as to formalise this inequality.

**Recommendation 39:**

Section 160 of the HRAD Bill be amended to include a LGBTI Commissioner or explicitly vest responsibility for LGBTI issues with another member of the Commission such as the President.

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<sup>133</sup> Ibid.

For more information and discussion about the consolidation of Federal anti-discrimination laws, visit:

[www.equalitylaw.org.au](http://www.equalitylaw.org.au)

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