



**Standing Committee on Legal and Constitutional Affairs Inquiry into the
Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft
Legislation**

**Submission of the Anti-Discrimination Commissioner of
Tasmania**

December 2012

Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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Introduction

Thank you for the opportunity to provide the following submission to the Standing Committee on Legal and Constitutional Affairs *Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation*.

My comments draw on my earlier submission in response to the Discussion Paper, *Consolidation of Anti-Discrimination Laws*, prepared by the Federal Attorney-General's Department. A full list of the recommendations from that submission and the extent to which the Human Rights and Anti-Discrimination Bill 2012 (the draft Bill) incorporates those recommendations is provided in Appendix 1.

The introduction of consolidated federal anti-discrimination legislation should place Australia at the forefront internationally of protection of the rights to equality and non-discrimination and be flexible enough to respond to contemporary thinking on these rights.

To achieve this, it is critical that Australia adopts a positive, proactive and innovative framework for addressing equality and non-discrimination issues, which.

- gives full effect to the human rights commitments adopted by Australia;
- ensures there is no diminution of existing rights, responsibilities or protections afforded under Commonwealth or State and Territory laws;
- includes a clear objective of achieving substantive equality for all Australians;
- provides clarity and certainty in relation to both rights and obligations;
- promotes innovation and consistency across jurisdictions;
- includes provisions that prescribe positive duties to prevent discrimination and promote equality, including special measures and duties to make reasonable adjustments to assist in the realisation of these rights;
- incorporates obligations and functions that enable systemic causes of discrimination to be effectively addressed and ensure the full enforcement of duties;
- includes a comprehensive system of penalties and sanctions that are effective, proportionate and dissuasive; and
- ensures the necessary powers and resources to the Australian Human Rights Commission to enable it to effectively implement new actions.

Whilst the draft Bill makes significant advances towards achieving these objectives, I urge the Committee to consider proposing a number of additions and amendments to the draft Bill as outlined in the following submission.

In this submission, I have used the chapter structure from the draft Bill to frame the contents.

I welcome the opportunity to expand on this submission before the Committee should you wish me to do so.

Chapter 1: Introduction

Objects of the Act

I strongly support the revised objects clause—clause 3—and in particular the strengthened references to the object of promoting recognition and respect for substantive equality.

I consider, however, that all international human rights instruments by which Australia is bound or supports should be referenced in the objects clause. This should include the *Universal Declaration of Human Rights* as the foundation on which all human rights treaties are based and the *Declaration on the Rights of Indigenous People* which provides a basis on which the rights of Australia's Aboriginal and Torres Strait Island peoples are recognised.

Revised wording in clause 3 of the Act would allow a fuller range of agreements and international human rights documents to be recognised and could be drafted to enable the objects of the Act to encompass future and emerging instruments without the necessity of amending the Act.

Recommendation 1

That the Universal Declaration of Human Rights and the Declaration on the Rights of Indigenous People be included in the list of human rights instruments in clause 3(2) and the wording of clause 3 be amended to enable the Act to encompass all current human rights instruments and future human rights instruments ratified by Australia without the need to seek amendment to the Act.

Interpretation

Gender Identity and Sexual Orientation

The inclusion of gender identity and sexual orientation as separate protected attributes in the draft Bill is welcomed. However, amendment is needed of the definition of gender identity and the coverage of intersex in the draft Bill to ensure it reflects current understanding of these attributes.

As currently drafted the draft Bill confuses sex characteristics (which may include those who are not wholly male or female) with gender identity.

Biological *sex or sexual characteristics* refers to the anatomical and physiological characteristics associated with maleness and femaleness separate from the cultural expressions of gender or gender identity. This includes the characteristics of people who are intersex and people who are transsexual who are neither wholly female nor wholly male or have a combination of features with or without regard to the individual's designated sex at birth.

Gender identity refers to the gender with which a person identifies or the gender they lives as, which may be different to the one designated at birth regardless of whether the person is intersex or their biological sexual characteristics have been medically or surgically altered.

This is a matter that has been given extensive consideration in relation to changes currently being considered to the Tasmanian *Anti-Discrimination Act 1998* (the Tasmanian Act).

In November 2012, the Tasmania Legislative Assembly (the Tasmanian lower House) approved legislation to amend the *Anti-Discrimination Act 1998* (Tas) to *inter alia* clarify provisions in relation to gender attributes. The changes include adding gender identity and intersex as separate protected attributes in section 16 of the Tasmanian Act and defining both in section 3.

The amending Bill is due to be considered by Tasmania's Legislative Council at its next scheduled sitting. Once amended, Tasmania will be the first jurisdiction to provide protection against discrimination on the basis of a person whose physical sex is indeterminate or intersex, whether or not their gender identity is male or female. In doing so Tasmania will have in place the best available approach to gender-related issues nationally.

The definition of **gender identity** under the amended Act will cover gender-related identity such as transsexualism and transgenderism in line with modern definitions as follows:

gender identity means the gender related identity, appearance or mannerisms or other gender related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.

The approach taken in the Tasmanian legislation is based on defining gender identity in a way that does not incorporate binary notions of sex as either male or female. Binary constructs of sex and/or gender promote recognition of individuals as either male or female and fail to recognise that there is a spectrum of biological sex or sexual characteristics and gender identity and sexual orientation.

This approach was originally adopted in the United States *Employment Non-Discrimination Bill of 2009* (US):¹ and has the advantage of not restricting gender identity to those who identify with a sex other than that assigned at birth.²

A person who is intersex is a person whose chromosomal, gonadal or anatomical sex is not exclusively 'male' or 'female'. The Tasmanian Act will, when the amendments are enacted, separately define **intersex** as follows:

intersex means the status of having physical, hormonal or genetic features that are

- (a) neither wholly female nor wholly male; or
- (b) a combination of male and female; or
- (c) neither female nor male.

This definition does not require consideration to be given to an intersex person's gender identity or for an intersex person to identify as a particular sex in order for that person to be afforded protection from discrimination. There are persuasive arguments for recognising intersex persons separately in anti-discrimination law.

People who are intersex are vulnerable to discrimination in relation to a range of matters that are unique to persons born with indeterminate biological sex characteristics. To confuse issues related to the circumstances of intersex people with those who, for example, may be voluntarily seeking to undergo gender reassignment risks marginalising this group and contributing toward an even greater sense that they are 'invisible' to the broader community.

Specific protection against discrimination on the basis of being intersex would ensure that differences in biological indicators of sex would be separately recognised and not reliant on being considered only in relation to a person's gender identity.

I note in this regard that in some areas of Commonwealth service delivery, Departments have chosen to recognise individuals who fall outside of male/female binary categories. This is the case, for example, in relation to the issuing of Australian passports, which include provision for issuing a passport to sex and gender diverse applicants in M (male), F (female) or X (indeterminate/unspecified/intersex) categories.

¹ Employment Non-Discrimination Bill of 2009 (USA) cl 3(6).

² See Anna Chapman, *Protection from Discrimination on the Basis of Sexual Orientation or Sex and/or Gender Identity in Australia* (2010) 8.

Express reference to and protection on the basis of being intersex in the draft Bill would provide clear and comprehensive protection for those who are discriminated against on the basis of sex characteristics and would be in line with the commitment that the approach taken in the draft Bill will reflect best Australian practice in discrimination law.

I submit this approach would be preferable to the inclusion of reference to ‘indeterminate sex’ as proposed in the draft Bill.

Recommendation 2

That intersex be included in the draft Bill as a separate attribute and be defined as it is in the Anti-Discrimination Act Amendment Bill 2012 (Tas), and that the definition of gender identity in clause 6 of the draft Bill be amended to encompass a non-binary definition of sex or sex characteristics.

Law

There are several provisions within the interpretation clause—clause 6—that deal with ‘law’: ‘Commonwealth law’; ‘law’, ‘State law’ and ‘Territory law’. The definitions of Commonwealth law and Territory law are in very similar form and specifically refer to legislation. State law on the other hand is arguably broader as is not expressly limited to statute law. There is no apparent basis for this different treatment and is not consistent with the use of the term in, for example, the exception provided in clause 30(2)(c).

Recommendation 3

That the definition of ‘State law’ in clause 6 of the draft Bill be amended to more closely reflect the definitions of Commonwealth law and Territory law.

Aboriginal person and Torres Strait Islander

Clause 6 of the draft Bill separately defines ‘Aboriginal person’ and ‘Torres Strait Islander’. The definitions are distinctly different:

Aboriginal person means a person of the Aboriginal race of Australia

Torres Strait Islander means a descendant of an Indigenous inhabitant of the Torres Strait Islands

While this may simply reflect maintenance of the definitions as found in the *Racial Discrimination Act 1975* (Cth), I urge the Committee to consult with Aboriginal people and Torres Strait Islanders to ensure that they support the current approach.

Recommendation 4

That the Committee consult with Aboriginal people and Torres Strait Islanders about the current definitions in clause 6 of the draft Bill of ‘Aboriginal person’ and ‘Torres Strait Islander’ to ensure that the different approach to these two definitions is supported.

Other interpretation issues

Clause 6 includes definitions pertaining to family responsibilities including ‘immediate family’ and ‘child’. The definition of child includes an adopted child, a step child or exnuptial child but does not expressly include a child born through surrogacy or a child in respect of whom the person has formal or informal guardianship. This does not appear to be corrected by the reference in (b) of the definition.

Similarly, the definition of immediate family may not be broad enough to encapsulate family responsibilities that come through formal or informal guardianship arrangements.

Recommendation 5

That the definition of 'child' in the draft Bill be amended to expressly include a child of the person born through a surrogacy arrangement and a child in respect of whom the person has formal or informal guardianship.

Recommendation 6

That the definition of 'immediate family' in the draft Bill be amended to expressly a person in respect of whom the person has formal or informal guardianship.

Connected with an area of public life

I urge the Committee to support the current drafting of clause 7 of the draft Bill. This drafting together with clause 22 greatly simplifies the approach to discrimination law federally and will enable a single interpretive approach to be developed and apply to all attributes in respect of the range of areas of activity.

Multiple reasons or purposes for conduct

Clause 8 of the draft Bill provides that a person engages in conduct for a particular reason or purpose if it is a sole or one of the reasons for the conduct. The current wording of this clause has the potential to be interpreted to set a different standard than is currently the case in all of the current federal anti-discrimination laws. In all of those Acts, the test clearly states that the purpose or reason need not be the 'dominant or a substantial reason' for the conduct.³ The introduction of a new and different form of words in clause 8 has the potential to complicate interpretation with no apparent rationale for the change.

Recommendation 7

That clause 8(1) of the draft Bill be amended to ensure that it is clear that the purpose or reason need not be the dominant or a substantial reason for the conduct.

Interaction with state and territory laws

Clause 14 of the draft Bill provides for arrangements governing the interaction with state and territory anti-discrimination laws.

Clause 14(1) provides that the Act is not intended to exclude or limit the operation of a state or territory anti-discrimination law to the extent that that law is capable of acting concurrently with the Act.

Clause 14(2) excludes disability standards and compliance codes from these provisions.

However clause 14(3) allows the Commonwealth to prescribe state and territory anti-discrimination laws using regulation-making powers. This provides discretion to the Commonwealth to recognise or otherwise exclude (and thereby override) state or territory anti-discrimination laws unless they have been prescribed by regulation.

Whilst the approach suggested has the capacity to streamline the Act and allow recognition of new or amended state and territory laws using a mechanism other than amending the Act, the powers accorded to the Commonwealth under clause 14(3) are unreasonably broad and may have unintended consequences should they be used to override state and territory law. A more appropriate approach would be to schedule the list of state and territory anti-discrimination laws to the Act, as this would ensure that any amendment to the list would require the fuller parliamentary scrutiny afforded to amendment to primary legislation.

³ See, *Racial Discrimination Act 1975* (Cth) s 28; *Sex Discrimination Act 1984* (Cth) s 8; *Disability Discrimination Act 1992* (Cth) s 10; and *Age Discrimination Act 2004* (Cth) s 16.

Recommendation 8

That clause 14 of the draft Bill be amended to remove discretionary powers available to the Commonwealth to prescribe state and territory laws for the purposes of the Act and instead schedule a list of the relevant state and territory legislation to the principle Act.

Chapter 2: Unlawful conduct & equality before the law

Protected Attributes

Consolidation of Commonwealth legislation provides an opportunity to ensure that all attributes currently contained in anti-discrimination legislation across the Australian jurisdictions are covered.

At minimum, the draft Bill should contain all attributes identified in current Commonwealth legislation, including the *Australian Human Rights Commission Act 1986* and the *Fair Work Act 2009*, together with all attributes covered by state and territory legislation.

Coverage of all attributes would reduce inconsistent protection between jurisdictions and assist in simplifying responsibilities. The situation where a person, for example, has protection from discrimination on the basis of an irrelevant criminal or medical record in Tasmania but not if the discrimination was through actions of the Federal Government, is inconsistent with the underlying principle of equality for all.

The Discussion Paper raised the option of extending the Act to covered attributes relating to ILO discrimination, including religion, political opinion, industrial activity, nationality, criminal record and medical record. Tasmania's legislation already covers these attributes and I support their inclusion in the consolidated Act.

As noted above, I support the inclusion of gender identity and intersex as protected attributes. I am concerned that the draft Bill does not include two other attributes—homelessness and domestic/family violence—and refer the Committee to the submission made by the Australian Council of Human Rights Agencies in this regard.

Recommendation 9

That the draft Bill be amended to include protection against discrimination and other forms of prohibited conduct on the basis of all attributes currently protected under federal and state and territory anti-discrimination laws.

Recommendation 10

That the draft Bill be amended to include protection from discrimination on the basis of homelessness and family violence.

Flexibility to add additional attributes

In the earlier submission on the AGD Discussion paper, I supported the approach suggested by the Discrimination Law Experts group that the Act contain a provision that enables a simplified approach to the inclusion of additional attributes.⁴

There are a number of models that could be adopted to give effect to this approach.

One option may be to adopt the wording which has been used in article 26 of the *International Covenant on Civil and Political Rights*:

All 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

⁴ Discrimination Law Experts' Roundtable, *Report on Recommendations for a consolidated federal anti-discrimination law in Australia* (2010) 7.

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]

The use of the phrase ‘such as’ prior to the listing of attributes is not exclusive and the insertion of the phrase ‘or other status’ in Article 26 provides flexibility to extend coverage to other attributes.

Principle 5 of the *Declaration of Principles of Equality* identifies a broad list of grounds or attributes which warrant protection in respect of equality and non-discrimination. In addition the *Declaration* contains a three-step test for the identification of further characteristics which should be protected:

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds (stated above).

The approach set out in both the ICCPR and the *Declaration of Principles of Equality* could be included in the draft Bill to form the basis for the identification of attributes under the consolidated Act.

Should this not be the approach favoured, I suggest that the draft Bill include provision for a regular review of the attributes covered by the Act to ensure that emerging forms of discrimination such as domestic violence and homelessness can be considered over the life of the Act.

Recommendation 11

That clause 17 of the draft Bill be amended to include additional wording to enable the consideration additional characteristics or attributes consistent with the object of the Act using a simplified procedure for the addition of new attributes.

Recommendation 12

That the draft Bill provide for the regular review of attributes covered by the Act to ensure that emerging forms of discrimination are covered.

ILO 111 discrimination grounds

Whilst the inclusion of attributes related to Australia’s obligations under ILO 111 is supported, the restriction of coverage to work or work-related issues is likely to create complexity in the proposed Act and result in Commonwealth law being inconsistent with the protections afforded under a number of state and territory legislative regimes.

The limits on coverage for these attributes mean, for example, that discrimination in the provision of facilities, goods and services in areas such as education, health, accommodation and so forth, would not be afforded coverage under the proposed Act.

Table 1 provides information on complaints received by my office in 2011–12 identified by attribute and area of activity in respect of those characteristics or attributes most closely aligned to grounds for discrimination contained within ILO Convention 111. Whilst it confirms that most allegations of discrimination are in relation to employment activity, my office received complaints in relation to areas of activity other than employment, particularly in education and training and the provision of facilities, goods and services.

Table 1: Allegation of discrimination by areas of activity for selected attributes

	Family responsibilities	Industrial activity	Political belief	Political Activity	Religious Belief	Religious activity	Irrelevant criminal record	Irrelevant medical record
Awards & industrial agreements	2	1	0	0	0	0	0	0
Membership & activities of clubs	4	1	0	0	0	0	2	1
Administration of State laws and programs	4	1	0	0	1	0	1	0
Education & training	9	2	0	0	0	0	1	4
Accommodation	5	0	0	0	2	0	2	1
Provision of facilities, goods and services	14	5	1	1	3	1	8	6
Employment	17	19	0	3	1	0	7	5
Total	55	29	1	4	7	1	21	17

Complaints on these bases are not currently covered under the draft Bill.

Added complexity will arise in respect of intersectional matters, that is where one of the protected attributes is covered only in relation to work or work-related matters, while other attributes have protection in respect of all areas of public life.

Recommendation 13

That the draft Bill be amended to ensure protection from discrimination on the grounds of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion, and social origin if it is connected with any area of public life.

Discrimination on the basis of criminal record

Criminal record is the only ground not covered under the list of attributes included in the draft legislation as a result of commitments adopted by Australia under ILO 111.

As indicated above, ‘irrelevant criminal record’ is covered under Tasmanian legislation. Section 3 of the Tasmanian Act defines ‘irrelevant criminal record’ as follows:

“**irrelevant criminal record**”, in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where –

- (a) further action was not taken in relation to the arrest, interrogation or charge of the person; or
- (b) a charge has not been laid; or
- (c) the charge was dismissed; or
- (d) the prosecution was withdrawn; or
- (e) the person was discharged, whether or not on conviction; or
- (f) the person was not found guilty; or
- (g) the person’s conviction was quashed or set aside; or
- (h) the person was granted a pardon; or
- (i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises.

It is also unlawful to discriminate on the basis of criminal record in the Northern Territory and on the basis of spent convictions in the ACT.

In 2011–12, my office considered 15 complaints in which there were allegations of discrimination on the basis of irrelevant criminal record. Five of these related to employment. A further six related to the provision of facilities, goods and services; three to the provision of education and training; and one to the provision of accommodation.

Discrimination on the basis of criminal record occurs when the record of a former offender is used as a basis on which to treat that person unequally. This does not mean that it is unlawful to take account of a criminal record if it means that a person is unable to perform the inherent requirements of a particular job, or if there are legal obligations to refuse employment in certain cases where the nature of a criminal record may be relevant to the capacity of the individual to undertake those functions.

Section 50 of the Tasmanian Act, for example, provides an exception relating to irrelevant criminal record when dealing with children:

A person may discriminate against another person on the ground of irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances.

However, there must be a balance in how criminal record provisions apply. For it to justify exclusion or different treatment, a person's criminal record must be relevant to the particular activity and respect the fact that an offender has 'done the time'. That is, the decision must be made on a transparent basis taking into account those factors that are appropriate and not 'irrelevant'.

The exclusion of criminal record as an attribute in the proposed new legislation is likely to impact most highly on juvenile offenders. Acquiring a record at a young age should not mean that a person is prejudiced throughout adulthood. Protection is also required where a criminal record is imputed or where a person is discriminated against on the basis of their association with someone who has a criminal record.

The issue of discrimination on the basis of criminal record is becoming increasingly to the fore as employers strengthen criteria in relation to certain areas of employment. It is not uncommon, for example, to find many positions now being subject to criminal record checks. Whilst the prevention of employment based on a past criminal history is acceptable in many instances, we are increasingly seeing the application of criteria in areas where there is little or no relevance to the inherent requirements of the position, or where the nature of the criminal record is not taken into account. On this basis I believe there is a need for increased education and guidance to employers and others on this matter.

Recommendation 14

That the draft Bill be amended to provide protection against discrimination on the basis of criminal record, with the exception in clause 23 providing an appropriate balance to ensure that where the record is relevant to the circumstances it can be considered.

Meaning of discrimination

The inclusion of a simplified definition of discrimination will more closely align Australia with internationally recognised definitions of discrimination and better implement human rights treaty obligations.

In particular I support:

- recognition of intersectional discrimination;
- removal of the comparator test to identify discrimination;
- removal of references to direct and indirect discrimination and the perception that they may be mutually exclusive;

- removal of the requirement that the complainant must demonstrate that they cannot comply with the policy as a test for indirect discrimination;
- clear protection in the Act for associates;
- clear coverage in the Act of current, past and future activity;
- coverage of situations where a person or associate is assumed to have the attribute; to have had it in the past; or may have it in the future; and
- extension to cover discrimination connected with all areas of public life.

To be effective, however, the draft Bill must address the impacts on both individuals and vulnerable groups who shared protected attributes. This will ensure that the right to substantive equality, including systemic effects as reflected in the object of the draft Bill are protected.

The legislation as currently drafted risks preferencing an individualised complaints-based approach aimed at providing individual redress and would benefit from improved measures to address discrimination in a way that focuses on prevention and systemic level intervention.

Scope of ‘unfavourable treatment’

Clause 19(2) of the draft Bill defines unfavourable treatment as treatment that includes harassing another person or conduct that offends, insults or intimidates another person. I am aware of public comments regarding the use of the word ‘offends’ in this context and the concern that it may impact on free speech.

Similar concepts are included under the prohibited conduct provisions of the Tasmanian Act where they currently apply to gender attributes and under proposed amendments will shortly apply to all attributes. These provisions act to make it unlawful to humiliate offend or insult a person on the basis of protected attributes and have operated without incident during the period in which the Act has been operational.

I also note that the protection would be subject to the general exception in clause 23.

To this end I am supportive of the retention of reference to offends, insults or intimidates in clause 19(2). However, to provide greater certainty, this clause could also include the words humiliate, denigrate, ridicule or degrade to describe some of the specific types of behaviour that constitute unfavourable treatment.

Past, future and imputed characteristics

I strongly support the inclusion of clause 19(4) as it ensures that the legislation encompasses past, future and imputed attributes.

The protection against discriminatory action taken on the basis of imputed attributes is an important aspect of discrimination law that links back to the underlying understanding that decisions should be made and actions taken on the basis of the person’s actual relevant skills, abilities and attributes rather than on the basis of prejudiced assumptions about the person.

Discriminatory treatment and effect

Clause 19(1) and (3) replace previous approaches that have characterised discrimination as ‘direct’ and ‘indirect’. Clause 19(7) provides that 19(1) and (3) do not limit each other.

Paragraph 105 of the Explanatory Notes on the draft Bill states:

The Bill intentionally does not preserve the terms ‘direct’ and ‘indirect’ discrimination. This is to remove any perception that the two concepts are mutually exclusive), which is reinforced by subclause 19(7) which reiterates that the two do not limit each other) ...⁵

This important statement is not reflected in the drafting of clause 19(7). The words ‘do not limit each other’ does not clearly state that actions may constitute discrimination in the form identified in both 19(1) and 19(3).

Recommendation 15

That clause 19(7) of the draft Bill be amended to make it clear that clauses 19(1) and 19(3) are not mutually exclusive.

Positive action

The draft Bill would be considerably strengthened by the inclusion of a requirement to promote positive action to address all protected attributes as a key measure to realising full and effective equality.

The inclusion of positive duties to eliminate discrimination and promote equality would assist in addressing systemic discrimination and result in less reliance on addressing inequality through individuals using the complaints processes. This current reliance is a matter of ongoing concern as it places the bulk of the effort to achieve compliance on people who are often the most disadvantaged (hence their protection from discrimination).

Importantly it would also bring Commonwealth legislation into line with international best practice.

Principle 3 of the *Declaration of the Principles of Equality* provides that:⁶

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

Principle 11 similarly provides that:⁷

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must

- (a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;
- (b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;
- (c) Promote equality in all relevant policies and programs;
- (d) Review all proposed legislation for its compatibility with the right to equality;
- (e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;
- (f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;
- (g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

⁵ Australian Government, Attorney-General’s Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes* (2012) 26.

⁶ The Equal Rights Trust, Principle 3.

⁷ The Equal Rights Trust, Principle 11.

The Tasmanian Act currently includes a provision that obliges all organisations to, *inter alia*, ‘take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct’.⁸ Organisations not complying with this requirement are liable for any contravention of the Act committed by any of their members, officers, employees and agents.⁹ This goes some way to focus on the role of preventive action, but is not a sufficient positive duty provision to ensure proactive measures are taken as a matter of course.

The Victoria’s *Equal Opportunity Act 2010* also contains a clear duty to accommodate and this represents an important shift to a more progressive policy approach.¹⁰ Section 15(2) of the Act provides that

a person must take reasonable and proportionate measures to eliminate (that) discrimination, sexual harassment or victimisation as far as possible

The inclusion of stand-alone positive duty provisions in the draft Bill would assist in reorienting efforts to promote the attainment of human rights from one in which duty holders have a responsibility not to discriminate, to one where there is a positive obligation to promote the attainment of rights.

Whilst the application of a positive duty provision to both public and private sectors may introduce additional requirements for some sectors, clarity around the action necessary to address discrimination in a systemic way will assist in promoting a clearer understanding of duties under anti-discrimination law and aid in a more transparent understanding of actions required across the community to promote equality.

It will also assist in shifting effort toward a more proactive and preventative approach to preventing discrimination: one in which there is greater scrutiny of actions before they are implemented.

I note in this context that the Senate Standing Committee on Legal and Constitutional Affairs Report on the effectiveness of the *Sex Discrimination Act 1994* (Cth) (SDA) recommended that further consideration be given to amending the SDA to require that public sector organisations, employers, educational institutions and other service provider adopt positive measures to eliminate discrimination and promote gender equality.¹¹ This current consolidation of federal human rights laws would provide a significant opportunity to give effect to this recommendation.

Recommendation 16

The draft Bill include a separate positive duty to take all reasonable steps to eliminate discrimination and other forms of conduct prohibited under the legislation.

Reasonable adjustment

Clause 23(6) of the draft Bill provides that discriminatory conduct is not justifiable on the grounds of disability if a ‘reasonable adjustment’ could have been made. Clause 25 makes provision for the justification of discrimination on the basis of disability where the adjustment would have caused ‘unjustifiable hardship’.

However there is no explicit requirement in the draft Bill to make reasonable adjustments as provided for under the *Disability Discrimination Act 1992* (Cth) (DDA).

⁸ Anti-Discrimination Act 1998 (Tas) s 104(2).

⁹ Anti-Discrimination Act 1998 (Tas) s 104(3).

¹⁰ Equal Opportunity Act 2010 (Vic) Part 5.

¹¹ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1994 in Eliminating Discrimination and Promoting Gender Equality* (2008) 164.

The duty to make reasonable adjustments contained in the DDA arose in part because of the legal uncertainty created by the High Court's decision in *Purvis v New South Wales (Department of Education and Training)*¹² including the minority decision of Justices McHugh and Kirby. McHugh and Kirby JJ were of the view that the Act did not include an express duty to make reasonable adjustments. At the same time, McHugh and Kirby expressed the view that failure to make reasonable adjustment may result in unlawful discrimination.¹³

In assessing the impact of this decision in its review of the DDA, the Productivity Commission was of the view that a duty to make reasonable adjustments was important to achieving substantive equality for people with disability and would position the DDA as a 'positive force for change'.¹⁴

At the same time there is little basis on which to limit the application of unjustifiable hardship provisions to only one protected attribute, just as there is no basis for limiting the application of the duty to accommodate to only one or some protected attributes.

Consistent with the approach taken by the Productivity Commission, provisions should be included in the draft Bill to explicitly cast the duty to make adjustments as a positive duty applicable to all protected attributes, limited only by the unjustifiable hardship provisions outlined in clause 25 of the draft Bill.

This approach would align the federal legislation with best-practice approaches internationally.

I note that the Explanatory Notes state that:

It would be too complex to maintain this approach in the Bill which has a single test for discrimination for all attributes. Therefore the duty to make reasonable adjustments for disability is now part of the tests for determining whether conduct is justifiable or whether the inherent requirements exception applies.¹⁵

It is not clear to me how this is the case and I urge the Committee to seek clarification and worked examples of how the approach in the draft Bill operates as paragraph 166 above and seek advice from legal practitioners with expertise in discrimination litigation before determining whether or not to include the express duty to make reasonable adjustments.

One of the key benefits of the inclusion of an express provision setting out the duty to make reasonable adjustments is that it clearer on the face of the Bill what are the duties of people under the Bill.

Another benefit is that it promotes duty holders ensuring that when they are reviewing or developing policies, practices, job roles, etc, they actively consider the impact, if any, of particular approaches on people with protected attributes.

Further, 'reasonable adjustment' is included in clause 6 (The Dictionary) as follows: 'see section 25'. Clause 25 effectively provides that an adjustment is a 'reasonable adjustment' if it can be made without causing 'unjustifiable hardship'.

¹² (2003) HCA 62.

¹³ Productivity Commission, *Review of the Disability Discrimination Act 1992, Report No 30* (2004) 187.

¹⁴ Productivity Commission, *Review of the Disability Discrimination Act 1992, Report No 30* (2004) 194.

¹⁵ Australian Government, Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes* (2012) 37 ¶166.

Recommendation 17

That the draft Bill be amended include a separate, stand-alone duty on all duty holders to make reasonable adjustments in respect of all protected attributes, limited only by the unjustifiable hardship provision currently in clause 25(2) and (3) of the draft Bill with appropriate modifications to reflect coverage of all the protected attributes.

Exceptions to unlawful discrimination

Clauses 23-44 of the draft Bill require further consideration, both from a conceptual and drafting perspective.

As outlined in my earlier submission on the Discussion paper, there is a general confusion across anti-discrimination legislation regarding the differences between ‘defences’ available to justify actions that would otherwise be considered discriminatory and ‘exemptions’ that permit non-compliance on the basis of particular circumstances (and should be time limited and reviewable). It is positive to note that the exceptions and temporary exemption provisions are dealt with quite separately within the draft Bill. Amendment to the Bill to refer to ‘exceptions’ as ‘defences’ would be a further positive development that would reduce confusion.

I note that the provision dealing with the burden of proof in relation to the application on an exception to a particular alleged discriminatory action is found in clause 124(2). It would be useful to include a note about this at the beginning of the exceptions parts to ensure that the manner in which exceptions operate is understood. It would also be helpful if the note or the substantive provisions made it clear that evidence to support reliance on an exception must be available at the time of the alleged breach. If this is not clear, it would not preclude a person collecting and presenting evidence after the action was taken or decision made that was discriminatory. This would result in the situation whereby a person’s prejudicial assumptions underlying their actions or decisions could be justified after the fact. This approach fails to go to the heart of much discrimination: the assumptions and stereotypes about a person’s attributes that lead others to treat that person unfavourably or implement discriminatory practices without testing those assumptions and stereotypes.

Recommendation 18

That the draft Bill be amended to include a note in Chapter 2, Division 4 referring to the burden of proof provision at clause 124(2).

Recommendation 19

That clause 124(2) of the draft Bill be amended to make it clear, where a person is relying on an exception, that that person must have undertaken the necessary work to ascertain whether or not the circumstances relevant to the application of that exception were present prior to making a decision or taking an action that would be unlawful but for the application of the exception.

General limitations provision

Reliance a single general limitations provision provides a more simplified, consistent and streamlined approach to defending allegations of unlawful discrimination and should make redundant the need for exceptions specific to particular circumstances or protected attributes.

There is, however, a need to ensure that definitions contained in the draft Bill do not inadvertently provide a broader basis for the justification of discriminatory actions.

As currently drafted the main exception provided at clause 23 of the draft Bill is unclear and, in conjunction with the specific exceptions provided in clauses 32-44, risks introducing a range of new areas where unlawful discrimination may be defensible under the Act.

In particular, the use of the terms 'legitimate' and 'proportionate' in section 23 requires further consideration. A justifiable action must be one that is both legitimate and proportionate and also least restrictive.

I have previously suggested the following as the basis for drafting a general limitations clause:

- (1) It is not unlawful to discriminate if the person engaging in the discrimination is able to establish that at the time of the discrimination:
 - (a) the discrimination was determined by the person to be necessary to achieve direct compliance with a prescribed state or territory law or with a Commonwealth law;
 - (b) the discrimination was determined by the person to be necessary to achieve direct compliance with orders of a commission, court or tribunal;
 - (c) the discrimination was determined by the person to be based on a *bona fide* occupational requirement; or
 - (d) it was determined by the person that there was a *bona fide* justification for the discrimination.

A general limitation provision drafted along these lines provides a permanent exemption from the provisions of the Act for discrimination necessary to comply with Commonwealth laws and actions that are taken to comply with orders of a Commission, court or tribunal. It also provides a justification for discriminatory conduct where there is a *bona fide* occupation requirement or justification.

The *bona fide* defence provisions are modelled on the approach contained in the Canadian *Human Rights Act 1985*.¹⁶

Under the Canadian Act once a complainant establishes a *prima facie* case of discrimination, the respondent that seeks to rely on either a *bona fide* occupational requirement or a *bona fide* justification defence needs to be able to demonstrate that the discrimination is justified. To do so they need to be able to demonstrate all of the following:¹⁷

1. The underlying purpose of the conduct, standard, policy or practice is rationally connected to the performance of the job or delivery of the service at issue.

(This requires articulation of the purpose of the particular conduct, standard, policy or practice that is alleged to be discriminatory, and the objective requirements of either the job or the functions of the service and of how the purpose relates to those objective requirements of functions.)

2. The conduct, standard, policy or practice was adopted in an honest and good faith belief that it was necessary in order to accomplish the respondent's purpose.

(This requires articulation of, for example, when, how and why the conduct took place, or the standard policy or practice was developed.)

3. The conduct, standard, policy or practice is reasonably necessary for the employer or service provider to accomplish its purpose.

(This requires consideration of whether:

- the conduct, standard, policy or practice operates to exclude people with particular attributes based on 'impressionistic assumptions';
- the conduct, standard, policy or practice treats some people to whom it applies differently (and 'more harshly') than others;

¹⁶ Canadian Human Rights Act, RSC 1985, c H-6, s 15(2).

¹⁷ Canadian Human Rights Commission, 'Bona Fide Occupational Requirements and Bona Fide Justifications under the Canadian Human Rights Act: The Implications of Meiorin and Grismer' (2010) <<http://www.chrc-ccdp.ca/discrimination/occupational-eng.aspx#grismer>> at 28 January 2011.

- alternatives were considered, including flexible or individualised arrangements, and if so why they weren't implemented and the approach taken was;
- the conduct, standard, policy or practice was the least discriminatory means of achieving the purpose;
- varying approaches could be adopted;
- the standard, policy or practice was 'designed to minimise the burden on those required to comply';
- efforts were made to accommodate those people who would be negatively affected because of one or more protected attributes (or the combined effect) and what those efforts were;
- assistance or expert advice was sought to identify possible accommodations; and
- whether the respondent would have 'undue hardship' if alternative approaches or individual accommodations were implemented.)

These elements are set out in guidelines or standards established by the Canadian Human Rights Commission and provide significant guidance on what duty holders need to do to ensure that they comply with their obligations to not discriminate.

This approach has the advantage of ensuring that duty holders pro-actively consider whether or not their proposed actions are discriminatory and, if so, whether they are defensible in the particular circumstances. After over 37 years of anti-discrimination law at the federal level it is troubling that proactive consideration by organisations of potential discriminatory impacts and of alternatives remains the exception rather than the rule.

Importantly the approach also provides the basis for assessing whether the proposed actions are the least discriminatory approach possible in the circumstances.

This approach is not dissimilar to that proposed in the draft Bill, however it has the advantage of being a great deal more succinct and clear in its meaning.

Should this approach not be favoured, there is a need for more clarity around the terms used in clause 23.

Recommendation 20

That clause 23 of the draft Bill be amended to capture a more simplified and streamlined general limitations defence along the lines of that in the Canadian Human Rights Act 1985 with the express inclusion of actions done in direct compliance with a Commonwealth law or a prescribed state or territory law and that clauses 26–44 be removed.

Recommendation 21

Should the current approach to clause 23 be retained, the draft Bill should include a clear definition of 'legitimate' to ensure that there is no broadening of the basis on which the exception might apply. Further, that the word 'proportionate' in clause 23(3)(d) be explained to ensure it is understood to include 'least restrictive' to more accurately reflect the requirement to adopt the least discriminatory approach possible in the circumstances.

Exceptions and review

Clauses 32–44 of the draft Bill provide for a range of specific exceptions to unlawful discrimination.

Inclusion of both a general limitations clause and a large number of specific exceptions serves to complicate the draft Bill and is at odds with the aim of achieving more simplified and streamlined legislation.

As recommended above, I urge the Committee to consider the removal of these exceptions and instead ensure that guidance materials show how the application of the general limitations provision

would provide the appropriate defences to unlawful discrimination. The current approach in the draft Bill will ensure the continued disparity in protection against discrimination because some exceptions apply to discrimination on the basis of some attributes only. This retains a significant complicating factor and does not make transparent any coherent principle that is said to underlie all exception.

I note the statutory requirement in clause 47 to undertake a review of all exceptions in the draft Bill. I consider, however, that the draft Bill should include further guidance around the timeframe for the completion of the review and the nature of exceptions within the Act.

Clause 47(2) provides that the review of the exceptions must commence within 3 years. However, it does not provide a timeframe for this review to be completed. The inclusion of requirement to report within 1 year of commencing the review and a 5-year sunset clause on all exceptions from the commencement of the Act would provide a strong incentive to ensure that the review is completed in a timely manner.

Further the provision requiring review should expressly include the requirement to consult with people with protected attributes whose rights are affected by the exceptions.

Should the review determine that specific exceptions are to continue to be included in the Act, I am of the view that these should also be subject to sunset provisions. This approach would be consistent with the Australian Human Rights Commission's recommendation to the Senate Committee Inquiry into the *Sex Discrimination Act 1984* that all permanent exceptions be subject to a 3-year sunset clause.¹⁸

This will ensure that exceptions remain relevant and reviewable and provision is made to enable them to be updated, amended or identified as no longer applicable as social attitudes and practices change.

A broad-based limitations clause, together with clear guidelines on the criteria and timeframes for coverage from unlawful discrimination under specific exceptions, would considerably strengthen the legislation, enable a clearer focus on actions aimed at promoting equality and non-discrimination rights and work to remove from the legislation over time the enumeration of the plethora of exceptions currently included in the draft Bill which serve only to confuse both duty and rights holders and highlight where discrimination continues to be tolerated for reasons that may not be justifiable.

Recommendation 22

That the draft Bill include provision for the review of exceptions to be completed within 1 year of the commencement of the review, for consultation with people with protected attributes and their representative bodies and include a sunset clause restricting the application of specific exceptions to a period of 5 years from the commencement of the Act.

Recommendation 23

That the draft Bill be amended to ensure that any exceptions retained in the Act following the review provided for in clause 47 be subject to a 5-year sunset clause.

Specific exceptions

Exceptions related to religion

The application of specific provisions to new attributes (sexual orientation and gender diversity) in effect reflects a policy decision to provide exceptions to enable discriminatory practices in some circumstances.

¹⁸ Australian Human Rights Commission, *Submission into the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 151.

The inclusion of gender identity and sexual orientation within the list of attributes to the exception in clause 33, for example, has the capacity to provide protection for a range of discriminatory behaviours engaged in by religious bodies and educational institutions that may be at odds with the objective of the draft Bill. For example, it would enable discrimination on the basis of sexual orientation in religious schools. Nor does there appear to be any justification for including pregnancy or potential pregnancy in the exceptions in clause 33. (The meaning of potential pregnancy is so broad that this inclusion in the exceptions would arguably remove the protection against discrimination for all women of child-bearing age.)

Exceptions provided on the basis of gender identity, sexual orientation, pregnancy or potential pregnancy should be subject to public discussion and review prior to being included in the legislation. To include them now risks sending a clear message that discrimination on the basis of gender identity and sexual orientation is something that will be tolerated in certain circumstances. This is at odds with the Commonwealth Government commitment to provide protection against discrimination on the basis of these characteristics and represents a substantial change to the exceptions currently provided.

As a matter of principle, I am opposed to the Act providing any protection for discriminatory practices of whatever kind unless that protection can be fully justified. Should religious bodies or educational institutions wish to be exempt of the grounds of sexual orientation or gender identity, it may be more appropriate for them to rely on the provisions available under Division 8 (Temporary Exemptions) to do so.

Recommendation 24

That no extension of exceptions on the basis of new or existing attributes be included in the draft Bill unless and until they have been subject to full consultation, evaluation and review.

Recommendation 25

That entities seeking to be relieved of their duties not to discriminate on the basis of existing and new protected attributes be required to apply for a temporary exemption until a full review of the exceptions has been completed.

Validity of state and territory laws

I am concerned that the inclusion of broad-based exceptions applying to all areas of public life may threatens the validity of decisions made under the Tasmanian Act where the terms of the exception are narrower than proposed in the draft Bill.

Section 27(1)(a) of the Tasmanian Act provides for an exception based on gender in relation to religious institutions if it is required by the doctrines of the religion or institution and section 27(1)(b) acts to allow discrimination in education on the basis of gender if it is for the purpose of enrolment in a one-gender school or hostel. Additionally, section 42 allows for discrimination on the basis of race in relation to places of cultural or religious significance if the discrimination is in accordance with the customs of the culture or the doctrines of the religion and it is necessary to avoid offending the cultural and religious sensitivities of any person of the culture or religion. Sections 51 and 52 of the Tasmanian Act provide exceptions to unlawful discrimination on the basis of religious belief, affiliation or activity in on the following terms:

51. Employment based on religion

- (1) A person may discriminate against another person on the grounds of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.
- (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teaching, principles or practices of a particular religion if the discrimination is in order to enable, or better enable,

the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

52. Participation in religious observance

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to –

- (a) the ordination and appointment of a priest; or
- (b) the training and education of any person seeking ordination or appointment as a priest; or
- (c) the selection or appointment of a person to participate in any religious observance or practice; or
- (d) any other act that –
 - (i) is carried out in accordance with the doctrine of a particular religion; and
 - (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.

Amendments to the Tasmanian Act were introduced into the Tasmanian Parliament in November 2012 to enable a school or school system conducted in accordance with tenets, beliefs, teachings, principles or practices of a particular religion to apply for an exemption from the provisions of the Tasmanian Act relating to protection from discrimination in education on the basis of religious belief, religious affiliation or religious activity. The amendments provided that a faith-based school facing more demand for admission places than it had places available would be able to apply for an exemption from the operation of those provisions to permit it to give preference to children of that faith. This amendment was rejected by the Tasmanian Parliament, in part because of the reluctance to introduce further exceptions to unlawful discrimination in education into the Tasmanian Act.

Importantly the proposed exemption for faith based schools and school systems was cast to ensure that discriminatory conduct on the basis of any characteristic other than religious belief, affiliation or activity was expressly avoided. In part this was to address the concerns of the LGBTI community about discrimination on the basis of sexual orientation and gender identity.

The exceptions provided to religious bodies in Tasmania achieves an appropriate balance between the protection of freedom of religion and the right to equality and freedom from discrimination. The provision of exceptions to religious bodies that permit discrimination on bases other than religious belief or affiliation has the capacity to create a ‘hierarchy of protected attributes’ and a privileging of certain duty holders over others in which some sectors of society are seen to be predominantly outside the workings of anti-discrimination law. I do not believe that this approach is justified or proportionate in the circumstances and consider that the nature of the current exceptions should be fully evaluated prior to providing any further basis for exception in the Act.

Should the terms of the exception become law, a complaint based on discrimination in a faith-based school on the basis of sexual orientation which could be considered under the Tasmanian Act would be expressly excluded by virtue of the operation of clause 14 of the draft Bill.

This approach is at odds with the commitment made by the Commonwealth at the commencement of the review process that the new legislation would not seek to override protections available in state or territory law and would not represent a reduction in rights.

It is also at odds with the right of states and territories to make laws where the Commonwealth does not have exclusive legislative power under the Australian *Constitution*. In this regard, matters related to the regulation of religions and educational facilities remain the responsibility of state and territory governments and are not an area in which Commonwealth law should prevail.

Recommendation 26

That the draft Bill clearly state that any broader exceptions in the legislation are not intended to interfere with protections against discrimination under state or territory anti-discrimination laws.

Application of the religious exception to aged care

Commonwealth-funded aged care is not captured by the exception by virtue of clause 33(3) of the draft Bill. Whilst supportive of excluding aged care services from this exception, I cannot see any basis on which other services and activities undertaken by religious bodies and educational institutions using public funds should have discriminatory conduct permitted by clause 33.

Commonwealth funds are used by a range of organisations, including religious bodies, to provide an extensive range services and programs and there would appear to be little justification for not including these activities in clause 33(3) as well.

Recommendation 27

That all Commonwealth-funded services, programs and activities be excluded from the scope of the exception provided to religious bodies and educational institutions in clause 33.

Exceptions for insurance, superannuation and credit

Clause 39(2) of the draft Bill provides protection for discrimination on the basis of age, disability and sex in relation to the terms and conditions on which an insurance policy is offered or refused. To take advantage of this protection, insurers must, among other matters, provide reasonable access to the data on which the decision to discriminate applies.

In 2011 I commenced an own-motion investigation into the practice of some insurance companies of excluding volunteers from volunteer insurance coverage on the basis of age.

My report into this matter is due to be publicly released shortly.

A significant issue emerging throughout the investigation was the availability of information on which insurance decisions are made and the capacity for independent oversight to determine the reasonableness of the risk and coverage decisions being made.

It is likely that I will make recommendations regarding the way in which this matter may be taken forward at a national level.

Provisions in the draft Bill that require a person who is alleging discrimination in the provision of insurance services to be provided with information on the actuarial, statistical or other data on which the decision is based will improve transparency in the way in which decisions to exclude individuals from insurance coverage on the basis of age (or other protected attributes) are determined.

However specific powers allowing the Australian Human Rights Commission to request data and the offence for failing to comply with such a request as provided under section 87 of the SDA, section 107 of the DDA and sections 52 and 54 of the ADA have not been maintained in the current draft.

While clauses 107 and 140 of the draft Bill empower the Australian Human Rights Commission to require information to be provided during a complaint or inquiry, an explicit obligation to provide the Commission with information on which decisions have been made in relation to insurance, superannuation and credit may assist in ensuring an effective independent mechanisms for the oversight of these decisions can be put in place.

Recommendation 28

That the draft Bill be amended to include provisions requiring that actuarial, statistical and other data relied on in determining whether or not to provide insurance, superannuation and credit be provided to the Australian Human Rights Commission or similarly authorised body.

Equality before the law

Clause 60 of the draft Bill makes provision for equality before the law for peoples of all races.

There is no equivalent of section 10 of the *Racial Discrimination Act 1975* (Cth) (RDA) in any other Commonwealth, state or territory legislation. Section 10 operates by modifying any law of the Commonwealth, state or territories that denies or limits the rights of people of a particular race, colour or national or ethnic origin.

Extension of the right to equality before the law on the basis of sex or other attributes would not appear to have significant ramifications and would be consistent with Australia's international human rights obligations in regard to equality. However, equality before the law provisions in the original Disability Discrimination Bill were dropped due to concerns about the possible effects on special legal regimes for people with disability, such as guardianship and mental health legislation.

In its 2004 review of the DDA, the Productivity Commission acknowledged that many areas where equality before the law has been raised relate to state or territory responsibilities: accommodation, safeguards for decision making by and for people with cognitive disability, removing barriers to fair and equal treatment in the justice system and to civic participation; and challenging laws that deliberately or inadvertently discriminate against people with disability.¹⁹

Equality before the law is a fundamental human right under the *International Covenant on Civil and Political Rights*. However, in practice limitations have often been placed on this right for people with disability, particularly where people with disability have limited capacity to make decisions about their personal circumstances or their financial or legal affairs.

Nevertheless several 'equality before the law' issues have been raised including situations where people with disability are denied choice in terms of options following de-institutionalisation (accommodation, access to services, and tenancy rights for people in supported accommodation), arrangements for making informed decisions and the provision of legally effective consent (particularly with regard to those with cognitive disability), fair and equal treatment in the justice system and the right to participate in civic activities (particularly voting and jury duty).

There is room for improvement at both Commonwealth and state and territory level in relation to these matters and 'equality before the law' provisions would assist in protecting rights in this area.

The Productivity Commission concluded its assessment of these issues by indicating that it is not clear why the concerns raised resulted in 'equality before the law' provisions being excluded in the DDA.²⁰ The Commissioners argued that the possible effect on special legal regimes in relation to people with disability, including guardianship and mental health legislation, could have been addressed by exemption mechanisms for 'prescribed laws'. This would have had the effect of exempting these laws from the operation of the Act, but preserve the general right to 'equality before the law'.

I agree with this observation and recommend that the draft Bill include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law.

¹⁹ Productivity Commission, *Review of the Disability Discrimination Act 1992, Report No 30*, (2004) 233.

²⁰ Ibid 291.

Equality before the law provisions should extend to all protected attributes, with exemption mechanisms used as the basis where the operation of the provision would have adverse effect.

Recommendation 29

That the draft Bill include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law and that equality before the law provisions should extend to all protected attributes.

Chapter 3: Measures to assist compliance

Action plans

I commend the provision in the draft Bill that provides for the making of action plans. This is an important mechanism to encourage organisations to review their operations for potentially discriminatory actions or effects and set out and implement steps to remove such actions or effects.

Compliance codes

Clause 76(4) of the draft Bill provides for the Commission to make a compliance code to enable duty holders to clarify their responsibilities under the Act. The draft Bill provides that the AHRC may make a code on its own initiative or following an application by a person or body seeking clarity in relation to conduct specified in the Code.

The inclusion of compliance codes is potentially a positive step if the focus of such codes is on ensuring duty holders are more pro-active in achieving compliance with anti-discrimination laws through their duties are clearer in the context of their industry.

Clause 75(4)(a) enables the Commission to provide for the manner in which a Code, in whole or in part, affects the operation of state or territory laws.

This represents a significant broadening of the powers available to the Commission and the manner in which these and other legislative instruments interact with state and territory laws requires further consideration.

Under the draft Bill compliance codes, special measures determinations and temporary exemptions are legislative instruments. As a consequence they will be caught by section 24 of the Tasmanian Act which provides, *inter alia*, that a person may discriminate against another person if it is reasonably necessary to comply with any law of the Commonwealth.

Whilst the Commission is required to comply with consultation requirements outlined in the *Legislative Instruments Act 2003* (Cth), the draft Bill does not contain specific reference to requirements to seek the express approval of states and territories or consultation with the state and territory anti-discrimination authorities in instances where the code or other legislative instrument has the capacity to impact on the operation of state or territory law.

The approach taken in the relation to the development of compliance codes and other measures is at odds with the approach taken toward national harmonization across a broad range of areas where the Commonwealth and states and territories share responsibility.

Provisions under national work health and safety laws for the express involvement of States and Territories in the making of legally binding codes of practice provide a model for consideration in this context. The *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*, for example, provides that to have legal effect in a jurisdiction a model code of practice must be approved as a code of practice in that jurisdiction.

This approach provides a precedent on which to base the application of compliance codes and other legally binding measures to areas of state responsibility and could serve as a model on which the application to states and territories could be based.

At a minimum, it is essential that the draft Bill include a formal requirement to consult with state and territory anti-discrimination authorities prior to certification of compliance codes and other measures.

This will ensure that relevant local experience is brought to bear on the development of compliance code and the risk of inconsistency is minimized.

To ensure transparency, the draft Bill should also include provision for the establishment of a public register of all legislative instruments it has granted.

Recommendation 30

That the draft Bill include provision for states and territories to approve the contents of a compliance code, and for the state and territory anti-discrimination authorities to be consulted on proposed compliance codes, special measures determinations and temporary exemptions prior to their application within individual jurisdictions.

Recommendation 31

That the draft Bill include provision for the establishment of a publicly accessible register of legislative instruments approved or prescribed under the legislation.

Chapter 4: Complaints

Referral of Complaints

Whilst the Bill does not make major changes to the complaint-handling functions of the AHRC, by virtue of the extended reach of the proposed Act into all areas of public life, further consideration is required on the interaction of the Bill with complaints handled under state and territory legislation.

Clause 102 provides that the Commission must refer complaints to Fair Work Australia, the Remuneration Tribunal or the Defence Force Remuneration Tribunal if the complaint falls within the jurisdiction of those bodies. Similarly, clauses 103 and 104 provide for a complaint to be referred to the Inspector-General of Intelligence and Security or the Information Commissioner in the case of complaints regarding activities of an intelligence agency or where the complaint is more effectively or conveniently dealt with by the Information Commissioner.

Consistent with the principle that the Commission should refer complaints to bodies that are best placed to deal with the matter, the draft Bill should also include provision for complaints to be referred to relevant state and territory anti-discrimination bodies where the matter falls within the legislative reach of that jurisdiction and the particular legislation provides coverage and remedies that are at least as extensive as those under the Act.

Consideration could also usefully be given to providing a more flexible approach to the handling of discrimination complaints at the state and territory level involving Commonwealth matters or where those complaints involve matters which are covered under both Commonwealth and State law. Options to improve operational efficiency in the way in which complaints are handled could include agreement with relevant state or territory anti-discrimination bodies to enable them to assume responsibility for dealing with complaints under Commonwealth law on behalf of the Commission within their own local jurisdiction.

Recommendation 32

That the Bill includes provision for complaints to be referred to relevant state and territory anti-discrimination authorities where the matter falls within the legislative reach of that jurisdiction and the particular legislation provides coverage and remedies that are at least as extensive as those under the Act.

Recommendation 33

That consideration be given to establishing a mechanism that would allow Commonwealth complaints to be dealt with by relevant state and territory anti-discrimination authorities on behalf of the Commission where the complaint falls within that jurisdiction.

Standing: who may make a complaint

Clause 89 of the draft Bill preserves the capacity of an organisation to make a representative complaint: clause 89(1)(b). However, no provision has been included in the draft Bill to enable the organisation to commence proceedings in the Federal Court or Federal Magistrates Court on the same basis.

This means that, for example, a disability advocacy organisation could make a complaint to the Australian Human Rights Commission on behalf of all people with a particular disability but not be able to continue as the complainant in the Federal Court or Federal Magistrates Court. If the complaint could not be resolved at the AHRC, the Federal Court and Federal Magistrates Court would require a person with that particular disability to become the complainant (that is, if such a change to the identity of the complainant party would be permitted) in the Federal Court. This problem has

been identified for some years and still remains a barrier to using the complaints mechanisms to challenge systemic discrimination.

In the case of *Scott v Telstra*²¹, the organisation, Disabled People's International (Australia) (DPI) was able to join Mr Scott's individual complaint of discrimination with a complaint of discrimination on behalf of all people in Australia who are profoundly deaf. This case was dealt with prior to the move of the hearing function from the AHRC to the Federal Court and, as such, DPI was able to be the co-complainant in this case. Under the current system and the draft Bill, an organisation would have to be able to argue in the Federal Court or Federal Magistrates Court that it was subjected to unlawful discrimination rather than establishing that it was acting on behalf of a group or class of people with a protected attribute who, because of that attribute, had experienced discrimination.

The failure to address this gap stands as a significant barrier to situations where an individual is unable to bring a complaint on their own behalf: such as a person with serious cognitive impairment; or the systemic nature of the alleged discrimination means that a representative complaint would be the more effective approach.

Systemic discrimination is often not effectively dealt with through individual complaints and the addition of a mechanism that would allow representative complaints to be heard in those courts has the capacity to significantly improve the way in which systemic discrimination is addressed.

There will often be situations where an individual is unable to bring a complaint on their own behalf and empower organisations to act on their interests. However, currently only an 'affected person' can make an application to the Federal Court.

In my submission on this matter to the Attorney-General's Department, I set out circumstances in which an organisation could be given standing. These included, for example, that the organisation has objectives that are relevant to the protection of the rights or interests of those people whose rights have allegedly been breached and that it has undertaken work with or in respect of those people whose rights have allegedly been breached within a recent timeframe.

Recommendation 34

That the draft Bill include provision for consequential amendment to the Federal Court of Australia Act 1976 (Cth) and the Federal Magistrates Court Act 1999 (Cth) to give a person or organisation that has made a complaint under the consolidated Act standing to commence proceedings in those courts. The draft Bill should also include criteria for determining where a person or organisation should be granted standing to make such a complaint.

²¹ *Scott v Telstra Corporation Limited; Disabled People's International (Australia) Limited v Telstra Corporation Limited* (1995) HREOC H95/34 and H95/51 (19 July 1995)
<http://humanrights.gov.au/disability_rights/decisions/comdec/1995/dd000060.htm> at 17 December 2012.

Appendix 1: Responses to OADC recommendations on AGD Discussion paper

Recommendation 1 The OADC recommends that the consolidated legislation provide that the burden of proof on complainants should be limited to establishing, on the balance of probabilities, that the alleged conduct took place and that it was conduct *prima facie* within the definition of discrimination. The burden of establishing a valid, non-discriminatory reason for the treatment or effect and the availability of a defence should rest on the respondent.

Incorporated

Recommendation 2 The OADC recommends that the consolidated legislation include a separate, stand-alone special measures provision that clearly specifies that special measures are aimed at achieving substantive equality and do not constitute discrimination.

Incorporated in part: reduced protection compared to RDA. Permits measures that have the sole or dominant purpose of benefitting a targeted group. Needs clarification.

Recommendation 3 The OADC recommends that the consolidated legislation include a separate, stand-alone duty to make adjustments in respect of all protected attributes in all areas of activity that clearly specifies that a failure to make adjustments is a form of discrimination.

Not incorporated.

Recommendation 4 The OADC recommends that the consolidated legislation include a separate, positive duty on all organisations to take all reasonable and proportionate steps to eliminate discrimination and other forms of conduct prohibited under the legislation.

Not incorporated.

Recommendation 5 The OADC recommends that the consolidated legislation expressly make it unlawful to harass in all areas of activity on the basis of one or more protected attributes or a combination of attributes, with all attributes protected. Further the OADC recommends that the consolidated legislation include a definition of harassment that expressly includes conduct that is offensive, humiliating, intimidating, insulting or ridiculing.

Incorporated in effect.

Recommendation 6 The OADC recommends that sex or sexual characteristics, gender identity and sexual orientation be separately defined in the consolidated federal Act and that intersex be included as a separate attribute.

Incorporated in part. Gender identity and sexual orientation covered. Intersex and sex characteristic coverage unclear.

Recommendation 7 The OADC recommends that the consolidated legislation includes association with a person with any other protected attribute as a protected attribute and that associates be protected against discrimination and all other forms of conduct prohibited in the legislation.

Incorporated.

Recommendation 8 The OADC recommends that the consolidated legislation protect against discrimination and other forms of prohibited conduct on the basis of all of the attributes currently protected under the various federal and state and territory anti-discrimination laws.

Incorporated in part. Some additional coverage, but some attributes not covered.

Recommendation 9 The OADC recommends, in addition to the attributes previously recommended for inclusion, the consolidated legislation provide protection on the basis of homelessness, place of residence and social status (including source of income being social security or emergency assistance and other social support, such as public housing).

Not incorporated.

Recommendation 10 The OADC recommends that the consolidated legislation include the following definition:

For the purposes of this Act, discrimination includes:

- (a) any distinction, restriction, exclusion or preference that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the civil, political, economic, social, cultural or any other field of public life on the basis of one or more protected attributes or on the effect of a combination of protected attributes; and
- (b) harassment on the basis of one or more protected attributes or on the effect of a combination of protected attributes.

Without limiting the generality of subsection (1)(a), a person discriminates against another person if:

- (a) the person treats or proposes to treat the other person unfavourably on the basis of one or more protected attributes or on the effect of a combination of protected attributes; or
- (b) the person imposes or proposes to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging a person, or a group of people, on the basis of one or more protected attributes or on the effect of a combination of protected attributes;
- (c) the person fails or proposes not to make adjustments if the effect is that a person experiences unfavourable treatment under (a) or a detriment under (b).

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

Without limiting the generality of subsection (1)(b), a person harasses another person if the person engages in conduct that is offensive, humiliating, ridiculing, intimidating or insulting on the basis of one or more protected attributes or on the effect of a combination of protected attributes.

Accepted in part. Intersectional discrimination partly covered, but for some attributes protection limited to employment. Comparator test removed. Failure to make adjustments not covered as a discriminatory act. Does not include specific reference to prohibited conduct provisions.

Recommendation 11 The OADC recommends that the consolidated legislation define protected attributes to include, where relevant, past, present and future attributes, and:

- (a) characteristics related to the protected attribute;
- (b) characteristics imputed to that attribute; and
- (c) imputed attributes; and
- (d) imputed characteristics related to a imputed protected attribute.

Accepted.

Recommendation 12 The OADC recommends that the consolidated legislation include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law. Equality before the law provisions should extend to all protected attributes.

Not accepted. Equality before the law applies to race only.

Recommendation 13 The OADC recommends that the consolidated legislation should provide protection from discrimination and harassment by or against a person engaged in, or undertaking any, activity in connection with civil, political, economic, social, cultural or any other field of public life including but not limited to: accommodation; clubs and associations; education and training; disposal of land; access to premises; employment and employment-related areas; provision of facilities, goods and services (including services relating to superannuation, entertainment, refreshment and recreation), local, state, territory and Federal laws, programs and functions; statutory powers, services and functions; and sport.

Incorporated in part. Act covers all areas of public life for most attributes.

Recommendation 14 The OADC recommends that the consolidated legislation provide protection from discrimination for paid, voluntary and unpaid workers (including, for example, interns and work placement participants). Such protection should not be limited to protection against discrimination in employment.

Incorporated. Volunteers now covered

Recommendation 15 The OADC recommends that the consolidated legislation not provide an exception for domestic workers.

Not incorporated.

Recommendation 16 The OADC recommends that the consolidated legislation extend coverage to membership and activities of all clubs and associations, whether licensed or not.

Incorporated.

Recommendation 17 The OADC recommends that the consolidated legislation extend coverage to partnerships regardless of size.

Incorporated

Recommendation 18 The OADC recommends that the consolidated legislation expressly prohibit requests for information that could be used to discriminate against a person on the basis of a protected attribute.

Incorporated.

Recommendation 19 The OADC recommends that the consolidated legislation include clear provisions that provide for organisational liability for conduct of those associated with the organisation where there has been a failure to comply with positive duties to address and prevent discrimination and other unlawful conduct. The OADC recommends that consideration be given to a higher order obligation on any organisation that has been the subject of orders under the consolidated legislation as is found in section 104(1)(c) of the *Anti-Discrimination Act 1998* (Tas).

Incorporated in part. Clauses 56 and 57 covers extension of liability for unlawful conduct, but does not extend to providing higher order obligations on any organisation that has been the subject of orders.

Recommendation 20 The OADC recommends that the consolidated legislation include a single exemption provision, supplemented by guidelines and codes of practice outlining how the provision is to be applied. Such a provision should not permit any reduction in the nature and scope of protection against discrimination provided in respect of race under the *Racial Discrimination Act 1975* (Cth).

Not incorporated. Extensive exception provisions remain, but are to be reviewed.

Recommendation 21 The OADC recommends that the consolidated legislation include a single general limitations provision based on that which exists in the *Canadian Human Rights Act 1985*.

Incorporated in part. Wording of the general limitation clauses requires clarification.

Recommendation 22 The OADC recommends that the consolidated legislation include provision for voluntary development and implementation of action plans in respect of all areas of activity, including employment, by all duty holders, in respect of all protected attributes.

Incorporated.

Recommendation 23 The OADC recommends that the consolidated legislation include mechanisms mandating obligations in relation to the achievement of employment equity for those people who have historically faced significant barriers to employment.

Not incorporated.

Recommendation 24 The OADC recommends that proof of the development and effective implementation of an action plan and/or an employment equity plan should be relevant to the availability of defences under the consolidated legislation.

Incorporated in part.

Recommendation 25 The OADC recommends that the consolidated legislation include provision for complaints to be made by a person or organisation on behalf of a person or persons affected by an alleged breach or breaches of the legislation and that amendments be made to the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Court Act 1999* (Cth) to give a person or organisation that has made such a complaint standing to commence proceedings under the consolidated legislation in those courts. The consolidated legislation should include criteria for determining where a person or organisation should be granted standing to make such a complaint with the criteria not being overly onerous.

Not incorporated.

Recommendation 26 The OADC recommends that the consolidated legislation include provision for the special-purpose Commissioner or the AHRC to (a) have standing in respect of all anti-discrimination complaints that proceed to hearing as a party providing assistance similar the role of the Canadian Human Rights Commission under the *Canadian Human Rights Act 1985*; and (b) have standing to prosecute failures to comply with standards made under the consolidated legislation and previous federal anti-discrimination legislation. The OADC also recommends that the AHRC be resourced to take on these roles effectively.

Not incorporated. Commission to have standing in both first instance and appeals matters. No provision for Commission to have standing without a complaint.

Recommendation 27 That consideration be given to including provisions that would enable the special-purpose Commissioners or the AHRC to have standing as a complainant in matters where the Commission has conducted an investigation into systemic discrimination or prohibited conduct and formed the view that a strong *prima facie* case exists and there is no complainant identified.

Not incorporated.

Recommendation 28 The OADC recommends that the Federal Government undertake as a matter of urgency research into, and development and implementation of, effective strategies to provide greater support to litigants in anti-discrimination matters including, for example, provision of legal aid across all areas of discrimination and prohibited conduct, and increased targeted support to community legal centres to assist and provide representation in anti-discrimination matters irrespective of whether they are conducted under federal or state/territory anti-discrimination legislation.

Not incorporated.

Recommendation 29 The OADC recommends that the consolidated legislation provide for a presumptive non-costs jurisdiction with the power vested in the tribunal to order costs against a party in limited circumstances. In the event that the current costs jurisdiction is retained, the OADC recommends that further consideration be given to providing greater guidance to the tribunals on the circumstances in which costs should not be ordered or should be capped.

Incorporated

Recommendation 30 The OADC recommends that, if the costs jurisdiction is to be retained for federal anti-discrimination law cases, consideration be given to creating a mechanism for costs indemnity for any party receiving a grant of legal aid. Consideration should include how to remove the effect on the NSW Legal Aid grant indemnity of the decision in *Woodlands v Permanent Trustee Company Limited* (1996) 68 FCR 213.

Not incorporated. Party to bear own costs unless exceptional circumstances.

Recommendation 31 The OADC recommends that the consolidated legislation include provisions relating to remedies that expressly require consideration to be given to the systemic effect of any discrimination or prohibited conduct that has been found proven and require remedies in respect of any systemic effect.

Not incorporated

Recommendation 32 The OADC recommends that in the consolidation process consideration be given to guidance on quantum of remedies for injury to feelings and that such guidance be developed having regard to compensating non-financial injury in comparative areas of law, such as defamation damages for injury to reputation.

Not incorporated.

Recommendation 33 The OADC recommends that the consolidated legislation include remedies provisions that provide decision makers with sufficient flexibility to order remedies that are broad-ranging, restorative and address structural or underlying causes of discrimination.

Not incorporated